

ADMINISTRATIVE APPEAL DECISION

KEN WEINER AND MARK FREEMAN PROPERTY

FILE NO. SAJ-2008-2438

JACKSONVILLE DISTRICT

18 SEPTEMBER 2009

Review Officer: Thomas J. Cavanaugh, U.S. Army Corps of Engineers (Corps), South Pacific Division, San Francisco, California

Appellant: Jason Hunt, Passarella and Associates (Appellant)

District Representative: Skip Bergmann, Army Corps of Engineers, Jacksonville District (District)

Receipt of Request for Appeal: 8 December 2008

Appeal Meeting and Site Visit Date: 24 March 2009

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

Summary of Decision: This approved jurisdictional determination (JD) is remanded to the District for further evaluation and consideration of information provided by the Appellant. The District should further evaluate its conclusions that there is perennial flow and a hydrologic connection to the nearest downstream Traditional Navigable Water (TNW). In doing so, the District should consider elevation (topographic) data provided by the Appellant and complete an analysis of whether wetlands on the property have a significant nexus with the nearest downstream TNW. This analysis should include, but is not limited to, an analysis of the volume, duration and frequency of the flow of water from the wetlands on the property to TNW, and the functions performed by the tributary and all its adjacent wetlands (e.g. an evaluation of the wetlands' capacity to hold floodwaters, intercept sheet flow from uplands, maintain more consistent water temperature in tributaries, and trap and hold pollutants that may otherwise reach tributaries).

Background Information: The property is an approximate 2.5 acre site, located at 3821 Colonial Boulevard, Section 32, Township 45 South, Range 25 East, Latitude 26.59 North, Longitude 81.83 West, Fort Myers, Lee County, Florida. The topography of the site is relatively flat.

The property owner's consultant delineated the site using the 1987 Corps of Engineers Wetlands Delineation Manual (1987 Manual). On June 16, 2008, the Appellant's consultant provided the District with a letter requesting an approved JD and verification that no permit would be required

for the project proposed for the subject property. The wetland map prepared by the consultant indicated that there are 2.51 acres of wetlands on the property. The Appellant's request for verification that no permit was required was based on a conclusion that wetlands on the property were isolated and, therefore, not subject to regulation under the CWA.

On September 30, 2008, the District issued its approved JD for the property. The District again concluded that the site contained 2.51 acres of wetlands within Clean Water Act (CWA) jurisdiction. The Appellant disagrees and appealed the District's decision citing the reasons for appeal addressed in this appeal decision.

Appeal Evaluation, Findings and Instructions to the District Engineer (DE):

REASON 1: The topographic information for the project, along the south property line (adjacent to the roadside swale), suggests an increase in elevation between the on-site wetlands and the roadside swale. This increase in elevation minimizes a "surface water connection" to the swale thus isolating the wetlands from the [relatively permanent water] RPW.

FINDING: This reason for appeal has merit.

ACTION: The District must further evaluate its conclusions that there is perennial flow and a hydrologic connection to the nearest downstream TNW. In doing so, the District should consider topographic data provided by the Appellant that may clarify the area topography. The District must then complete an analysis of whether wetlands on the property have a significant nexus with the nearest downstream TNW.

DISCUSSION: In response to questions asked at the appeal conference, the Appellant indicated that topographic data shows that wetlands on the property are lower in elevation than the roadside swale. The general elevation of the forested wetland range from 16.61 feet National Geodetic Vertical Datum (NGVD) to 16.98 feet NGVD, while the elevations between the south property boundary and the roadside swale range from 17.36 feet NGVD to 17.62 feet NGVD. The Appellant indicated that they believe this difference in elevation minimizes the hydrologic connection of the on-site wetlands to the swale and the potential for a significant nexus to the downstream TNW.

In *Rapanos v. United States*, 547 U.S. 715 (2006), the United States Supreme Court addressed the question of the circumstances under which a wetland or tributary is a "water of the United States" within the meaning of the CWA. The *Rapanos* decision included five opinions, with no single opinion commanding as majority of the court. The U.S. Army Corps of Engineers and Environmental Protection Agency issued guidance in response to the *Rapanos* decision. The December 2, 2008, "Clean Water Act Jurisdiction Following the Supreme Court Decision in *Rapanos v. United States* and *Carabell v. United States*" ("Revised Guidance") provides that "[w]here there is no majority opinion ..., controlling legal principles may be derived from those principles espoused by five or more justices." As a result, "regulatory jurisdiction under the CWA exists over a water body if either the plurality's or Justice Kennedy's standard is satisfied." Revised Guidance, p. 3. This is sometimes referred to as the "two test" approach. The

plurality's test (Plurality Test) extends the Corps regulatory authority "only to 'relatively permanent, standing or continuously flowing bodies of water' [referred to as "RPWs"] connected to traditional navigable waters [TNWs], and to 'wetlands with a continuous surface connection to' such relatively permanent waters." Justice Kennedy's test (Kennedy Test) concluded that wetlands are waters of the United States "if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity" of traditional navigable waters [TNWs]." Revised Guidance, pp. 1 – 3.

However, the Plurality Test may no longer be used to establish jurisdiction in the states of the 11th Circuit, including Florida. The 2007 decision of the 11th Circuit Court of Appeals in *United States v. Robison*, 505 F.3d 1208 (11th Cir. 2007), cert. denied sub nom, *United States v. McWane, Inc.*, 129 S.Ct. 627 (Dec. 1, 2008) disagreed with this "two-test approach" where jurisdiction may be found under the CWA if either the Plurality or Kennedy Tests is satisfied. Instead, the 11th Circuit held that it was Justice Kennedy's 'significant nexus' test which provides the "governing rule of *Rapanos*" and "governing definition of 'navigable waters' under *Rapanos*." The *Robison/McWane* Court further noted Justice Kennedy's determination that "a 'mere hydrologic connection' between a wetland and a navigable-in-fact body of water would not necessarily be sufficiently substantial to meet his "significant nexus" test." Under the rule of the *Robison/McWane* decision, the Plurality Test may no longer be used to establish jurisdiction in the states of the 11th Circuit. The Revised Guidance, p. 3, n. 16, recognizes that "the Kennedy standard is the sole method of determining CWA jurisdiction in [the Eleventh] Circuit."

The Revised Guidance states that, in considering how to apply the significant nexus standard, the agencies have focused on the integral relationship between the ecological characteristics of tributaries and those of their adjacent wetlands, which determines in part their contribution to restoring and maintaining the chemical, physical and biological integrity of the Nation's traditional navigable waters. The ecological relationship between tributaries and their adjacent wetlands is well documented in the scientific literature and reflects their physical proximity as well as shared hydrological and biological characteristics. The flow parameters and ecological functions that Justice Kennedy describes as most relevant to an evaluation of significant nexus result from the ecological inter-relationship between tributaries and their adjacent wetlands. For example, the duration, frequency, and volume of flow in a tributary, and subsequently the flow in downstream navigable waters, is directly affected by the presence of adjacent wetlands that hold floodwaters, intercept sheet flow from uplands, and then release waters to tributaries in a more even and constant manner. Wetlands may also help to maintain more consistent water temperature in tributaries, which is important for some aquatic species. Adjacent wetlands trap and hold pollutants that may otherwise reach tributaries (and downstream navigable waters) including sediments, chemicals, and other pollutants.

In Section III.B.2.b of the data sheet supporting its September 30, 2008 jurisdictional determination, the District indicated that the general flow relationship with the non-TNW is perennial flow, with overland sheet flow and subsurface flow. The block at Section III.D.5 is checked and indicates that wetlands on-site do not directly abut an RPW, but when considered in combination with the tributary to which they are adjacent and with similarly situated adjacent wetlands, have a significant nexus with a TNW are jurisdictional. It is indicated that data

supporting this conclusion is provided at Section III.C. Section III C indicates that considerations when evaluating a significant nexus include, but are not limited to the volume, duration and frequency of the flow of water in the tributary and its proximity to a TNW, and the functions performed by the tributary and all its adjacent wetlands. In Section III.C.3, the District's significant nexus analysis is limited to a description that indicates wetlands onsite sheet flow and shallow sub-surface flow to the roadside swale along Colonial, which is a conveyance to the 10 Mile Canal, which is an RPW. The administrative record, however, does not contain sufficient information to document either the perennial flow or the series of connections indicated by District, in its data sheet, to support the determination that there is a significant nexus with the nearest downstream TNW. Additionally, the District indicated, in response to questions at the appeal conference, that they were unaware of the elevation difference between the wetlands on the property and the swale along colonial road.

Therefore, prior to making its final decision, the District must further evaluate its conclusions that there is perennial flow and a hydrologic connection to the nearest downstream TNW. In doing so, the District should consider elevation data provided by the Appellant. The District must then complete an analysis of whether wetlands on the property have a significant nexus with the nearest downstream TNW. As stated in the *Rapanos* Jurisdictional Determination Form Instructional Guidebook ("JD Guidebook"):

Field staff will provide an explanation that demonstrates whether or not the aquatic resource has more than an insubstantial or speculative effect on the chemical, physical, or biological integrity of the TNW. The specific connections between the characteristics documented and the functions/services they play in affecting the TNW will be demonstrated. Specifically, an evaluation will be made of the frequency, volume, and duration of flow; proximity to the 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. [JD Guidebook, pp. 55-56]

Other relevant factors include an evaluation of the wetlands' capacity to hold floodwaters, intercept sheet flow from uplands, maintain more consistent water temperature in tributaries, and trap and hold chemical and biological pollutants that may otherwise reach tributaries (and downstream navigable waters).

REASON 2: The topographic information for the roadside swale, (i.e., the significant nexus) located west of the project (between the project and the RPW), indicates a minimal decrease in elevation and frequent increased elevations which inhibit the volume, frequency, and duration of surface flow to the RPW.

FINDING: This reason for appeal has merit.

ACTION: The District must further evaluate its conclusions that there is perennial flow and a hydrologic connection to the nearest downstream TNW. In doing so, the District should consider

elevation data provided by the Appellant. The District must then complete an analysis of whether wetlands on the property have a significant nexus with the nearest downstream TNW.

DISCUSSION: The Appellant indicated, in response to appeal questions, that the elevation of the roadside swale fluctuates as it approaches the RPW. Topographic data shows the central elevation of the swale at the project's southwest property boundary is 17.25 NGVD while at similarly situated topographic point located approximately 1000 feet west of the project is recorded at 17.22 feet NGVD. The Appellant indicated that it was their opinion that this elevation is representative of the length of the roadside swale and that the elevation precludes a substantial flow of surface water and potential flow of pollutants to a TNW. The Appellant indicated that they did not believe the District evaluated the aquatic functions of the swale itself during the review. The Appellant further indicated that they believe the flow characteristics of the swale suggest the projects potential effects to the TNW are insubstantial.

As indicated above, the revised December 2, 2008 guidance states that, in considering how to apply the significant nexus standard, the agencies have focused on the integral relationship between the ecological characteristics of tributaries and those of their adjacent wetlands, which determines in part their contribution to restoring and maintaining the chemical, physical and biological integrity of the Nation's traditional navigable waters. The flow parameters and ecological functions that Justice Kennedy describes as most relevant to an evaluation of significant nexus result from the ecological inter-relationship between tributaries and their adjacent wetlands. See the discussion regarding the JD Guidebook and significant nexus findings under Reason 1, above.

The District indicated, in response to appeal questions, that they did not have the elevation data for the swale along Colonial Boulevard. As indicated above, the District's data sheet does not adequately support that the wetlands on the property have a significant nexus to the nearest downstream TNW.

Therefore, as required in response to reason 1 above, the District must, prior to making its final decision, further evaluate its conclusions that there is perennial flow and a hydrologic connection to the nearest downstream TNW. In doing so, the District should consider elevation data provided by the Appellant. The District, as required above, must then complete an analysis of whether wetlands on the property have a significant nexus with the nearest downstream TNW.

REASON 3: The project will be constructed per the rules and regulations set forth by the South Florida Water Management District. The potential for the flow of pollutants from the on-site wetlands to the RPW as referenced by the Corps is speculative. Furthermore, the potential biological, chemical, or physical effects of the wetland on the RPW should be considered insubstantial.

FINDING: This reason for appeal has merit.

ACTION: As required in response to the above reasons, the District must complete an analysis of whether wetlands on the property have a significant nexus with the nearest downstream TNW.

DISCUSSION: In response to questions at the appeal conference, the appellant indicated that they believed that the flow characteristics of the wetlands and the nexus itself would have less than a significant and substantial effect on the chemical, physical, and biological characteristics of the TNW located approximately 10 miles to the south of the project site. The Appellant further indicated that they believed that the District did not evaluate all of the factors required in its significant nexus evaluation; specifically, the potential flow characteristics (i.e., volume, duration, and frequency) of the tributary itself, the proximity of the project and roadside swale to the TNW, and the small size of the on-site wetlands. The Appellant asserted that the roadside swale is in excess of two miles in length before it connects to an RPW, does not exhibit substantial signs of surface water volume, duration or frequency, includes multiple culverts and control structures, connects directly to a filter marsh associated with the 10 Mile Canal prior to connecting to the RPW. The Appellant believes that the District's decision was not based on substantial evidence. The appellant's opinion is that based on the above considerations, the effects of the project on the TNW are insubstantial.

As indicated in the above discussions, the District did not adequately evaluate whether there is a significant nexus between wetlands on the property and the nearest downstream TNW. Section III.C (Significant Nexus Determination), part 5, of the District's Approved Jurisdictional Determination Form indicates only, by the checking of the block at that part, that the site contains wetlands that do not directly abut an RPW, but when considered in combination with the tributary to which they are adjacent and with similarly situated adjacent wetlands, have a significant nexus with a TNW. The District did not include data or analysis to support this conclusion. The record must demonstrate "the specific connections between the characteristics documented and the functions/services they play in affecting the TNW." A significant nexus evaluation that meets the requirements of the revised December 2, 2008 guidance as required to respond to the above reasons for appeal would resolve this reason for appeal, as well. In its final decision, the District must also consider whether the capacity of the wetlands on the property to hold floodwaters, intercept sheet flow from uplands, or trap and hold pollutants, that may otherwise reach tributaries (and downstream navigable waters) that the wetlands on the property would contribute to a conclusion that there is a significant nexus with a downstream TNW.

REASON 4: It is unclear where the roadside swale discharges into the RPW. A direct connection could not be found.

FINDING: This reason for appeal has merit.

ACTION: The District must, prior to making its final decision, further document the existence of the hydrologic connections that form the basis of its significant nexus determination.

DISCUSSION: In response to questions asked at the appeal conference, the appellant indicated that it was their opinion that the District's assertion of a hydrologic connection of the project wetlands via a "significant nexus" to a TNW is inconclusive and speculative.

In Section III.C.3, the District's significant nexus analysis is limited to a description that indicates wetlands onsite sheet flow and shallow sub-surface flow to the roadside swale along

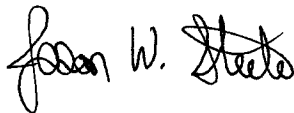
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Colonial, which is a conveyance to the 10 Mile Canal, which is an RPW. The administrative record does not contain documentation that the District verified the existence of these connections, nor was the District able to clearly point to these connections on the day of the appeal conference and site visit. The District must, therefore, further evaluate and document whether these various hydrologic connections are present and, if present, the locations of each connection. The District must also consider whether the capacity of the wetlands on the property to hold floodwaters, intercept sheet flow from uplands, or trap and hold pollutants, that may otherwise reach tributaries (and downstream navigable waters) that the wetlands on the property would contribute to a conclusion that there is a significant nexus with a downstream TNW.

Information received and its disposition during the appeal review:

The administrative appeal was evaluated based on the District's administrative record, the Appellant's Request for Appeal, and responses from the Appellant and the District to questions provided with the agenda and discussed at the appeal conference. Elevation data provided by the Appellant, while new, served to clarify the Appellant's points concerning the hydrologic connectivity that was the basis of the District's assertion that there is a significant nexus between wetlands on the property and the nearest downstream TNW.

CONCLUSION: For the reasons stated above, I find that the appellant's request for appeal has merit. The approved JD is remanded to the District to include sufficient documentation in the administrative record to support its JD and reconsider its JD as appropriate.



Jason W. Steele
Administrative Appeals Review Officer
South Atlantic Division