

ADMINISTRATIVE APPEAL DECISION

KELCO, LLC.

FILE NO. SAC-2002-34858-3JH

CHARLESTON DISTRICT

5 FEBRUARY 2010

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

Appellant: Kelco, LLC.

Acceptance of Request for Appeal: 23 November 2009

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

BACKGROUND

Kelco, LLC. is appealing the Charleston District's 28 August 2009 decision to assert jurisdiction on a 4.89 acre tract (subject property), located south of the intersection of Tern Hall Drive and S.C. Highway 707, Latitude: 33.64469°N / Longitude: -79.02888°W, Horry County, South Carolina.

The agent agrees that there are wetlands onsite (0.41 acres), but believes the 0.41 acres of wetlands are isolated (i.e. uplands between the onsite wetlands and the stormwater pond / no surface connection between the 0.41 acres of onsite wetlands and the stormwater pond). The agent believes that the only reason there are any wetlands onsite is because portions of the site were severely rutted during logging, and hold water artificially. In addition, agent stated the topography/gradient precludes any surface flow of stormwater from the subject site into the uppermost stormwater pond in the Tern Hall / Osprey Cove subdivisions. The agent further contends that any drainage connection is through subsurface flow. As such, agent believes that particulate pollutants cannot be transported offsite, and no pollutant could reach the stormwater ponds. In addition, the agent believes the remainder of the wetlands onsite (as deemed by the Corps (3.29 of the 3.7 acres)) are non-jurisdictional due to the areas not exhibiting either wetland vegetation, soils, or hydrology. The agent agrees that the stormwater ponds/system (within Tern Hall /Osprey Cove subdivisions) flow into a Traditional Navigable Water (TNW), but believes the ponds remove all pollutants prior to discharging into the Relatively Permanent Water (RPW) that flows into the TNW. Because the ponds remove pollutants prior to discharge, agent believes the subject wetlands and stormwater ponds do not have a significant nexus to the downstream TNW (i.e. chemical characteristic).

The District contends there are 3.7 acres of onsite jurisdictional wetlands that directly abut a stormwater pond within Tern Hall/Osprey Cove subdivision. The District further contends that

this stormwater pond is interconnected with a series of other stormwater ponds that connect, after overflowing a water-control structure, to an RPW that flows directly into a downstream TNW. The District considers the stormwater ponds non-jurisdictional conveyances and the onsite wetlands are considered adjacent (neighboring) to the RPW, which is located approximately 4,000 feet away. In addition, the District contends that the onsite wetlands and offsite RPW have a significant nexus to the downstream TNW.

SUMMARY OF DECISION

Appellant's request for appeal (RFA) has merit. The administrative record supports the District's determination that the subject property contains waters of the United States (U.S.), as required by the *Corps of Engineers Wetland Delineation Manual*, January 1987 (87 Manual) and *Interim Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Atlantic and Gulf Coastal Plain Region*, October 2008 (Supplement to the 87 Manual). However, the administrative record does not support the District's determination that the onsite waters of the U.S. have a significant nexus to the nearest downstream TNW.

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 appeal conference. This information was in the form of answered questions and aerial maps depicting the stormwater ponds and their interconnections.

APPELLANT'S STATED REASONS FOR APPEAL

Appeal Reason 1: "The Charleston District failed to properly consider the field data. The soils at the site are not typically hydric, and the emergent vegetation is FACU or better, including common occurrences of *Pteridium aquilinum* (Bracken Fern), *Papalum notatum* (Bahigrass), *Eupatorium capillifolium* (Dogfennel) and *Rhus copallina* (Winged Sumac). The subject site was logged circa 1998, and rutting and disturbance from the logging activities has produced rutted areas that have occasional ponding, and include some wetter hydrophytic species. The soils under these ponded areas are generally unsaturated (surface saturation only), and have relict hydric soil features within the upper 20". The site fails to meet the wetland parameters in vegetation, hydric soils and wetland hydrology."

Appeal Reason 2: "The Nationwide Permit submitted on November 13, 2008 was never acted on, and under the applicable statutes, the Corps has only 30 days to issue comments. We submit that, under operation of the law, the wetlands and the fill were authorized by the inaction of the Conway Branch, and that a permit was issued by default as of 45 days of our submittal, on December 28, 2008."

Appeal Reason 3: “The Corps erred in claiming jurisdiction on any of this property. In our submittal in February 2009, we included runoff routing data indicating that the subject property is located roughly 5 miles from the nearest navigable water. The runoff from this site travels almost a mile through a system of multiple in-series retention ponds, underground piping and open channels in the adjacent Tern Hall / Osprey Cove communities, before reaching an outfall to the nearest 1st order stream. These ponds are designed and permitted by the state and federal government to contain and remove pollutants in runoff. It defies logic to believe that the same ponds required by federal and state government, which must meet stringent federal standards for removal of pollutants from land disturbance and residential development, would pass pollutants from the subject site through them, and then another 4 miles or so to the nearest navigable water. The significant nexus standard is entirely based on, not the presumption, but the certain expectation that a discharge into wetlands on a site will result in a discharge to the navigable water body. Such a conclusion here is wholly unsupported.”

Appeal Reason 4: “The Conway Branch office erred in the preparation of the Approved Jurisdictional Determination Form and Significant Nexus data. In Section I, Part B (1) they incorrectly find that the site includes “*wetlands adjacent to but not directly abutting RPW’s that flow directly or indirectly into TNW’s*”. The subject tract has no surface connection to, or anywhere near a RPW, even to the nearby stormwater retention pond. The Corps cannot reasonably consider a manmade retention pond, constructed to contain pollutants and prevent them from passing downstream, a *relatively permanent water* in the context of the Rapanos decision, meaning a water which has the capacity to carry pollutants downstream, directly or indirectly, to a TNW. Excluding these retention ponds means the nearest RPW is over 4,000 feet away.”

EVALUATION OF THE REASONS FOR APPEAL, FINDINGS, DISCUSSION, AND ACTIONS FOR THE CHARLESTON DISTRICT ENGINEER (DE)

Appeal Reason 1

Finding: This reason for appeal does not have merit.

Discussion: The administrative record shows that the District considered all information provided by appellant’s agent. However, the District did not agree with some of the information (i.e. data forms, wetland determination). The District considers the site to be an atypical situation, because of lack of vegetation due to the site being timber harvested in the 1990’s and frequently mowed ever since. According to the 87 Manual, atypical situations are defined as: “areas in which one or more parameters (vegetation, soil, and/or hydrology) have been sufficiently altered by recent human activities or natural events to preclude the presence of wetland indicators of the parameter.” According to the Supplement to the 87 Manual, atypical situations are defined as: “wetlands in which vegetation, soil, or hydrology indicators are absent due to recent human activities or natural events.”

The District provided the following information, when asked at the appeal conference how they handle atypical situations: “The 1987 Corps of Engineers Wetlands Delineation Manual is used

by the district for atypical situations. For this site, Section F, Subsection 1-Vegetation was used in determining whether hydrophytic vegetation previously occurred. This process included all of the steps (1-4) outlined within Section F, Subsection 1. Step 3 of this process, which is used to determine the type of vegetation that previously occurred, consisted of reviewing aerial photographs for vegetation signatures of adjacent properties in relation to 1994 aerial photographs of site, previous site inspection documented in SAC 81-2002-1417(X) field data forms dated September 16, 2002 with surveyed boundaries of wetlands dated July 16, 2002, adjacent properties undisturbed vegetation, and an onsite inspection of the existing herbaceous stratum.”

The District prepared *Wetland Determination Data Form* (Data Form) – Atlantic and Gulf Coastal Plain Region, dated April 2, 2009 states that the site was inspected two times during the growing season and each time, the sampling point met all three criteria for a wetland to be jurisdictional, as per the 87 Manual (hydrophytic vegetation (atypical), hydric soils, and hydrology).

A District prepared Memo, dated August 28, 2009, states, “The day of the initial site visit water was observed above the surface and wildlife was observed feeding and using the area. In addition, hydrologic indicators observed were oxidized rhizospheres around live root channels, portion of the area was inundated, area was saturated to the surface, water staining, algae mats were observed, and iron deposits. In addition, these indicators were observed on a second site visit performed with the consultant on April 17, 2009. Soils within the wetland area were determined to be a hydric soil using the NRCS Field Indicator of F-3, depleted matrix. Soils were determined to be loamy fine sand. Vegetation was determined to be significantly disturbed due to past timber harvesting and maintenance mowing that has occurred onsite. A 5 foot radius plot was used to determine dominant species for both uplands and wetlands. The only stratum present onsite is the herbaceous stratum. Wetland dominant species were both OBL and FACW and upland herbaceous dominant species were OBL, FACW, and FACU. Both hydrology was present on both uplands and wetlands, however, uplands lack the hydric soil indicator.”

As such, the District appropriately classified the site as atypical, due to lack of vegetation, and further, applied the steps that must be followed when assessing atypical sites when completing the data forms. In addition, the District appropriately followed the steps, outlined in the 87 manual, when classifying the 3.7 acres of onsite wetlands as jurisdictional based on hydrophytic vegetation (atypical), hydric soils, and hydrology.

Action: None required.

Appeal Reason 2

Finding: This reason for appeal is not an appealable action.

Discussion: 33 CFR § 331.2 defines “appealable action” as “an approved JD [jurisdictional determination], a permit denial, or a declined permit, as these terms are defined in this section.” “Permit denial is defined as the “written denial with prejudice ...

of an *individual* permit ...,” while “[d]eclined permit” is defined as “a proffered *individual* permit ... that an applicant has refused to accept.” [italics added]. Therefore, Nationwide permit actions (or inactions) cannot be appealed.

Action: None required.

Appeal Reason 3

Finding: This reason for appeal has merit.

Discussion: 33 CFR § 328.3(a) states: “Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States.”

It is recognized that stormwater ponds provide some water quality benefits, such as entrapping sediments. However, the fact that the ponds are designed to contain and remove pollutants in runoff does not necessarily make them a water treatment system within the meaning of 33 CFR 328.3(a). In addition, the ponds/water control structure may be designed to periodically discharge into the RPW, thus, making them susceptible to discharging pollutants to the downstream TNW.

The *U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook* (Guidebook), dated 5/30/2007, page 16, states: “Certain geographic features (e.g., swales, ditches, pipes) may contribute to a surface hydrologic connection where the features:

- replace or relocate a water of the U.S., or
- connect a water of the U.S. to another water of the U.S., or
- provide relatively permanent flow to a water of the U.S.”

The *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States* (“Revised Guidance”), dated December 2, 2008, page 12, states: “Even when not jurisdictional waters subject to CWA §404, these geographic features (e.g., swales, ditches) may still contribute to a surface hydrologic connection between an adjacent wetland and a traditional navigable water. In addition, these geographic features may function as point sources (i.e., “discernible, confined, and discrete conveyances”), such that discharges of pollutants to other waters through these features could be subject to other CWA regulations (e.g., CWA §§ 311 and 402).”

The District has indicated, in the administrative record, that the stormwater ponds are non-jurisdictional conveyances (i.e. a surface hydrologic connection where the features “connect a water of the U.S. to another water of the U.S.”).

The 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.” In other words, a significant nexus may exist where the effect is on either the chemical, physical or biological integrity (an effect on one or more, but not necessarily all, is required) of the TNW, depending on the significance of the effect(s).

The Revised Guidance, 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.” “Significant nexus includes consideration of hydrologic and ecologic factors.”

The District classified the onsite wetlands as wetlands adjacent to but not directly abutting RPWs that flow directly or indirectly into TNWs.

The Guidebook, page 58, states: “**Wetlands adjacent to but not directly abutting RPWs that flow directly or indirectly into TNWs.** This class of water bodies is jurisdictional under the CWA where there is a “significant nexus” with a TNW.

Documentation requirements to support determination:

- Wetlands will meet the 3-parameter test contained in the agency's regulatory definition of wetlands. See also the protocol identified in the *Corps of Engineers Wetlands Delineation Manual* (1987) or appropriate Regional Supplement
- Section III.B.1 of the form needs to demonstrate that water flows from an RPW directly or indirectly into a TNW
- Section III.B.2 and 3 need to identify rationale that wetland is adjacent (not directly abutting) to an RPW that flows directly or indirectly into a TNW
- Section III.C.3 needs to identify rationale to support significant nexus determination for a wetland, in combination with all other wetlands adjacent to that tributary

The 3-parameter test (hydrophytic vegetation, hydric soils, and hydrology) was met as per Appeal Reason 1 above.

Section III.B.1 of the *Approved Jurisdictional Determination Form* (JD Form), dated August 28, 2009, provides the following information: 1) An un-named tributary flows into another un-named tributary that flows directly into the AIWW (TNW). 2) That the flow within the RPW is perennial with 20 or greater flow events per year.

Section III.B.2 and 3 of the JD Form, dated August 28, 2009, provides the following information: 1) That the onsite wetlands are adjacent to (not directly abutting) the RPW, through a discrete wetland hydrologic connection (i.e. “flow to tributary is through an established stormwater system of an adjacent residential development which was verified with Horry County Stormwater. The wetland hydrologic connection is through a series of stormwater ponds that are connected by a series of stormwater ditches that outfall into a manmade canal located to the northwest of the Osprey residential development. The man-made canal then discharges into a man-altered tributary that flows to the TNW

through a series of tributaries.”). 2) The similarly situated wetlands contribute vital biological, chemical, and physical functions to the adjacent RPW. This wetland system enhances a variety of wildlife species by providing diversity through timber type changes and where an aquatic system adjoins an upland. Due to surrounding land uses of development and silvicultural practices, these wetlands act as a catch basin for adjacent uplands filtering sediment and other pollutants and/or reducing the amount of flood waters reaching the TNW.

In order to establish jurisdiction for these wetlands, the JD Form and supporting record must establish the claimed adjacency to the RPW. Regarding the hydrologic connection between the wetlands in question and the stormwater ponds and ditches, the JD Form under II.B.2.i states regarding the characteristics of wetlands that they have “intermittent flow ... during wetter months and after rainfall,” and that the “[s]urface flow is: [o]verland sheetflow.” Subsurface flow is designated as “unknown.”

Under the Revised Guidance, pp. 5 and 6, wetlands are adjacent

if one of following three criteria is satisfied. First, there is an unbroken surface or shallow sub-surface connection to jurisdictional waters. This hydrologic connection maybe intermittent. Second, they are physically separated from jurisdictional waters by man-made dikes or barriers, natural river berms, beach dunes, and the like. Or third, their proximity to a jurisdictional water is reasonably close, supporting the science-based inference that such wetlands have an ecological interconnection with jurisdictional waters.

The District does not claim wetland adjacency based on either the second or third criteria, but on the first. As the guidance indicates, the unbroken surface connection may be intermittent. “Intermittent” is not defined, but on page 7, the Revised Guidance indicates that “‘relatively permanent’ waters do not include ephemeral tributaries which flow only in response to precipitation and intermittent streams which do not typically flow year-round or have continuous flow at least seasonally.” Corps regulations define “adjacent” as “bordering, contiguous, or neighboring.” The question, then, is whether the intermittent, overland sheetflow across uplands is sufficient to render the wetlands contiguous to the stormwater system and, by extension, adjacent to the RPW. The District’s description and supporting data in the JD Form is insufficient to base a finding of adjacency under these circumstances. The District must be able to document the approximate volume of sheetflow, whether it is continuous during the rainy months or even then only intermittent, whether the flow satisfies the requirements to be considered intermittent as opposed to ephemeral, account for the gradient and distance across uplands, etc.

In addition, the District claims that the onsite wetlands are adjacent to the RPW via connection through an intermittent stormwater system. There are at least two points in the system of stormwater ponds that also have potential breaks in the surface connection: the pond into which the sheetflow is said to be deposited has to rise beyond an overflow

release point to discharge to the next pond – there is no documentation in the JD Form as to the volume and frequency of such events; and, there is also a water control structure further down the stormwater system which must be overflowed – again, there is no data in the JD Form regarding the volume or frequency of such events.

Section III.C.3 of the JD Form, dated August 28, 2009, provides the following information: 1) The forested wetlands which are similarly situated and adjacent to the RPW with perennial flow are collectively performing functions consistent with the following: Biological – wetlands adjacent to this RPW include depressional wetlands.

As such, a variety of biological functions are being performed which include providing breeding grounds and shelter for aquatic species, foraging areas for wetland dependent species. These wetlands are essential in providing organic carbons in the form of their collective primary productivity to downstream waters, resulting in the nourishment of the downstream food web. Chemical – wetlands and tributary within the review area are providing the important collective functions of removal of excess nutrients which are contributed by runoff from surrounded uplands, reducing nitrogen and phosphorous loading downstream, and effectively preventing oxygen depletion that can result from eutrophication. Physical – wetlands and tributary in the review area are collectively performing flow maintenance functions, including retaining runoff inflow and storing rain water temporarily. Flow maintenance results in the reduction of downstream peak flows (discharge and volumes), helping to maintain seasonal flow volumes. Based on the collective functions described above and their importance to the biological, chemical, and physical integrity of the traditional navigable waters of the Atlantic Intracoastal Waterway (AIWW), it has been determined that there is a significant nexus between the relevant reach of the tributary and adjacent wetlands to the downstream TNW.

The District speaks to the overall functions provided by the similarly situated wetlands along the RPW. However, they do not speak to the specific functions that the onsite wetland provides to maintaining the chemical, physical, and biological integrity of the downstream TNW.

Action: 1) Assess the flow characteristics between the wetland and the stormwater pond; between the stormwater ponds themselves; between the stormwater ponds and the canal; between the canal and the water control structure; and finally, between the water-control structure and the RPW. 2) Document how the intermittent, overland sheetflow renders the wetlands contiguous to the stormwater system and, by extension, adjacent to the RPW, taking into account volume, frequency, intermittent vs. ephemeral, and gradient/distance across uplands. 3) Explain how the “onsite” wetland affects the chemical, physical and biological integrity of the downstream TNW. Specifically, how the wetland physically connects to the downstream TNW, and how pollutants from the wetland can affect the TNW.

Appeal Reason 4

Finding: This reason for appeal has merit.

Discussion: 33 CFR § 328.3 (c) states: “The term *adjacent* means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are “adjacent wetlands.”

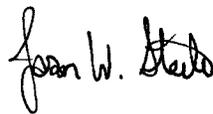
A District prepared Memo, dated August 28, 2009, states, “Onsite non-abutting wetlands were determined to have a direct hydrologic connection to the downstream TNW through an established stormwater system of the adjacent residential subdivisions. Wetlands onsite abut a man-made stormwater ditch and stormwater pond located to the northwest. Flow to tributary is through an established stormwater system of the adjacent residential development which was verified with Horry County Stormwater. The wetland hydrologic connection is through a series of stormwater ponds that are connected by a series of stormwater ditches that outfall into a manmade canal located to the northwest of the Osprey residential development. The man-made canal then discharges into a man-altered tributary that flows to the TNW through a series of tributaries.”

The Guidebook, page 54, states: “It is not appropriate to determine significant nexus based solely on any specific threshold of distance (e.g. between a tributary and its adjacent wetland or between a tributary and the TNW). Similarly, the fact an adjacent wetland lies within or outside of a floodplain is not solely determinative of a significant nexus.”

Action: Same as actions required for Reason 3 above.

CONCLUSION

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