

ADMINISTRATIVE APPEAL DECISION

MONTE PALATINO

FILE NO. SAJ-2010-2119

JACKSONVILLE DISTRICT

2 AUGUST 2012

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

Receipt of Request for Appeal: 14 September 2011

Acceptance of Request for Appeal: 20 September 2011

Appeal Conference: 16 December 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 wetlands and streams have a significant nexus to the nearest downstream Traditional Navigable Water (TNW), as required by the *U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook* (6/1/2007) ("JD Guidebook").

BACKGROUND

The Monte Palatino property (Property) is approximately 89.3-acres, located north of road PR-834, Mamey Ward, Municipality of Guaynabo, Puerto Rico.

For purposes of evaluation during the CWA jurisdictional determination, the Appellant's consultant evaluated the site using the 1987 Wetland Delineation Manual (87 Manual), Caribbean Regional Supplement, Code of Federal Regulations (CFR) definitions of jurisdictional waters, and supporting guidance documents. On June 21, 2010, the Appellant's consultant submitted a request for a jurisdictional determination and verification of the delineation map for the Property. The District's review included a site visit on February 10, 2011.

On August 9, 2011, the District issued an approved jurisdictional determination (AJD) for the Property. The District concluded that the site contained two streams (stream 1 and stream 5) and 3 wetland/stream areas (wetlands 2, 3, and 4), all waters of the United

States, subject to regulation by the Corps. The Appellant submitted a Request for Appeal (RFA) on September 8, 2011. The Appellant disagreed with the District's determination that wetlands 2, 3, and 4 are waters subject to Corps' jurisdiction and appealed that determination, citing the reasons for appeal addressed in this appeal decision.

INFORMATION RECEIVED DURING THE APPEAL AND ITS DISPOSITION

The administrative appeal was evaluated based on the District's administrative record, the Appellant's Request for Appeal, and discussions at the appeal meeting with the Appellant and District.

APPELLANT'S STATED REASONS FOR APPEAL

Appeal Reason 1: The jurisdictional determination by the Antilles Regulatory Section on August 9, 2011, for the areas identified as wetlands 2, 3, 4, on the Monte Palatino property is based on an incorrect application of the current regulatory criteria and associated guidance to establish areas under USACE jurisdiction.

Appeal Reason 2: Wetlands 2, 3, and 4, on the Monte Palatino property are not abutting an RPW. They are non-RPWs with its associated abutting wetlands caused by clogged culverts under the State Road PR-834.

Appeal Reason 3: The administrative record, supporting data, and rationale do not fulfill the regulatory criteria to establish that the areas identified as wetlands 2, 3, 4, on the Monte Palatino property are wetlands directly abutting an RPW that flows directly or indirectly into TNWs and, thus, are under agency jurisdiction.

EVALUATION OF THE REASONS FOR APPEAL, FINDINGS, DISCUSSION, AND ACTIONS FOR THE JACKSONVILLE DISTRICT COMMANDER

Appeal Reasons 1, 2, & 3: Combined for similarity.

Finding: These reasons for appeal have merit.

Discussion: The District completed two AJD Forms, dated August 9, 2011; one for Streams 1 & 5, and one for Wetlands 2, 3 & 4.

As it relates to the AJD Form for Streams 1 & 5, the District indicated that the streams are "Relatively permanent waters (RPWs) that flow directly or indirectly into TNWs" (Section II.B.1.a.). The JD Guidebook, p.56-57, states, the documentation requirements to support this determination as:

- 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, anecdotal information, or

- If flow is continuous at least “seasonally” provide data supporting this conclusion in Section III.B.

As a matter of policy, field staff will include in the record any available information that documents the existence of a significant nexus between a RPW that is not perennial and a TNW.

The District did not complete Section III.B.1., as required by the JD Guidebook. In addition, if the stream/s are identified as “seasonal”, as a matter of policy the District should perform a significant nexus.

As it relates to the AJD Form for Wetlands 2, 3 & 4, the District indicated that the wetlands are “directly abutting RPWs that flow directly or indirectly into TNWs” (Section II.B.1.a.). The JD Guidebook, p.57, states, the documentation requirements to support this determination as:

- 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.

If flow between the RPW and TNW is at least seasonal, then:

- Section III.D.2 of the form needs to demonstrate that water flows from an RPW directly or indirectly into TNW.
- Section III.B.2 needs to document that the wetland is directly abutting an RPW.

As a matter of policy, field staff will include in the record any available information that documents the existence of a significant nexus between a wetland directly abutting an RPW that is not perennial and a TNW.

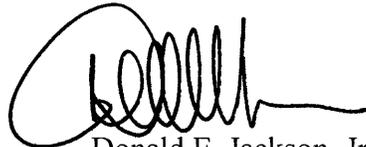
The District did not complete Section III.D.2. or Section III.B.2., (depending on perennial versus seasonal determination) as required by the JD Guidebook. In addition, if the stream/s are identified as “seasonal”, as a matter of policy the District should perform a significant nexus.

Actions:

1. For streams 1 & 5, complete Section III.B.1., as required by the JD Guidebook. If the stream/s are identified as “seasonal”, as a matter of policy the District should perform a significant nexus.
2. For wetlands 2, 3 & 4, complete Section III.D.2. or Section III.B.2., (depending on perennial versus seasonal determination) as required by the JD Guidebook. If the stream/s are identified as “seasonal”, as a matter of policy the District should perform a significant nexus.

CONCLUSION

For the reasons stated above, I have determined the appeal has merit. The AJD is remanded to the District for reconsideration and reevaluation based on comments detailed above. 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.



Donald E. Jackson, Jr.
Colonel, US Army
Commanding