

ADMINISTRATIVE APPEAL DECISION

KERRY WILLIS

FILE NO. SAW-2004-1002

WILMINGTON DISTRICT

12 August 2009

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

Appellant: Dr. Kerry Willis

Date of Receipt of Request for Appeal: 06 May 2009

Date of Acceptance of Request for Appeal: 01 June 2009

Appeal Conference/Site Visit Date: 18 June 2009

Authority: Title 33, Code of Federal Regulations, Part 331

ACCEPTED REASONS FOR APPEAL: SAD accepted the following reasons for appeal, as detailed by the Appellant, in the Request for Appeal dated 06 May 2009:

1. Both prongs of the Recapture provision are not met by the US Army Corps of Engineers (USACE) in this matter;
2. Wetlands on this tract are not directly abutting Relatively Permanent Waters (RPWs) that flow directly into Traditional Navigable Waters (TNWs). Aerial maps in the file demonstrate large areas of uplands that sever any hydrologic connection to TNWs adjacency criteria are not met;
3. The TNW is not identified in its section of the Jurisdictional (JD) Form;
4. The RPW involved does not have a continual year round flow or significant seasonal flow independent of rain events. There is no water source that originates on the property except ones fed by rain. There are no springs or streams and the swamps involved only overflow or have sheet-flow with rain events. A significant nexus is not claimed or demonstrated and should have been required to claim USACE jurisdiction over these isolated wetlands;
5. Monitoring data demonstrate no conversion activity by the ditch which brings it under the minor drainage exemption;
6. Site elevation data demonstrates that the areas of the ditch in wetlands are relatively flat and lack a significant gradient for flow. Flow occurs on the ditch as a result of rainfall events;

7. Rapanos criteria for jurisdiction not met.

SUMMARY OF DECISION: There is substantial evidence in the administrative record to support the District's jurisdictional determination, with the exception of Appeal Reasons 2 and 4. The administrative record does not adequately support the determination that the on-site wetlands directly abut an RPW that is perennial. The administrative record also does not adequately support the conclusion that the onsite RPW directly or indirectly flows into a TNW. Since the record does not adequately support the conclusion that the RPW is perennial, it could not be determined whether the record must include, as a matter of policy for non-perennial flows, any available information that documents the existence of a significant nexus between the RPW (and its adjacent wetlands, if any) and the TNW. This policy requirement concerning the inclusion of any available information that is relevant to a significant nexus determination is not the same as the requirement to conduct a fact-specific analysis to make a significant nexus determination – which must be conducted when the non-navigable tributary is not relatively permanent.

BACKGROUND INFORMATION: Dr. Kerry Willis is appealing the Wilmington District's decision to take jurisdiction over wetlands on property located along Whitetail Road, off Chatham Street, Latitude 34.7967° North, Longitude 76.9236° West, Newport, Carteret County, North Carolina.

This is the third appeal from Dr. Willis on this property. The first was an appeal of an approved Jurisdictional Determination (JD) received 17 April 2006. This appeal was found to have no merit, via letter dated 11 September 2006. The second was an appeal of a permit denial, received 05 January 2009. This appeal was found to not meet the criteria for appeal, via letter dated 29 January 2009.

On 23 February 2009 Dr. Willis requested a re-evaluation of the previous JD, based on the new Rapanos opinion by the Supreme Court. On 06 March 2009, the District issued a JD form stating that the onsite wetlands were directly abutting RPWs that flow directly or indirectly into TNWs and therefore the onsite wetlands are subject to Corps jurisdiction, under Section 404 of the Clean Water Act (33 USC 1344). It should be noted that the date on the Approved Jurisdictional Form (JD Form) is 03 July 2007. The District completed another JD Form post-Rapanos, but did not supply this new form to the appellant until the appellant requested it on 23 February 2009.

On 06 May 2009, the appellant submitted a request for appeal which was accepted by the South Atlantic Division on 01 June 2009.

On 18 June 2009, the Review Officer, appellant, and District staff conducted an on-site visit and appeal conference.

The activity from which the series of appeals stem was the appellant's excavation (i.e., construction) of a ditch and side casting in wetlands, which was discovered on 5 May 2004 during an on-site investigation for a proposed mitigation area. The initial options to address the

activity were restoration, to apply for an after-the-fact (ATF) permit, or to refer the case to the US Environmental Protection Agency for enforcement action. Detailed background information is provided in the 6 September 2009 appeal decision.

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 his written appeal, the appellant did not provide, nor was requested to provide, any additional information that was not in the administrative record. During the 18 June 2009 on-site visit and appeal conference, however, the appellant referenced Regulatory Guidance Letter (RGL) No. 07-02 as support for his appeal.

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

Appeal Reason 1: Both prongs of the Recapture provision are not met by the USACE in this matter.

Finding: This reason for appeal does not meet the criteria for appeal.

Discussion: This issue was addressed in the first appeal and was found not to have merit. No information was provided with this appeal to support a change to the previous determination that the minor drainage exemption does not apply and the ditch has the effect of lowering the water table and draining the land, thus converting the abutting wetlands to non-wetlands. Therefore, Appeal Reason 3 of the 6 September 2006 appeal decision stands. 33 CFR Section 331.5(b)(3) states, "A final Corps decision that has resulted from additional analysis and evaluation, as directed by a final appeal decision" is not an appealable action. However, the following information is added because appellant referenced RGL No. 07-02 during the 18 June 2009 appeal conference.

RGL No. 07-02, "Exemptions for Construction or Maintenance of Irrigation Ditches and Maintenance of Drainage Ditches under Section 404 of Clean Water Act," is not applicable to this appeal because the activity at issue is the construction of a drainage ditch. Consequently, the exemption for maintenance of a drainage ditch does not apply, and the discussion in the RGL regarding the "recapture provision" is not applicable.

Action: None required.

Appeal Reason 2: Wetlands on this tract are not directly abutting Relatively Permanent Waters (RPWs) that flow directly into Traditional Navigable Waters (TNWs). Aerial maps in the file demonstrate large areas of uplands that sever any hydrologic connection to TNWs adjacency criteria are not met.

Finding: This reason for appeal has merit.

Discussion: The information in the administrative record does not adequately support the conclusion that the wetlands directly abut a non-navigable tributary that is relatively permanent and typically flows year-round. Without the addition of flow characteristics to the JD Form, information addressing the lack of standing water in the photographs 3-21, the indication that flowing water was observed, and any other relevant information, it is not clear that the relatively permanent tributary typically flows year-round.

Based on the 2 December 2008 Clean Water Act (CWA) Jurisdiction post-Rapanos guidance [hereinafter 2 Dec 2008, Rapanos Memo], if the tributary flows year-round, USACE will assert jurisdiction. If it is determined to be a relatively permanent tributary that is not perennial, the penultimate paragraph in the guidance document instructs that the record will include any available information that documents the existence of a significant nexus between a relatively permanent tributary that is not perennial (and its adjacent wetlands if any) and a TNW, even though a significant nexus finding is not required as a matter of law. If the non-navigable tributary is not relatively permanent, a fact-specific analysis is required to determine whether it has a significant nexus with the TNW.

In addition to the administrative record not sufficiently supporting the conclusion that flow is perennial vice seasonal, the record also does not adequately trace the connections between the waters (i.e., wetlands to non-navigable tributary to TNW). The basis for both of these determinations is provided in more detail below.

The information on the 3 July 2007 Approved Jurisdictional Form (JD Form) only evaluated the excavated ditch, the wetlands “abutting” that ditch and the connection of the ditch to the TNW. It did not incorporate the entire property. Therefore, my analysis is limited to the excavated (constructed) ditch, the wetlands “abutting” this ditch, and the connection of the ditch to the TNW.

Section III D. 4. of the 3 July 2007 Approved JD Form is titled “Wetlands directly abutting an RPW that flow directly or indirectly into TNWs”. This section asks for data and rationale indicating that the tributary is perennial as well as rationale indicating that the wetland is directly abutting an RPW. The District’s data and rationale are as follows:

The wetlands within the review area is part of a headwater wetland complex that continues and is abutting, or flows into, an intermittent section of the RPW. This section gradually transitions into the perennial stream. There is a continuation of the wetland system up to the point where the perennial RPW has been channelized/excavated, and the adjacent floodplain has been cleared and converted to farmland and a residential yard. There are scattered remnants, or newly formed areas, of wetland benchmarks along the incised channelized RPW, but they are infrequent and continue to change due to ongoing modifications of the stream.

This description is not sufficiently clear since it may be describing two separate wetland areas (i.e. one that flows into the intermittent section and one that abuts the perennial RPW that has been channelized/ excavated).

Also in the data and rationale, the District used the phrase “intermittent section of the RPW” and states that this intermittent section “gradually transitions into the perennial stream.” If the water flow is “intermittent,” the Corps’ jurisdiction would be dependent on a fact-specific analysis to determine whether it has a significant nexus with the TNW. More specifically, the 5 June 2007 “U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook (Guidebook) defines RPWs as perennial (tributaries that typically flow year-round) or as seasonal (has continuous flow at least 3 months of the year). The Guidebook defines intermittent as tributaries that do not typically flow year-round or have continuous flow at least seasonally.

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.
- If flow between the RPW and TNW is perennial, then:
 - Section III.D.2. of the form needs to demonstrate that flow is typically year-round.
 - Demonstrate wetland is directly abutting an RPW. Note that a continuous surface connection does not require surface water to be continuously present between the wetland and the tributary.

The District’s use of the term “intermittent” raises confusion about whether the onsite wetlands directly abut an RPW. Additional documentation is necessary to resolve this ambiguity.

Action: The Approved JD Form should be revised to support the conclusion regarding the flow (i.e., perennial, seasonal, or intermittent) of the tributaries and a connection of the tributaries to a TNW should be clearly established. The conclusions should be supported with sufficient information provided either in Section III.B.1 of the form (e.g., flow/gage data, rainfall data, anecdotal information) or in Section III. D. 4. under the rationale. Although not required, it would be helpful to complete all of Section III. B. 1.(i) and (ii).

Clearly explain whether there are two separate wetland areas being referenced in Section III. D. 4 and make an adjacency determination (i.e. abutting, adjacent).

Appeal Reason 3: The TNW is not identified in its section of the Jurisdictional Form.

Finding: This reason for appeal does not have merit.

Discussion: The TNW is identified as Newport River on the JD Form, dated 3 July 2007, in Section I. C., under “Name of nearest Traditional Navigable Water (TNW) into which the aquatic resource flows.” This fact was explained to the Appellant’s satisfaction during the 18 June 2009 appeal conference.

Action: None required.

Appeal Reason 4: The RPW involved does not have a continual year-round flow or significant seasonal flow independent of rain events. There is no water source that originates on the property except ones fed by rain. There are no springs or streams and the swamps involved only overflow or have sheet-flow with rain events. A significant nexus is not claimed or demonstrated and should have been required to claim USACE jurisdiction over these isolated wetlands.

Finding: This reason for appeal has merit.

Discussion: As stated in the discussion for Appeal Reason 2, the administrative record does not contain sufficient information to make a determination that the on-site RPWs are perennial and flow directly or indirectly into a TNW, the Newport River.

Section III D. 2. of the 3 July 2007 Approved JD Form is titled “RPWs that flow directly or indirectly into TNWs”. This section asks for data and rationale indicating that the tributary is perennial. The District’s data and rationale are as follows:

There appears to be (2) drainage ways, or RPWs, in which the subject review wetland system flows into. The first drainway, or RPW #1, is located further east of the two RPWs, and was field verified from the review area wetland (unauthorized ditch) to its origin. Within this RPW, evidence of perennial status is the following: there is the presence of an OHW line, interception of the ground water table, presence of wrack lines and debris, located within a valley landscape, and has a drainage area of over 100 acres in size. The wetlands within the review area continue along the intermittent section of this first drainway and its transition into the perennial section, RPW #1. The wetlands discontinue where the perennial RPW #1 has been channelized/ excavated and the adjacent floodplain has been cleared and converted to farmland and a residential yard. There are scattered remnants, and newly formed areas, of wetland benchmarks along the incised channelized RPW #1, but they are infrequent and continue to change due to ongoing modifications of the stream. For RPW #2, portions of the review area wetlands connect to a zero order riparian headwater wetland that was field verified for over 100 yards. This zero order wetland is located within a valley landscape and exhibits an unconfined channel. Debris, wrack lines, and exposed roots were present within the unconfined channel. Aerial photos, floodplain maps, and soil survey were used to make the connection of the riparian wetlands to a listed stream (FEMA) or RPW #2, which flows into Deep Creek/Canal.

This section then asks for the estimates for jurisdictional waters in the review area. No estimates were provided.

The Guidebook provides some instructions regarding flow information. On page 52 of the Guidebook, Part IV. Section III. B. (“Characteristics of tributary reach (that is not a TNW) and its adjacent wetlands (if any)”) gives the following instructions:

If the RPW has perennial flow, complete only Section III.D.2 because a significant nexus finding is not required as a matter of law or policy. If the aquatic resource is a wetland directly abutting an RPW with perennial flow, complete Sections III.D.2 and III.D.4 because, as above, a significant nexus finding is not required as a matter of law or policy.

On page 56 of the Guidebook: Part IV, Section III, D, 2. states for “RPWs that flow directly or indirectly into TNWs,” “This class of water bodies is jurisdictional under the CWA.”

Documentation to support determination:

- If flow is typically year-round, flow determinations should be supported by characteristics in Section III.B.1 of the form such as flow/gage data, rainfall data, and anecdotal information.

- Applying the flowchart on pages 8-9 of the Guidebook (figures 1a and 1b) to determine administrative record requirements in relation to this jurisdictional determination, I find the following:
 - 1) Start Point
 - 2) Is the aquatic resource a non-wetland water body with no adjacent wetlands? District Answer (according to the JD Form): No.
 - 3) See Figure 1b: Combined Non-Wetland Waters & Adjacent Wetlands Analysis
 - 4) Aquatic resource area includes non-wetland water body with adjacent wetlands? District Answer (according to the JD Form): Yes
 - 5) Is wetland adjacent to a TNW? District Answer (according to the JD Form): No
 - 6) Is wetland directly abutting an RPW? District Answer (according to the JD Form): Yes
 - 7) Is flow of the RPW perennial? There was no documentation in the administrative record to allow a conclusive answer to this question. Depending on this answer, the flow-chart goes on to state, If Yes, the District must document site conditions to support flow determination. (If the answer is no, as explained in preceding discussions, the District must document site conditions to support flow determination and ensure compliance with policy regarding the inclusion of available information relevant to a significant nexus determination.)

Based on the application of the flowchart, the JD Form does not adequately document site conditions to support the District’s perennial flow determination.

As addressed in the discussion for Appeal Reason 2, the District used the term “intermittent” as follows: “The wetlands within the review area continue along the intermittent section of this

first drainway and its transition into the perennial section, RPW #1.” The use of this term makes the administrative record unclear since there are differences between perennial, seasonal, and intermittent flows and their corresponding documentation requirements, as was discussed for Appeal Reason 2.

The District’s use of the phrase “appears to be” also creates the possibility of different meanings. Specifically, the District stated, “There appears to be (2) drainage ways, or RPWs, in which the subject review wetland system flows into.” It could not be determined whether the District meant that there appeared to be two drainage ways/RPWs, or the subject review wetland system appeared to flow into the two drainage ways/RPWs. Either way, the use of this phrase is not definitive and makes the meaning ambiguous.

Action: The Approved JD Form should be revised to support the conclusion regarding the flow (i.e., perennial, seasonal, or intermittent) of the tributaries. Also, a connection of the tributaries to a TNW should be clearly established. The conclusions should be supported with sufficient information provided either in Section III.B.1 of the form (e.g., flow/gage data, rainfall data, anecdotal information) or in Section III. D. 2. under the rationale. Although not required, it would be helpful to complete all of Section III. B. 1.(i) and (ii).

If an RPW is perennial for a portion of its length and has a differing flow regime (e.g., non-permanent such as intermittent), then a determination must be made regarding the flow regime that best characterizes the entire tributary (see 2 Dec 2008, Rapanos Memo, note 24).

Under Section III. D. 2. of the Approved JD Form, the estimates for jurisdictional waters in the review area should be completed.

The conclusion that the flow is “intermittent” requires a significant nexus determination. Therefore, the District should re-evaluate the accuracy of this conclusion. If it is correct, a significant nexus determination is required.

The use of the phrase “appears to be” is not definitive. Therefore, the District should perform a more definitive analysis.

Appeal Reason 5: Monitoring data demonstrate no conversion activity by the ditch which brings it under the minor drainage exemption.

Finding: This reason for appeal does not meet the criteria for appeal.

Discussion: This reason for appeal is closely linked to the reason in Appeal Reason 1. As stated for Appeal Reason 1, the applicability of the minor drainage exemption was addressed in the first appeal and was found not to have merit. No information was provided with this appeal to support a change to the previous determination that the minor drainage exemption does not apply and the ditch has the affect of lowering the water table and draining the land, thus converting the abutting wetlands to non-wetlands. Therefore, Appeal Reason 3 of the 6 September 2006 appeal decision stands. 33 CFR Section 331.5(b)(3) states, “A final Corps decision that has resulted

from additional analysis and evaluation, as directed by a final appeal decision” is not an appealable action. However, the following information is added because appellant referenced RGL No. 07-02 during the 18 June 2009 appeal conference.

RGL No. 07-02 is not applicable to this appeal because the activity at issue is the construction of a drainage ditch. Consequently, the exemption for maintenance of a drainage ditch does not apply.

Action: None required.

Appeal Reason 6: Site elevation data demonstrates that the areas of the ditch in wetlands are relatively flat and lack a significant gradient for flow. Flow occurs on the ditch as a result of rainfall events.

Finding: This reason for appeal does not have merit.

Discussion: “Ephemeral” refers to “Water that flows typically during and after storm events.” (Refer to pages 23-25 of the Guidebook.)

On Page 16, of the Guidebook: In accordance with the *Rapanos* Guidance:

Certain geographic features generally are not jurisdictional waters:

- swales, erosional features (e.g. gullies) and small washes characterized by low volume, infrequent, and 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, and
- uplands transporting over land flow generated from precipitation (i.e., rain events and snowmelt).

The District will re-evaluate the flow determination, as instructed under Appeal Reason 4 above. However, the JD supports the conclusion that, at a minimum, the flow is intermittent. Therefore, the flow is not ephemeral.

Action: None required.

Appeal Reason 7: Rapanos criteria for jurisdiction not met.

Finding: This reason for appeal does not have merit.

Discussion: Whether or not a significant nexus determination is required will be established through the District’s actions to provide adequate support for its conclusion regarding the non-navigable tributary that is relatively permanent (that is, whether it is perennial, seasonal, or intermittent) and to establish the connections between the waters (i.e., wetlands to non-navigable tributary to TNW) (see sections for Appeal Reasons 2 and 4, above).

As stated in the 2 Dec 2008, Rapanos Memo, the situations that require a significant nexus determination are summarized as follows:

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 agencies will apply the significant nexus standard as follows:

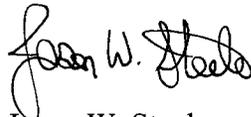
- A significant nexus analysis will assess the flow characteristics and functions of the tributary itself and the functions performed by all wetlands adjacent to the tributary to determine if they significantly affect the chemical, physical and biological integrity of downstream traditional navigable waters.
- Significant nexus includes consideration of hydrologic and ecologic factors.

Action: None required if the tributaries are found to be “perennial” and the connection of the perennial tributaries to a TNW is established. If the tributaries are found to be “seasonal”, the JD Form will need to be updated in the appropriate sections. If the tributaries are found to be “intermittent”, the JD Form will need to be updated in the appropriate sections.

OVERALL CONCLUSION: As my final decision on the merits of the appeal, I conclude there is substantial evidence in the administrative record to support the Wilmington District’s jurisdictional determination, with the exception of Appeal Reasons 2 and 4. Other than Appeal Reasons 2 and 4, the administrative record and information obtained at the site visit do not support the Appellant’s reasons 1, 3, 5, 6, and 7. The District’s determination was not otherwise arbitrary, capricious or an abuse of discretion, and was not plainly contrary to applicable law or policy. The approved jurisdictional determination is remanded back to the District for reconsideration in light of this decision. If the District concludes that the tributary/s in question are best characterized by seasonal flow, then as a matter of policy on remand, it is reminded to ensure that any information it has relevant to a significant nexus determination is included in the record. The District should complete these tasks within 60 days from the date of this decision

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and upon completion, provide the South Atlantic Division Administrative Appeals Review Officer and Appellant with its decision document and final JD.

A handwritten signature in black ink, appearing to read "Jason W. Steele". The signature is written in a cursive, somewhat stylized font.

Jason W. Steele
Administrative Appeals Review Officer
South Atlantic Division