

**ADMINISTRATIVE APPEAL DECISION**

**ALAN MONTANE - SELECT MOTOR CAR**

**FILE NO. SAJ-2012-03337**

**JACKSONVILLE DISTRICT**

**8 December 2014**

**Review Officer:** Jason Steele, U.S. Army Corps of Engineers, South Atlantic Division, Atlanta, Georgia

**Receipt of Request for Appeal:** 17 June 2013

**Acceptance of Request for Appeal:** 28 June 2013

**Appeal Meeting:** 22 August 2013

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

**SUMMARY OF DECISION**

Mr. Alan Montane (Appellant), owner of the Select Motor Car property (Property), is appealing a U.S. Army Corps of Engineers (Corps), Jacksonville District (District) approved jurisdictional determination (AJD) for a wetland on his property located in Gainesville, Alachua County, Florida. The Appellant asserts the District incorrectly applied current regulatory criteria and associated guidance for identifying and delineating wetlands as well as incorrectly applied law, regulation, guidance, and policy when it determined that Hogtown Creek was a traditionally navigable water (TNW); Springstead Creek was a relatively permanent water (RPW); the subject wetland was adjacent to Springstead Creek; and the subject wetland had a significant nexus with the nearest downstream TNW.

For reasons detailed in this document, it is found that the District's administrative record (AR) adequately supports its determination that the subject wetland is adjacent to Springstead Creek. However, the District's AR does not support its determination that Springstead Creek is a RPW, Hogtown Creek is a TNW, or that the subject wetland has a significant nexus to the nearest downstream TNW. Therefore, the Appellant's request for appeal (RFA) has merit and the AJD is remanded to the District for reconsideration.

**BACKGROUND**

The Property is approximately three acres and is located just north of 2715 N. Main Street and southeast of the intersection of N. Main Street and NE 28th Street, in Gainesville, Alachua County, Florida. On 19 December 2012, the Appellant's consultant submitted to the District a

request for an AJD for the Property. On 5 April 2013, the District completed an AJD Form and, on 9 April 2013, the District issued an AJD for the Property concluding that it contained a 1.41 acre wetland that is subject to the permit requirements of Section 404 of the CWA. The Appellant objected to the District's AJD and submitted an RFA to the District (via email) and the South Atlantic Division (Division) (via facsimile) on 7 June 2013. The Division accepted the RFA via letter to the Appellant dated 28 June 2013.<sup>1</sup>

### **INFORMATION RECEIVED DURING THE APPEAL AND ITS DISPOSITION**

The administrative appeal was evaluated based on the District's AR, received by the RO on 15 July 2013, the Appellant's RFA, discussions at the 22 August 2013 appeal meeting, and clarifications in response to RO questions. A summary of the appeal meeting topics were documented by the RO in a memorandum for record (MFR) that was provided to the Appellant and the District on 19 September 2013. Using the Appellant's RFA and the clarifying discussions at the appeal meeting, the Appellant's reasons for appeal are summarized as follows:

**Appeal Reason 1:** The District incorrectly determined Hogtown Creek to be a TNW.

**Appeal Reason 2:** The District incorrectly designated Springstead Creek as an RPW.

**Appeal Reason 3:** The District incorrectly concluded that the subject wetland is adjacent to Springstead Creek.

**Appeal Reason 4:** The District has not demonstrated a significant nexus between the subject wetland and the TNW.

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

**Appeal Reason 1:** The District incorrectly determined Hogtown Creek to be a TNW.

**Finding:** This reason for appeal has merit. The District did not document a sufficient basis to support that Hogtown Creek is a TNW.

**Discussion:** In his RFA, the Appellant asserts that the District incorrectly determined Hogtown Creek to be a TNW. The Appellant claims that Hogtown Creek does not cross state lines and was not used to transport mill products.

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<sup>1</sup> The Division did not receive the 7 June 2013 facsimile due to an error. However, because there is evidence that the Appellant's agent, George F. Young, Inc. attempted to submit the RFA to the Division on Day 60 (appeal deadline), the RO determined the RFA to be timely. The RFA was provided again to the Division on 17 June 2013 by the Appellant's agent, as soon as the lack of receipt was discovered.

Section III.A.1.<sup>2</sup> of the 30 May 2007 *U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook* ("JD Guidebook") sets forth the documentation requirements to support a District's TNW determination as follows:

- A District determination that the water body is a navigable water of the United States (U.S.) pursuant to 33 C.F.R. § 329.14;
- One or more decisions of the Federal courts determining that the water body is a navigable water of the U.S.;
- One or more decisions of the Federal courts determining that the water body is a navigable water of a particular state, although not a navigable water of the U.S. (e.g., Great Salt Lake, UT);
- The water body qualifies as a navigable water of the U.S. under any of the tests set forth in 33 C.F.R. Part 329 (e.g., the water body is (a) subject to the ebb and flow of the tide, and/or (b) the water body is presently used, or has been used in the past, or may be susceptible for use (with or without reasonable improvements) to transport interstate or foreign commerce); or
- The water body is Navigable-in-Fact (i.e., it is either currently used or susceptible to use in its existing condition for any commercial purpose involving navigation).

The District summarized its rationale supporting that Hogtown Creek is a TNW in Section III.A.1. of the AJD Form as follows:

- Hogtown Creek is an intrastate creek that has and can be used by interstate or foreign travelers for recreational purposes. Hogtown Creek is well known in the southeastern U.S. as having a high density of fossilized sharks teeth. Interstate and foreign fossil hunters have visited and will likely continue to visit Hogtown Creek;
- Hogtown Creek has been used in the past for interstate commerce. Hogtown Sawmill began operations in the 1850's and lumber produced by the mill was used locally and transported to Georgia; and
- Intrastate, interstate and foreign travelers have and will likely continue to tube, canoe and/or kayak large sections of Hogtown Creek.

Although the District described recreational activities (e.g., fossil hunting and tubing) as occurring within Hogtown Creek, the AR does not contain any documentation to support that Hogtown Creek is either currently used or susceptible to use in its existing condition for any commercial purpose involving navigation (i.e. Navigable-in-Fact). Specifically, the District did

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<sup>2</sup> JD Guidebook, pp. 51-52.

not provide documentation to support that Hogtown Creek is currently used or susceptible to use for a commercial purpose.

In addition, the District's rationale that Hogtown Creek was used in the past for interstate commerce (i.e., lumber produced by a Hogtown sawmill was transported to Georgia) is not supported by any documentation in the AR. To the contrary, during the appeal meeting, the District stated that Hogtown Creek was not used to transport lumber and mill products but, instead, was used as a source of power for the sawmill that produced products that were transported to Georgia starting in 1884.<sup>3</sup>

Finally, the District's rationale that intrastate, interstate and foreign travelers have and will likely continue to tube, canoe, and/or kayak large sections of Hogtown Creek is not supported by any documentation in the AR. Although the District stated, during the 19 September 2013 appeal meeting<sup>4</sup>, that personnel observed tubes and kayaks using Hogtown Creek, they did not support this observation via documentation within the AR (i.e., Hogtown Creek is currently used or susceptible for use in its existing condition for any commercial purpose involving navigation).

Accordingly, the District did not provide adequate information or documentation, in the AR, necessary to support that Hogtown Creek is a TNW.

**Action:** The District shall review applicable regulation, guidance, and policy, to identify and document (via the AJD Form) the nearest downstream TNW (Hogtown Creek or other) relative to the subject wetland.

**Appeal Reason 2:** The District incorrectly designated Springstead Creek as an RPW.

**Finding:** This reason for appeal has merit. The District did not adequately document that Springstead Creek is an RPW. The AR inadequately documents the flow characteristics (frequency, duration, and volume) within Springstead Creek to support an RPW designation.

**Discussion:** The Appellant asserts Springstead Creek is improperly designated as an RPW because the District did not provide evidence to support that the water body flows continuously for at least three months.

The JD Guidebook states that "...an RPW is defined as a tributary that is not a TNW and that typically flows year round or has continuous flow at least seasonally (e.g., typically 3 months)."<sup>5</sup> Examples of hydrologic information to consider when determining flow are as follows: gauge data, flood predictions, historic records of water flow, statistical data, and personal observations/records.<sup>6</sup> Examples of physical indicators of flow are the following: the presence and characteristics of a reliable ordinary high water mark (OHWM) with a channel

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<sup>3</sup> See the 19 September 2013 appeal meeting MFR.

<sup>4</sup> See the 19 September 2013 appeal meeting MFR.

<sup>5</sup> Footnote 6, p. 50.

<sup>6</sup> JD Guidebook, p. 55.

defined by bed and banks.<sup>7</sup> Other physical indicators of flow may include shelving, wracking, water staining, sediment sorting, and scour.<sup>8</sup> Consideration will be given to certain relevant contextual factors that directly influence the hydrology of tributaries, including the size of the tributary's watershed, average annual rainfall, average annual winter snow pack, slope, and channel dimensions. Data supporting the conclusion that flow is seasonal should be documented in Section III.B. of the AJD Form.<sup>9</sup>

In Section III.B.1.(ii)(c) of the AJD Form, the District classified the flow of Springstead Creek as seasonal, with 20 (or greater) flow events (frequency) per year. However, the District did not provide any supporting documentation or information as to how 20 (or greater) flow events were determined to occur each year. In addition, the District did not provide any information related to the duration or volume of flow.

Accordingly, the District did not adequately document the frequency, duration, and volume of flow within Springstead Creek to support its determination that the tributary is an RPW.

**Action:** The District shall review applicable regulation, guidance, and policy to adequately document (via the AJD Form) the flow characteristics (frequency, duration, and volume) of Springstead Creek. After the District has sufficiently documented the flow characteristics, it shall then determine the classification of Springstead Creek (i.e., non-RPW, RPW-seasonal, or RPW-perennial).

**Appeal Reason 3:** The District incorrectly concluded that the subject wetland is adjacent to Springstead Creek.

**Finding:** This reason for appeal does not have merit. It is found that the District adequately documented that the subject wetland is adjacent to Springstead Creek.

**Discussion:** In his RFA, the Appellant asserts that the subject wetland is not adjacent to Springstead Creek and disagrees with the District's description of a "grassy berm." Instead, the Appellant describes this berm as a concrete, metal, and wood structure that serves to restrict the flow into Springstead Creek by "virtually eliminate[ing] any flow from the south to the Creek, except during large storm events."

The term "adjacent" is defined at 33 C.F.R. § 328.3(c) to mean "bordering, contiguous, or neighboring." This section further states, "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.'" The regulatory definition of adjacency is further clarified in the guidance that the Corps and Environmental Protection Agency jointly issued in response to the U.S. Supreme Court consolidated cases of *Rapanos v. United States* and *Carabell v. United States*

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<sup>7</sup> JD Guidebook, p. 55.

<sup>8</sup> JD Guidebook, p. 55.

<sup>9</sup> JD Guidebook, p. 56.

(*Rapanos* Guidance).<sup>10</sup> This guidance document explains that wetlands are adjacent if one of the following three criteria is satisfied: (1) there is an unbroken surface or shallow subsurface connection to jurisdictional waters; (2) they are physically separated from jurisdictional waters by man-made dikes or barriers, natural river berms, beach dunes, and the like; or (3) their proximity to a jurisdictional water is reasonably close, supporting the science-based inference that such wetlands have an ecological interconnection with jurisdictional waters.<sup>11</sup>

The District determined that the subject wetland is “adjacent to but not directly abutting an RPW that flows directly or indirectly into a TNW”. The District determined there to be a “discrete wetland hydrologic connection” between the subject wetland and Springstead Creek. The District explained that “[f]low from the subject wetland discharges by culvert to wetlands on the abutting property. ... On the abutting property, water flows through a by-pass ditch over a grassy berm with a control elevation of 167.5 ft NGVD into a deep ditch via culvert. The deep ditch discharges into the canalized portion of Springstead Creek.”<sup>12</sup>

According to the AR, water flows over the grassy berm. The Appellant’s statement is that the berm affects the flow by restricting it rather than severing any connection. Also, the Appellant does not provide documentation to support that the District’s description of a “grassy berm” is incorrect. Even if the description should have been different, it is the effect of the berm on water flow from the wetland to the RPW rather than its composition that is relevant to the adjacency analysis. The effect of the berm is not described in the AR nor in Appellant’s RFA as severing the connection between the wetland and the RPW.

The District’s determination (i.e., there is a discrete wetland hydrologic connection) and explanation (i.e., water flows through a by-pass ditch over a grassy berm) are consistent with the first criteria of adjacency outlined above. Furthermore, the berm may serve to restrict water flow, based on Appellant’s statement, but neither the Appellant in his RFA nor the District in its AR, assert that the berm severs the connection. Accordingly, it is determined that the District adequately documented that the subject wetland is adjacent to Springstead Creek.

**Action:** None required.

**Appeal Reason 4:** The District has not demonstrated a significant nexus between the subject wetland and the TNW.

**Finding:** This reason for appeal has merit. The District did not adequately document that the subject wetland has a significant nexus to the nearest downstream TNW.

**Discussion:** The Appellant asserts that the District has not demonstrated a significant nexus between the subject wetland and the TNW.

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<sup>10</sup> Guidance Memorandum. “Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in *Rapanos v. United States* and *Carabell v. United States*.” The original guidance was released on 5 June 2007 in response to the U.S. Supreme Court consolidated cases of *Rapanos v. United States* and *Carabell v. United States*, 126 S. Ct. 2208 (2006). Revised guidance was released on 2 December 2008.

<sup>11</sup> *Id.* at pp. 5-6.

<sup>12</sup> See Section III.B.2.(i)(c) of the AJD Form.

The District concluded that the Property contains a wetland that is adjacent to but not directly abutting an RPW that flows directly into the TNW. Wetlands that are adjacent to but not directly abutting RPWs that flow directly or indirectly into TNWs are jurisdictional under the CWA where there is a "significant nexus" with a TNW.<sup>13</sup> Documentation requirements to support a significant nexus determination include the following:

- 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; and
- 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.<sup>14</sup>

Factors to be considered in a significant nexus evaluation include:

...the specific connections between the characteristics documented and the functions/services that affect a TNW. Specifically, an evaluation will be made of the frequency, volume, and duration of flow; proximity to a 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.

In addition, the evaluation will also consider the functions performed cumulatively by any and all wetlands that are adjacent to the tributary, such as storage of flood water and runoff; pollutant trapping and filtration; improvement of water quality; support of habitat for aquatic species; and other functions that contribute to the maintenance of water quality, aquatic life, commerce, navigation, recreation, and public health in the TNW. This is particularly important where the presence or absence of a significant nexus is less apparent, such as for a tributary at the upper reaches of a watershed. Because such a tributary may not have a large volume, frequency, and duration of flow, it is important to consider how the functions supported by the wetlands, cumulatively, have more than a speculative or insubstantial effect on the chemical, physical, or biological integrity of a TNW.<sup>15</sup>

As explained for Appeal Reason 3, Sections III.B.2 and 3 of the AJD Form provide adequate support that the wetland is adjacent to but not directly abutting an RPW that flows directly or indirectly into a TNW. However, as explained for Appeal Reason 2, Section III.B.1 of the AJD

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<sup>13</sup> JD Guidebook, p. 58.

<sup>14</sup> *Id.*

<sup>15</sup> JD Guidebook, pp. 55-56.

Form does not adequately document that water flows from an RPW directly or indirectly into a TNW. Furthermore, Section III.C.3 of the AJD Form does not adequately document the District's rationale to support a significant nexus determination.

The District's significant nexus findings in Section III.C.3 of the AJD Form are as follows:

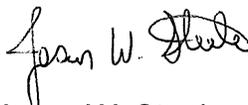
Historically the wetland on the project site was part of a large wetland system that directly abutted Springstead Creek. Currently there is a discrete hydrological connection between wetlands on the project site and Springstead Creek. Flow from the subject wetland discharges by culvert to wetlands on the abutting property. On the abutting property, water flows through a by-pass ditch over a grassy berm with a control elevation of 167.5 ft NGVD into a deep ditch via culvert. The deep ditch discharges into the canalized portion of Springstead Creek. The wetland on the project site provides forested wildlife habitat in a highly urban environment. The wetland on the project site provides nutrient sequestration and pollutant filtration in a highly urbanized and impaired watershed.

The conclusion in Section III.B.1 of the AJD Form is not adequately supported in the AR; thus, the significant nexus evaluation (Section III.C.3) is flawed. In addition, there is insufficient information in the District's significant nexus evaluation to support that the subject wetland has more than a speculative or insubstantial effect on the chemical, physical, and/or biological integrity of the downstream TNW. Accordingly, the AR does not adequately support the determination that the subject wetland has a significant nexus to the nearest downstream TNW.

**Action:** The District shall review applicable regulation, guidance, and policy and adequately document whether the subject wetland has a significant nexus to the nearest downstream TNW.

## **CONCLUSION**

For the reasons stated above, I have determined the appeal has merit. The AR does not support the District's determination that the subject wetland is within CWA jurisdiction, consistent with the JD Guidebook. 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