

ADMINISTRATIVE APPEAL DECISION

DERMATOLOGY ASSOCIATES, INC.

FILE NO. SAJ-2005-9919 (JD-LSL)

JACKSONVILLE DISTRICT

4 MARCH 2011

Review Officer: Jason Steele, U.S. Army Corps of Engineers, South Atlantic Division (SAD)

Appellant: Dermatology Associates, Inc.

Date of Receipt of Request for Appeal: 5 October 2010

Acceptance of Request for Appeal: 29 October 2010

Appeal Conference: 23 November 2010

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

SUMMARY OF DECISION

Appellant's request for appeal (RFA) has merit. The administrative record (AR) does not substantiate the District's determination that the subject wetlands have a significant nexus to the nearest downstream Traditional Navigable Water (TNW), as required by the *U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook (6/1/2007)* ("JD Guidebook"), and the EPA/Army Memorandum, *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States* (2 December 2008) ("Rapanos Memorandum").

BACKGROUND

Dermatology Associates, Inc. is appealing the Jacksonville District's (District) 6 August 2010 decision to assert jurisdiction over 0.08 acres of wetlands on the appellants property, located east of Harrison Avenue on 19th Street, Section 8, Township 2 South, Range 15 West, Panama City, Bay County, Florida.

The District has issued three separate jurisdictional determinations for this property. The first was an approved jurisdictional determination (JD) letter dated 18 December 2001. The second was an approved non-jurisdictional (isolated) determination letter dated 29 August 2008. The third letter involves the 6 August 2010 approved jurisdictional determination being appealed. The District's decision to reevaluate its 29 August 2008 approved non-jurisdictional determination was due to a change that had occurred at the site consisting of the excavation of a

new ditch adjacent to the appellant's property to alleviate flooding in the area. The District's 6 August 2010 letter states that "the onsite wetlands have been hydrologically connected to St. Andrew Bay by the City of Panama City."

The District contends that the onsite wetlands are adjacent to a Relatively Permanent Water (RPW) that flows directly into a TNW. The District's rationale is as follows: Wetland A (onsite wetland) is adjacent to (contiguous) a newly constructed roadside ditch (non-jurisdictional conveyance). This roadside ditch has a direct hydrologic connection with a grass swale (non-jurisdictional conveyance) that has a direct hydrologic connection to a pipe that runs under a driveway to an adjacent apartment complex. This pipe has a direct hydrologic connection to Wetland B. Wetland B then directly discharges to Wetland C through another pipe, located under 19th street. Wetland C has an indirect hydrologic connection to the RPW, via subsurface flow under a manmade berm. The RPW has a direct hydrologic connection with the TNW (Pretty Bayou).

The District claims jurisdiction over the onsite wetlands via significant nexus to the downstream TNW.¹

The appellant contends there is no evidence of flow from the newly excavated ditch to the grass swale, either through direct observation or hydrologic indicators. In addition, the appellant believes the grass swale does not facilitate any water flow to the pipe, under the driveway of the adjacent apartment complex. The appellant further contends that the significant nexus evaluation, performed by the District, is generic (speculative) and not site-specific. Therefore, the appellant believes that the onsite wetlands are isolated.

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. The appellant's agent supplied supporting documentation at the time of submittal of the RFA.
3. The District and appellant's agent supplied information at the time of the appeal conference. This information was in the form of answered questions.

APPELLANT'S STATED REASONS FOR APPEAL

Appeal Reason 1: There is no evidence of flow from the newly excavated ditch to the grass

¹ In *United States v. McWane, Inc.*, 505 F.3d 1208 (11th Cir. 2007), petition for rehearing en banc denied, 521 F.3d 1319 (Mar. 27, 2008), petition for certiorari denied, Dec. 1, 2008, the Eleventh Circuit concluded that the Justice Kennedy's significant nexus test is the sole method for determining CWA jurisdiction in the 11th Circuit pursuant to *United States v. Rapanos*, 547 U.S. 715 (2006). Accordingly, all USACE approved jurisdictional determinations under Section 404 of the CWA within the Eleventh Circuit must employ the significant nexus standard.

swale, either through direct observation or hydrologic indicators. In addition, the grass swale does not facilitate any water flow to the pipe, under the driveway of the adjacent apartment complex.

Appeal Reason 2: The significant nexus evaluation, performed by the District, is generic (speculative) and not site-specific.

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

Appeal Reason 1: There is no evidence of flow from the newly excavated ditch to the grass swale, either through direct observation or hydrologic indicators. In addition, the grass swale does not facilitate any water flow to the pipe, under the driveway of the adjacent apartment complex.

Finding: This reason for appeal has merit.

Discussion: There are a number of contradictions in the District's classification of the jurisdictional and connecting waters.

The District identified two categories of jurisdictional "waters of the United States" on the site under Section II.B.1. of its 29 July 2010 JD Form: "wetlands adjacent to non-RPWs that flow directly or indirectly into TNWs," and "[n]on-RPWs that flow directly or indirectly into TNWs." However, the District stated at the appeal conference that the "onsite wetlands are adjacent to an RPW that flows directly into a TNW" (see MFR, Notes of 23 November 2010 Appeal Conference).

Under Section III.B.1(ii)(a), of the JD Form, the "tributary" was described both as a "[t]ributary [which] flows directly into TNW" and a "[t]ributary [which] flows through 2 tributaries before entering TNW." The flow route to the TNW was described under Section III.B.1(ii)(a) as follows:

Water moves from the wetland into the conveyance (a recently constructed roadside ditch on the north side of 19th Street), through a grassy swale to a culvert underneath an entrance road to an apartment complex. The water then flows through a second grassy swale into a culvert which runs underneath 19th Street into a stream which flows into Pretty Bayou.

During the appeal conference, the District described the flow route as follows:

Soil survey shows that Wetland A, B, and C is historically one wetland system. Wetland A exits the site via a recently constructed roadside ditch (non-jurisdictional conveyance). This ditch (non-jurisdictional conveyance) will fill to capacity and then outfall onto the grassy St. Augustine swale (non-jurisdictional

conveyance) in front of the apartment complex. The water enters into a pipe (non-jurisdictional conveyance) which runs underneath the apartment complex driveway. The water continues to flow into Wetland B on the corner of 19th Street and Wilson Road. This wetland area is connected via a pipe (jurisdictional conveyance) to Wetland C on the south side of 19th Street. Wetland C is separated by a manmade berm from the RPW; it is connected by shallow subsurface flow to the RPW. The RPW flows approximately 3.5 miles to Robinson Bayou which is a TNW. Robinson Bayou has an open water connection to St. Andrew Bay.

Wetland A, B, and C comprise one wetland system dissected by roads and development as evidence from soil surveys and aeriels. They remain hydrologically connected by non-jurisdictional conveyances and a jurisdictional culvert.

Under Section III.B.1(ii)(b) of the JD Form, the “General Tributary Characteristics” were described as Natural, Artificial (man-made) (i.e., “Man-made ditch”), and Manipulated (man-altered) (i.e., “A culvert was placed under the driveway to the apartment complex and a culvert was placed under 19th Street to the RPW”).

The District must specify whether it is claiming the onsite wetlands are adjacent to a non-RPW or an RPW. The District must clearly identify the tributary to which the onsite wetlands are claimed to be adjacent. It cannot be determined from the JD Form which hydrologic conveyance the District has identified as the relevant “tributary” (i.e., whether it is the recently constructed ditch, grass swale, pipe underneath driveway, or the conveyance beside the berm in wetland C). The District must also specify whether this tributary flows directly into a TNW or flows through two tributaries before reaching the TNW. In addition, it must clarify which general characteristics apply to that tributary under Section III.B.1(ii)(b). And, as stated at the appeal conference, if there is no second grassy swale (i.e., the pipe underneath the apartment complex driveway directly discharges into Wetland B), the JD form should be corrected to eliminate the reference to such a conveyance. Further, the JD Form states that the TNW is Pretty Bayou and the 6 August 2010 letter states that the TNW is St. Andrews Bay. However, the District’s statement at the appeal conference identify Robinson Bayou as the TNW. Finally, the District must identify what “[n]on-RPWs that flow directly or indirectly into TNWs,” if any, it is identifying as jurisdictional waters on the Appellant’s site.²

The JD Guidebook (p. 55) states that for “[s]ignificant nexus findings for non-RPW and its adjacent wetlands, where the non-RPW flows directly or indirectly into [a] TNW,” documentation “will explain the specific connections ... [and] an evaluation will

² While the District was able to provide some explanations with regard to the contradictory and lacking items of information in the AR during the appeal conference, the assertion of jurisdiction must still be supportable based on the AR (including the JD Form), and corrective action is therefore required.

be made of the frequency, volume and duration of flow.” Under III.B(2)(i)(b) of the JD Form, the flow relationship between the onsite wetlands in question and the tributary is described in the JD Form as:

[i]ntermittent flow ... [d]uring site visits, standing water was observed in the ditch. It should be noted that prior to the site visit, several rain events occurred. No water was observed flowing from the wetland. Based on water drainage patterns within the wetlands, flow of water to and from the tributary is assumed to be present and intermittent.

Surface flow is ... discrete and confined. [III.B.2(i)(b)]

The flow in the tributary is described under Section III.B.1(ii)(c) as “intermittent but not seasonal” with an estimated “20 (or greater)” flow events per year. Surface flow in the tributary was described as “overland sheetflow” based on “visual observations.” Subsurface flow was identified as “two (2) culverted road crossings.” The flow regime was described as follows:

The tributary is ... expected to flow in response to rainfall throughout the year. During site visits, water was observed in the tributary. In every historical aerial reviewed, the presence of water was observed. Therefore, it was determined that water continuously flows.

It is unclear whether the District is describing multiple tributaries or portions of the same tributary above (i.e., “intermittent but not seasonal” versus “continuously flows”). It is also unclear how flow in the tributary would consist of “overland sheetflow.” There is no description or measurement of the volume of flow anywhere along the connecting sequence identified by the District (Wetland A – ditch – swale – culvert - Wetland B – culvert - Wetland C - RPW), and the frequency, volume, and duration of flow for some of these segments is not documented (though that depends in part upon what the District intends to identify as a “tributary”). In addition, the AR should clarify which tributary (or segment of a tributary) was viewed via historic aerials and whether that is intended to include the newly constructed ditch, since that would not show up on a historic aerial.

The District stated at the appeal conference:

Panama City is currently more than 20 inches below normal rainfall. An observance after a 1” to 3” rain event would not produce enough precipitation to show flow from the new excavated ditch (non-jurisdictional conveyance). Therefore, the area (including Wetland A) was dry and absorbing available rain. There have reportedly been observations that during normal rainfall periods that the storage capacity of Wetland A will overflow into the new excavated ditch (though it is unclear when these observations were made given the below-normal rainfall conditions). Once the ditch fills to capacity, it will overflow into the

grassy swale (non-jurisdictional conveyance).

However, this explanation is not supported by measurement data in the AR concerning frequency, volume, and duration of flow between the different connecting segments.

Actions: 1) Correct the JD Form to:

Document the frequency, volume, and duration of flow for the following:

- a) From Wetland A to the newly constructed ditch, along 19th street;
- b) From the newly constructed ditch through the swale to the culvert under the apartment complex driveway;
- c) From the culvert to Wetland B;
- d) From Wetland B through the culvert to Wetland C;
- e) From Wetland C to the RPW (including the assumed subsurface flow);
- f) From the RPW to the TNW

The use of separate JD Forms is highly encouraged (though not required). If one form is used, please ensure to be specific on which wetland and/or flow route you are describing.

2) Make a determination as to whether the onsite wetlands are adjacent to a RPW or non-RPW (once that determination is made, ensure that the procedures outlined in the JD Guidebook for completing the JD Form are followed).

3) Identify the upstream and downstream limits of the reach and the general characteristics of the tributary relevant to the significant nexus determination.

4) Clarify the sequence of connections supporting jurisdiction (including language pertaining to the second grass swale, the number of tributaries between the wetland and TNW).

5) Identify the TNW (Pretty Bayou vs. St. Andrews Bay vs. Robinson Bayou).

6) Explain which tributary, portions of the tributary, or other conveyances were viewed via historic aerials (accounting for the fact that the newly constructed ditch would not show up on a historic aerial).

Appeal Reason 2: The significant nexus evaluation, performed by the District, is generic (speculative) and not site-specific.

Finding: This reason for appeal has merit.

Discussion: The Rapanos Memorandum, page 1, states: "A significant nexus analysis will assess the flow characteristics and functions of the tributary itself and the functions

performed by all wetlands adjacent to the tributary to determine if they significantly affect the chemical, physical and biological integrity of downstream traditional navigable waters.” And, “[s]ignificant nexus includes consideration of hydrologic and ecologic factors.”

The JD Guidebook, page 7, states: “A significant nexus exists if the tributary, in combination with all of its adjacent wetlands, has more than a speculative or an insubstantial effect on the chemical, physical, and/or biological, integrity of a TNW.” Section III.C.2 of the JD Form must document the rationale to support a significant nexus finding for the on-site wetland and tributary at issue here.

Section III.C.2 of the JD Form provides the following information:

Water moves from the wetland into a recently constructed roadside ditch on the north side of 19th Street through a grassy swale to a culvert underneath an entrance road to an apartment complex. The water then flows through a second grassy swale into a culvert which runs underneath 19th Street into a tributary (a stream which flows into Pretty Bayou). Pretty Bayou is part of the estuarine system of St. Andrew Bay. The project manager and other staff have visually observed the path of water flow from the subject wetland to the outfall at the stream on several occasions. The conveyance, non-RPW, RPW, and its wetland clearly have a hydrologic connection to the downstream TNW. The conveyance and its abutting wetland directly contribute to the physical, biological, and chemical properties of the downstream TNW. As the wetland, conveyance, and non-RPW are surrounded by a highly developed area with highly utilized roads (19th Street and Harrison Avenue), pollutants associated with human presence and the roadway, including dirt, dust, rubber and metal deposits from tire wear, antifreeze, engine oil, and trash are washed into the tributary during rain events and transported to the downstream TNW. Some of these pollutants are effectively removed or filtered by the tributary and wetlands before being discharged into the downstream TNW. Some of the solid pollutants, such as dirt, dust, rubber, metal deposits, and trash, are either trapped or degraded by the wetlands and tributary. As these pollutants are transported along the tributary, heavier particles drop out of suspension and become incorporated into the sediments/soils within the tributary or become attached to vegetation growing in and along the tributary. The similarly situated wetlands considered in this evaluation are predominantly forested wetlands. These forested wetlands, along with the tributary, provide several functions that benefit the downstream TNW. These functions include, but are not limited to, carbon cycling, food web support, wildlife habitat, detention and attenuation of stormwater, nutrient cycling, filtration of pollutants, and sediment trapping. Observation of tannin-stained, non-turbid, waters within the wetlands and tributary serve as physical indicators that decomposed organic matter is present within the wetlands and tributary. Likewise, the wetlands provide water, nutrients (e.g., nitrogen and phosphorus), and food (e.g., organic

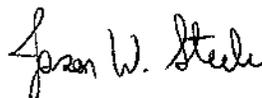
matter, microorganisms, and invertebrate prey) which support aquatic life in the downstream TNW (Wipfli, Mark S., et al, 2000). As the flow of water from the wetlands to the downstream TNW has been observed, evidence exists that the transport of organic matter and other waterborne nutrients and microorganisms, to the downstream TNW, occurs. The tributary and adjacent wetlands also provide habitat for prey items and small reptiles that are consumed by other species that also depend on the downstream TNW during part of their lifecycle.

As discussed under Appeal Reason 1, the District did not adequately document the flow characteristics within the different connecting conveyances or tributaries. Also as discussed under Appeal Reason 1, some of the statements regarding flow are contradictory (e.g., in the quote above, the District states that “the flow of water from the wetlands to the downstream TNW has been observed,” while under III.B.2(i)(b) of the JD Form the District stated, “No water was observed flowing from the wetland,” and that the flow of water to and from the tributary is assumed ...”). There is also mention of a both a non-RPW and RPW, which needs to be clarified. While the District did examine the functions and benefits of the wetlands and tributary, including hydrologic and ecologic factors, the already-noted lack of flow documentation makes it difficult to determine, based on the existing AR, whether the effects are more than speculative or insubstantial.

Action: 1) Integrate the documentation of the flow characteristics provided in response to Actions 1 and 3 under Appeal Reason 1, above, into the significant nexus findings and explanation.

CONCLUSION

For the reasons stated above, I find that the appeal has merit. The District’s administrative record does not contain substantial evidence to support the District’s determination that the subject wetlands have a significant nexus to the nearest downstream TNW. 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