

ADMINISTRATIVE APPEAL DECISION

JURISDICTIONAL DETERMINATION

GEORGE T. NEWELL

FILE NUMBER 2007-01277-2JX

CHARLESTON DISTRICT

DATE: JANUARY 30, 2008

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

Appellant: Mr. George T. Newell.

Receipt of Request for Appeal (RFA): October 26, 2007.

Appeal Accepted: November 30, 2007.

Appeal Conference/Site Visit: January 7, 2008.

Summary of Decision: This appeal has merit. I find that additional documentation is required to satisfy the significant nexus requirement.

Background Information: On June 22, 2001, the District received a request for a wetland jurisdictional determination from the Appellant for a 4.2 acre tract, located on the south side of US Highway 17-A, just west of the Moncks Corner City limits, in Berkeley County, South Carolina. In response to the request, the District issued a letter on October 1, 2001, stating that the Appellant's property contained 1.59 acres of jurisdictional wetlands.

In January 2002, the Appellant requested a re-evaluation of the jurisdictional determination (JD) in light of the Supreme Court's decision in the Solid Waste Authority of Northern Cook County vs. United States Army Corps of Engineers case. This decision limited the Corps jurisdiction under the Clean Water Act (CWA) to regulate isolated waters. Specifically, the Supreme Court struck down the use of the "Migratory Bird Rule"¹ to assert CWA jurisdiction over isolated, non-navigable, interstate waters that are not tributary or adjacent to navigable waters or tributaries. The District revisited

¹ The "Migratory Bird Rule" extended § 404(a) jurisdiction to intrastate waters: (a) Which are or would be used as habitat by birds protected by Migratory Bird Treaties; or (b) Which are or would be used as habitat by other migratory birds which cross state lines; or (c) Which are or would be used as habitat for endangered species; or (d) Used to irrigate crops sold in interstate commerce.

the site and determined that the wetland was not considered isolated based on its connection to an unnamed tributary of the West Branch of the Cooper River, a navigable water. The Migratory Bird Rule was not used by the District to re-evaluate jurisdiction. On February 11, 2002, the District issued a letter in response to the re-evaluation summarizing the hydrological connections and re-affirming the jurisdictional status of the wetland determination completed in 2001.

On May 22, 2007, the Appellant stated that Berkeley County and the City of Moncks Corner approved a planned community of subsidized apartments for the elderly as the best use of his property. The County and City authorities also granted a mitigation variance for the project (RB-SOP-93-02).

On May 24, 2007, the Appellant requested a second re-evaluation of the JD in light of the Supreme Court's 2006 decision in the *Rapanos/Carabell (Rapanos)* case concerning the scope of the Clean Water Act, specifically addressing adjacency. The Appellant stated that due to the *Rapanos* decision, his property is not considered to be adjacent to a navigable water and is therefore not regulated.

The Corps issued guidance on June 5, 2007, on how to conduct wetland determinations using the standards set by the Supreme Court in the *Rapanos* case. The District completed a third jurisdictional determination using the *Rapanos* guidance. The Charleston District concluded (see July 25, 2007, letter) that the approximately 1.8 acres of wetlands on the Appellant's property are still jurisdictional because they have a significant nexus to a Traditionally Navigable Water ("TNW").

The Approved Jurisdictional Determination Form ("JD Form") indicates that waters of the US on the site consist of wetlands adjacent to non-RPWs ("Relatively Permanent Waters") that flow directly or indirectly into TNWs. [JD Form, II.B.1]. Apparently, the wetlands are part of a larger, 120-acre wetland complex. [JD Form, II.B.1, III.B.3]. The JD Form is inconsistent on whether the wetlands on the site directly abut the non-RPW – at one point, it indicates they are adjacent by means of flow through ditches and pipes, and at another, indicates that they directly abut the non-RPW. [JD Form, III.B.2, and III.B.3]. The non-RPW has intermittent flow (≥ 20 flow events/year), an ordinary high water mark ("OHWM"), and is a part-channelized, part-natural tributary that flows through both wetlands and uplands. [JD Form, II.B.1]. The non-RPW flows more than 5 miles through either 2 or 3 unnamed tributaries (the JD Form is inconsistent here) to the Cooper River, a Section 10 TNW. [JD Form, II.B.1.ii.a]. The JD Form states the "significant nexus" as follows:

The wetland and tributaries within the review area are located just south of the town of Moncks Corner which is a developed area and is continuing to expand. The wetlands perform important functions to filter out pollutants and sediments caused by intense traffic and development, preventing them from entering the Cooper River. These wetlands also provide for flood storage in heavy rain events along with habitat for a diversity of aquatic and upland species.

The JD Form states that the estimated 120 acres of wetlands in the review area are jurisdictional, along with some 4,400 linear feet of the non-RPW tributary.

Since the Project Manager proposed to make a significant nexus determination, on July 16, 2007 the District forwarded the draft JD to the Environmental Protection Agency (EPA) Region IV, for coordination and review. By July 16, 2007, email, EPA Region IV declined to elevate the determination. The Appellant disagreed with the *Rapanos* determination decision and appealed the JD to the South Atlantic Division Commander on October 21, 2007. The South Atlantic Division Appeal Review Officer accepted the appeal on November 30, 2007.

Site Visit: Michael Bell, George Newell, District Project Managers Richard Darden, and Robert Vega attended the site investigation on January 7, 2008. The attendees started the investigation at the Appellant's lot and observed wetlands that abutted a tributary. The attendees followed the tributary to manipulated tributaries (ditches) which eventually connected to an unnamed tributary of the West Branch Cooper River. The tributaries were primarily dry with evidence of Ordinary High Water Marks on the banks. The RO concluded the field investigation and the attendees discussed the Reasons for Appeal.

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

Reasons for Appeal Transferred Verbatim from the RFA

Appeal Reasons 1 and 2: Property in question is connected solely by 550 ft. of pipe and two catch basins to a ditch dug by the S.C.D.O.T. [South Carolina Department of Transportation] This ditch connects to a non-RPW and another S.C.D.O.T. ditch (See D.O.T. plan No. 1). This makes the property non-jurisdictional according to your Clean Water Act Jurisdiction following *Rapanos-Carabell v. United States* (Enclosure 2).

FINDINGS: This reason for appeal has no merit.

ACTION: None required.

Discussion: During the site visit of the Appellant's property, the attendees observed that the wetlands abutted a tributary that connected to a 550-foot culvert which ran under US Highway 17-A. The tributary also had connections with roadside ditches (catch basins). The Appellant and the District agreed that the wetland and ditch system are hydrologically connected to the Cooper River, a TNW. However, the Appellant believed the tributaries were not jurisdictional because they are designated as ditches and drained only uplands. The wetland on his property would then be isolated and not regulated by the District.

The RFA emphasized that the South Carolina Department of Transportation (DOT) classified the tributaries adjacent to US 17-A as ditches and then referenced the *Key Points* statement from the *Rapanos* decision below that ditches "excavated wholly in

and draining only uplands and that do not carry a relatively permanent flow of water” are not regulated. The RFA contained two enclosures to support the Appellant’s position. The first enclosure is a DOT design drawing describing the tributaries adjacent to US-17-A as “ditches.” The second enclosure is a copy of page 1 from Appendix A of the June 5, 2007, U.S. Army Corps of Engineers and Environmental Protection Agency’s Rapanos Guidance, *Memorandum Re: CWA Jurisdiction Following the U.S. Supreme Court Decision in Rapanos v. United States*. The Appellant highlighted the following section from the *Summary of Key Points* on page 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 District demonstrated in the field that the tributaries (ditches) in question drain the standing water from the wetland on the Appellant’s property and not only uplands. The administrative record contains a site map from the Appellant and other drawings collected by the District showing the location of the wetland and the abutting ditch. Therefore, the ditch or tributaries would not drain only uplands, but wetlands and other features.

Appeal Reason 3: In the JD Determination flow events were described as 20 or greater. Your rules state that 3 months is required to be jurisdictional.

FINDINGS: This reason for appeal has no merit.

ACTION: None required.

Discussion: The RFA referenced another section from the *Summary of Key Points* on page 1 of Appendix A of the Rapanos Guidance Memorandum that discusses seasonal flow (e.g. **typically three months**) and wetlands that abut a tributary with a permanent non-navigable flow. [emphasis added]. The RFA also contained an attachment from page 3 of the August 27, 2007, *Approved Jurisdictional Determination Form*. The Appellant highlighted Section III.B.1, **Characteristics of the non-TNWs that flow directly or indirectly into TNW**, specifically part ii(c), Flow, that states:

Tributary provides for: **Intermittent but not seasonal flow**

Estimate average number of flow events in review area/year: **20 (or greater)**

Describe flow regime: holds water during wet portions of the year and flows after every rain event.

The Appellant tried to demonstrate that the District was required to provide evidence that three months of continuous flow is required for the tributaries and wetlands that abut the tributaries to be considered jurisdictional. The District only documented 20 or

greater flow events that provide flow after every rain event and did not show three months of seasonal flow.

The *Summary of Key Points* on page 1 of Appendix A of the Rapanos Guidance Memorandum states:

The agencies will assert jurisdiction over the following waters:

- Traditional navigable waters
- Wetlands adjacent to traditional navigable waters
- Non-navigable tributaries of traditional navigable waters that are relatively permanent where the tributaries typically flow year-round or have a continuous flow at least seasonally (e.g., typically three months)
- Wetlands that directly abut such tributaries

The agencies will decide jurisdiction over the following waters based on a fact-specific analysis to determine whether they have a significant nexus with a traditional navigable water:

- Non-navigable tributaries that are not relatively permanent
- Wetlands adjacent to non-navigable tributaries that are not relatively permanent
- Wetlands adjacent to but that do not directly abut a relatively permanent non-navigable tributary

The District's *Approved Jurisdictional Determination Form* states that the wetlands on the Appellant's property are adjacent to **non-RPWs** that flow directly or indirectly into TNWs. According to the guidance and the *Key Points Summary*, the District must determine whether they have a significant nexus with a TNW if the tributary that abuts the wetland is a **non-RPW**. The District documented the required significant nexus determination from the wetland on the Appellant's property to the Cooper River. The three-month seasonal flow requirement only applies when determining jurisdiction over a tributary with a Relatively Permanent Flow (RPW) of water where a case-by-case significant nexus determination is not required.

The administrative record, the *Approved Jurisdictional Determination Form*, and the observations made during the site visit support the District's determination that the wetland on the Appellant's property is a jurisdictional water of the US.

Appeal Reason 4: In the determination, portions of tributaries were based on an "Educated Guess." This is directly in disagreement with the Rapanos decision, according to Justice Kennedy:

On the other hand, when the effect of the wetland on water quality in a navigable water is "speculative or insubstantial," then the non-navigable water will not fall within the Corps' Jurisdiction.⁴

⁴ June 5, 2007, Legal Memorandum, page 10.

FINDINGS: This reason for appeal has merit.

ACTION: The District is required to revisit its jurisdictional determination to document and explain the specific connections between the wetlands and non-RPW tributary in question and the Cooper River, a TNW.

Discussion: The RFA contains the *Approved Jurisdictional Determination Form* as an attachment. The Appellant circled the “educated guess” terminology in III.B.1(c) of the tributary section on the third page of the form. The Appellant asserted that the District made an educated guess concerning the jurisdiction of the tributaries and the educated guess is “speculative or insubstantial.”

The JD form has 15 selections under the ordinary high water mark (OHWM) category of the tributary section. The Project Manager designated five selections under the OHWM category to describe the indicators of the OHWM. One of the selections is “other.” The District had this statement next to the “other” selection, “portions of the trib are visible and the others are based on an educated guess of what the tributaries look like along with aerial photos and topo map interpretation.” Even without the “other” indicator, the JD Form reveals adequate indicators of an OHWM. In addition, the quoted statement attributed to Justice Kennedy has to do with “speculative or insubstantial,” effects **on water quality** when making a significant nexus determination, and not on identifying whether a tributary possesses an OHWM.

However, the Appellant does raise a valid issue regarding the adequacy of documentation with regard to these specific wetlands and tributaries. The JD Form Instructional Guidebook provided as part of the *Rapanos* Guidance requires that specific connections be explained and documented. Making significant nexus findings for non-RPWs and their adjacent wetlands, where the non-RPW flows directly or indirectly into a TNW, is an example of the information needed.

Field 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.

In addition, the evaluation will also consider the functions performed cumulatively by any and all wetlands that are adjacent to the tributary, such as storage of flood water and runoff; pollutant trapping and filtration; improvement of water quality; support of habitat for aquatic species; and other functions that contribute to the maintenance of water quality, aquatic life, commerce, navigation, recreation, and public health in the TNW. [Instructional Guidebook, pp. 55-56].

In this case, the JD Form includes no documentation of the volume of flow through the wetland adjacent to the non-RPW. The volume of flow has an important impact on the connection between the tributary, and the functions and services it provides that affect the TNW, such as flood storage, filtration, capacity to transfer nutrients, sediment trapping, etc. The significant nexus determination in III.C.2 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 wetland functions (for example, habitat for aquatic species and a resultant effect on the TNW is mentioned without explanation though the wetlands and non-RPW are more than 5 river miles from the TNW). The JD Form is also inconsistent as to whether the wetlands are abutting or not.

CONCLUSION: As my final decision on the merits of the appeal, I conclude there is substantial evidence in the administrative record to support the Charleston District’s jurisdictional determination, with the exception of Appeal Reason 4. Other than Appeal Reason 4, the administrative record and information obtained at the site visit do not support the Appellant’s reasons for appeal that the wetlands on the property are isolated and not regulated. 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 Appeal Reason 4, the District is required to revisit its jurisdictional determination to document and explain the specific connections between the characteristics documented and the functions/services that affect the Cooper River. This concludes the Administrative Appeal Process.

for Benjamin W. Butler, COE
Joseph Schroedel
Brigadier General, US Army
Commanding