

ADMINISTRATIVE APPEAL DECISION
JURISDICTIONAL DETERMINATION
EMERALD COAST DEVELOPMENT CORP.

FILE NUMBER 2005-1862

JACKSONVILLE DISTRICT

19 NOVEMBER 2008

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

Appellant: Emerald Coast Development Corp.

Appellant's agents: Bethany Womack, Garlick Environmental Associates.

Date of Receipt of Request for Appeal: 27 May 2008.

Date of Acceptance of Request for Appeal: 18 August 2008.

Appeal Conference/Site Visit Date: 4 September 2008.

SAD-ACCEPTED REASON FOR APPEAL:

SAD accepted the following reason for appeal as detailed by the appellant in the attachment to the Request for Appeal dated 27 May 2008:

1. The district was incorrect in their application of the current regulatory criteria and associated guidance in asserting jurisdiction under the Clean Water Act for wetlands and waters onsite because they do not substantially affect the physical, chemical or biological integrity of St. Andrews Bay and therefore have no significant nexus.
2. The site does not have a hydrological or ecological connection to any traditionally navigable waterway.

SUMMARY OF DECISION:

The Appellant's request for appeal has merit. The administrative record does not clearly demonstrate that a significant nexus exists between the onsite wetlands and tributary that has more than a speculative or insubstantial effect on the chemical, physical and/or biological integrity of a Traditionally Navigable Water.

CENAD-PD-PSD-O

**SUBJECT: Emerald Coast Development Corp. Appeal Decision, Jacksonville District,
File No. 2005-1862**

BACKGROUND INFORMATION:

Emerald Coast Development Corp. is appealing the Jacksonville District's decision to take jurisdiction over wetlands and waters on property located on the north side of U.S. Highway 98 in Section 32, Township 3 South, Range 15 West in Panama City Beach, Bay County, Florida. On 14 February 2005 the Corps received a permit application from Emerald Coast Development Corp. to develop the site. The Jacksonville District of the US Army Corps of Engineers (the District) requested additional information on 25 February 2005 and subsequently withdrew the application on 13 June 2005 after the Appellant failed to respond to the request for information. On 8 August 2005, the Appellant provided the additional information requested by the District. A Public Notice was issued and comments received in response to the public notice. The comments were sent to the Appellant for response, but none were received. On 29 August 2007, the Appellant requested an approved Jurisdictional Determination (JD) for his property. On 25 September 2007, the District sent a JD letter stating that there were jurisdictional wetlands on the property. On 5 November 2007, the District sent a letter to the Appellant rescinding the 25 September 2007 JD stating that additional field evaluation of the project site would be necessary to determine the site's relationship to traditionally navigable waters (TNWs). On 30 November 2007, the District met with the Appellant's agent on site to re-evaluate the JD. On 6, 10 and 20 March 2008, the District conducted additional site visits. During the 20 March 2008 site visit, the District met with representatives of the Bay County Engineering Department who verified and provided a plan showing that the flow from the tributary on the Appellant's property to the east through an open channel that eventually connects to a subsurface man-made drainage system. Throughout March 2008, the District gathered additional information to support its determination and met with representatives from the Florida Department of Environmental Protection who provided plans (see administrative record) from issued stormwater management permits that show that the open water tributary ties into a man-made subsurface drainage system. On 17 April 2008, an approved JD was issued by the District stating that the waters on site are non-relatively permanent waters (RPWs) that have a significant nexus to a TNW (North Bay) and therefore, the waters and their adjacent wetlands are jurisdictional under the Clean Water Act.

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. 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 their application of the current regulatory criteria and associated guidance in asserting jurisdiction under the Clean Water Act for wetlands and waters onsite because they do not substantially affect the physical, chemical or biological integrity of St. Andrews Bay and therefore have no significant nexus.

Finding: This reason for appeal has merit.

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Discussion: The administrative record does not contain substantial evidence that a significant nexus exists between the onsite wetlands and tributary that has more than a speculative or insubstantial effect on the chemical, physical and/or biological integrity of a TNW. Based on the 5 June 2007 U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook (Guidebook), a significant nexus determination must be done for non-relatively permanent waters and any wetlands adjacent to non-RPWs that flow directly or indirectly into TNWs. The significant nexus determination should include a fact-specific analysis and documentation of ecologic and hydrologic factors, among other things. The Guidebook states:

[f]ield staff will explain the specific connections between the characteristics documented and the functions/services that affect a TNW. Specifically, an evaluation will be made of the frequency, volume, and duration of flow; proximity to a 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.

Some of those other relevant factors regarding the tributary and its adjacent or abutting wetlands include watershed size and annual rainfall, the carrying of pollutants and floodwaters, trapping and filtering pollutants other than sediments, and the storage of flood waters. In accordance with the Guidebook, a significant nexus exists if the tributary, in combination with all of its adjacent wetlands has more than a speculative or insubstantial effect on the chemical, physical and/or biological integrity of a TNW.

The record supports that the wetlands on-site and the tributary “may” or “are expected to” provide numerous functions including flood attenuation during storm events; sediment, pollutant and nutrient removal by vegetation in the wetlands and the tributary; carbon transport; as well as food web and life cycle support for various species of fish and wildlife. However, the administrative record does not provide detailed information which supports that a significant nexus exists between the on-site wetlands and the tributary that has more than a speculative or insubstantial effect on the chemical, physical and/or biological integrity of North Bay. Although these functions may exist and may provide more than a speculative or insubstantial effect on the chemical, physical and/or biological integrity of North Bay, it is not substantially documented in the administrative record.

Action: The District should further analyze the record and determine if there is or is not a significant nexus that has more than a speculative or insubstantial effect on the chemical, physical and/or biological integrity of the TNW. The significant nexus determination should contain a fact specific analysis of each of the functions that the wetlands and the tributary provide and should elaborate on why the nexus between the onsite wetlands and waters and the TNW is or is not significant and why it is or is not more than speculative or insubstantial. The analysis should focus on how each function performed by the onsite wetlands and the tributary affects the physical, chemical and/or biological integrity of the TNW. The administrative record should be revised accordingly to reflect the additional information.

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Appeal Reason 2: The site does not have a hydrological or ecological connection to any traditionally navigable waterway.

Finding: This reason for appeal has partial merit.

Discussion: The administrative record supports the District's determination that the on-site wetlands and the tributary have a hydrological connection to North Bay as well as it supports that North Bay is a TNW. Numerous aerial photographs in the administrative record taken during different years all show that water was present in the tributary. Water was present when the Review Officer visited the site on 4 September 2008, and water was also documented as being present during four other site visits by representatives of the District. The administrative record contains a video and numerous photographs that follow the path of the drainage from the site to a tidal canal leading into North Bay. There is also documentation that meetings were held by the District and the Bay County Engineering Department as well as the Florida Department of Environmental Protection where the District verified that the open water channel enters subsurface man made drainage systems before ultimately discharging into the tidal canal leading into North Bay. Plans showing the connections from open water to subsurface drainage systems as well as discussion of the flow patterns from the site to North Bay are detailed in the administrative record supporting that a hydrological connection does exist between the site and North Bay. It is stated in Section II of the Guidebook that geographic features including ditches and pipes may contribute to a surface hydrologic connection where the features connect a water of the U.S. to another water of the U.S. It is clearly documented in the administrative record that a surface hydrologic connection from the wetlands and the tributary onsite to North Bay exists through a series of open water tributaries and pipes. The record shows that minnows were observed on the site further supporting that lengthy periods of inundation occur.

The record states that the on-site wetlands and the tributary provide valuable functions to the ecological diversity of the area by providing habitat for various organisms which contribute to the food web and various life cycles within the ecological community between the site and North Bay. The record also supports that other functions such as flood attenuation during storm events; sediment, pollutant and nutrient removal by vegetation in the wetlands and the ditch; and carbon transport are provided by the onsite wetlands and the tributary. As discussed in Appeal Reason 1, the administrative record does not clearly show that the ecological connection between the onsite wetlands and the tributary has a significant affect on the integrity of the TNW.

Based on the above, the administrative record supports that the site has a hydrological and ecological connection to a TNW. However, the record does not support the conclusion regarding the significance of the connection or its effect on the chemical, physical and/or biological integrity of the TNW.

Action: See Appeal Reason 1.

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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 of its determination that a significant nexus exists between the on-site wetlands and the tributary and North Bay, the nearest traditionally navigable waterway. The District's determination was not otherwise arbitrary, capricious or an abuse of discretion, and was not plainly contrary to applicable law or policy. With regard to the aspects of the appeal on which merit has been found, I am remanding the approved JD decision back to the District to document and explain the specific connections between the characteristics and functions of the on-site wetlands and tributary, and their affect on North Bay. This concludes the Administrative Appeal Process. The District shall complete these tasks within 45 days from the date of this decision and upon completion, provide the Division office and Appellant with its decision document and final JD.



Joseph Schroedel
Brigadier General, USA
Commanding