

**ADMINISTRATIVE APPEAL DECISION**

**JAMES & NANCY SIMPSON**

**FILE NO. SAW-2009-876**

**WILMINGTON DISTRICT**

**24 JUNE 2011**

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

**Appellant:** James & Nancy Simpson

**Date of Receipt of Request for Appeal:** 3 December 2010

**Acceptance of Request for Appeal:** 17 March 2011

**Appeal Conference:** 29 April 2011

**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 property contains Relatively Permanent Waters (RPWs) that flow directly or indirectly into Traditional Navigable Waters (TNWs), and impoundments of waters of the United States (U.S.), as required by the *U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook* (6/1/2007) ("JD Guidebook"), and the Environmental Protection Agency/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**

James and Nancy Simpson are appealing the Wilmington District's (District) 1 October 2010 decision to assert jurisdiction over approximately 0.20 acres of ponds (P-09 = 0.10 acres, P-10 = 0.10 acres)<sup>1</sup> and approximately 1,000 linear-feet of stream (S-037d)<sup>2</sup> on their property, located at 7206 Secret Shortcut Road, Latitude 35.094429, Longitude -80.627289, Indian Trail, Union County, North Carolina.

A jurisdictional determination (JD) was requested by the North Carolina Department of

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<sup>1</sup> P-09 and P-10 correspond to the two ponds identified on appellant's property.

<sup>2</sup> S-037d corresponds to the stream identified on appellant's property.

Transportation (NC DOT) and the North Carolina Turnpike Authority (NCTA) as part of their future plans to construct a road known as the "Monroe Connector/Bypass". The District issued one approved JD to the NC DOT and NCTA with instructions to notify all fee owners along the proposed road corridor as "affected parties," where a JD was made on their property. The Simpson's were notified that a portion of their property was determined to have waters of the United States. Since the Simpson's are landowners, they were considered an "affected party" and were notified of their appeal rights.

The District determined that the areas designated as ponds (P-09 & P-10) and stream (S-037d), on the appellant's property, are waters of the U.S.

The appellant contends the two ponds (P-09 & P-10) are not jurisdictional because he created them years ago and the stream (S-037d) is not jurisdictional due to lack of connectivity to a TNW and minimal flow caused by a nearby housing development.

#### **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 supplied supporting documentation at the time of submittal of the RFA.
3. The District and appellant supplied information at the time of the appeal conference. This information was in the form of answered questions.
4. The appellant clarified the ponds were manmade during a follow-up conversation to the conference.

#### **APPELLANT'S STATED REASON FOR APPEAL**

**Appeal Reason:** The areas designated as ponds on the property (P-09 & P-10), are not jurisdictional because the appellant created these ponds years ago. In addition, the stream (S-037d) is not jurisdictional due to lack of connectivity to a TNW and minimal flow caused by a nearby housing development.

#### **EVALUATION OF THE REASON FOR APPEAL, FINDINGS, DISCUSSION, AND ACTIONS FOR THE WILMINGTON DISTRICT COMMANDER**

**Appeal Reason:** The areas designated as ponds on the property (P-09 & P-10), are not jurisdictional because the appellant created these ponds years ago. In addition, the stream (S-037d) is not jurisdictional due to lack of connectivity to a TNW and minimal flow caused by a nearby housing development.

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

**Discussion:** Under Section II.B.1.a. of the District's Approved Jurisdictional Determination Form (JD Form), the District indicated the presence of Waters of the U.S. in the review area as "Relatively permanent waters (RPWs) that flow directly or indirectly into Traditional Navigable Waters (TNW)" and "Impoundments of jurisdictional waters".

As it relates to the RPW, the JD Form indicates that the District wholly relied on a North Carolina Division of Water Quality report to make a determination that the onsite stream (S-037d) was relatively permanent (i.e., RPWs). The JD Form requires that for perennial RPWs, the "data and rationale" must be provided. The only insertion by the District in the JD Form at this point was, "S037d = NCDWQ stream score > 30." The water quality report should be considered supporting information (though it is not mentioned in the Section IV of the JD Form regarding Data Sources) and does not alleviate the requirement of the District to make an independent determination of perennial flow. The District may choose to agree with the NCDWQ conclusion, but must provide its rationale for that agreement. Absent a statement describing their rationale for relying on the State's data and conclusion, the District's determination should have been documented under Section III.B and Section III.D. 2 of the JD Form. Section III.B was left entirely blank and Section III.D provided no rationale. Where it is relying on data or forms from another reliable source, in addition to providing its rationale for doing so, the District also needs to ensure the completion of any portions of the required data in Section III.B of the JD Form (e.g., flow, in this case) that are not reflected in or covered by the external data or form.

As it relates to impoundments of jurisdictional waters, under Section III D. 7., the District checked "Demonstrate that impoundment was created from "waters of the U.S.", but did not provide any documentation or rationale. The JD Form (n. 9) refers to the Jurisdictional Guidebook in order to "to complete the analysis" regarding jurisdiction over impoundments. The Jurisdictional Guidebook, in turn (p. 58), notes that there are "documentation requirements to support [a] determination" to assert jurisdiction over an impoundment.

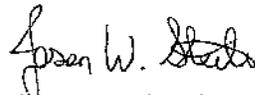
**Actions:**

1. Complete Section III B and Section III.D.2. of the JD Form to support a determination whether or not the onsite stream (S-037d) is an RPW that flows directly or indirectly into a TNW.
2. Under Section III D. 7., demonstrate whether or not the impoundments (ponds) were created from "waters of the U.S." using the key in Section III D. 7 of the *U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook* (6/1/2007).

## 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 property contains Relatively Permanent Waters (RPWs) that flow directly or indirectly into Traditional Navigable Waters (TNWs), and jurisdictional impoundments of waters of the United States (U.S.), 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"). 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