

**ADMINISTRATIVE APPEAL DECISION
HOGAN JURISDICTIONAL DETERMINATION
FILE NO. MVN 2005-4113-SZ, NEW ORLEANS DISTRICT
February 13, 2008**

Review Officer: James B. Wiseman, Jr., U.S. Army Corps of Engineers, Mississippi Valley Division (MVD)

Appellant/Applicant: Mr. Paul Hogan, Des Allemands, Louisiana

Authority: Section 404 of the Clean Water Act

Receipt of Request for Appeal: 26 September 2007

Approved JD Appeal Meeting and Site Visit: 27 November 2007

Summary of Appeal Decision: Mr. Hogan is challenging the assertion by New Orleans District that the U.S. Army Corps of Engineers has jurisdiction over his property, in particular that a significant nexus does not exist between his property and Bayou Gauche, a navigable water of the United States. I find that Mr. Hogan's reasons for appeal have partial merit. There is insufficient documentation in the record to support the finding that the wetland on Mr. Hogan's property, along with other similarly situated wetlands adjacent to the tributary, has a significant (more than insubstantial or speculative) effect on the chemical and biological integrity of Bayou Gauche. MVN should provide additional documentation to support their significant nexus determination.

Background Information:

By letter dated 9 November 2005, Mr. Paul Hogan (Appellant) requested that the Regulatory Branch of the U.S. Army Engineer District, New Orleans (MVN) conduct a jurisdictional determination on his property, a 6.32-acre parcel identified as Lot 69-A-2 and two unnumbered lots in Section 39, Township 14 South, Range 20 East, St. Charles Parish, Louisiana. Subsequently, Mr. Hogan's consultant, Conestoga-Rovers and Associates, provided a wetland report to MVN dated 6 March 2006. The consultant report included a wetland map and data sheets from a field inspection conducted by Mr. Andrew Ardoin on 14 February 2006. MVN reviewed the consultant report and by letter dated 28 April 2006, issued an approved jurisdictional determination (JD) confirming the consultant JD and wetland map. By letter dated 12 June 2007, the Appellant requested that MVN revisit the JD based on the U.S. Supreme Court decisions in the

Rapanos and Carabell cases. Even though not required by the guidance¹, MVN agreed to revisit the determination and conducted another field investigation on 27 July 2007. An additional field inspection was conducted on 15 August 2007 by MVN and Ms. Tammy Mick representing Region IV (Dallas office) of the Environmental Protection Agency (EPA). EPA and MVN collaborated in the completion of the JD Form including the significant nexus determination for the Appellant's property². By letter dated 18 September 2007, MVN reaffirmed their original JD. Mr. Hogan submitted a Request for Appeal (RFA) form which was received by the RO on 26 September 2007. By letter dated 28 September 2007, the RO accepted the RFA. MVN provided a copy of the administrative record (AR) for the JD to the RO (received 19 October 2007). MVN also provided a copy of the AR to the Appellant. A site visit and appeals meeting was held on 27 November 2007.

Information Received and its Disposal During the Appeal:

33 C.F.R. 331.3(a)(2) sets the authority of the Division Engineer to hear the appeal of this JD. However, the Division Engineer does not have authority under the appeal process to make a final decision regarding JDs, as that authority remains with the District Engineer. Upon appeal of the District Engineer's decision, the Division Engineer or his RO conducts an independent review of the administrative record to address the reasons for appeal cited by the Appellant. The administrative record is limited to information contained in the record by the date of the Notification of Administrative Appeal Options and Process (NAP) form. Pursuant to 33 C.F.R. Section 331.2, no new information may be submitted on appeal. Neither the Appellant nor the District may present new information to MVD. To assist the Division Engineer in making a decision on the appeal, the RO may allow the parties to interpret, clarify, or explain issues and information already contained in the administrative record. Such interpretation, clarification, or explanation does not become part of the administrative record because the District Engineer did not consider it in making the decision on the JD. However, in accordance with 33 C.F.R. 331.7(f), the Division Engineer may use such interpretation, clarification, or explanation in determining whether the administrative record

¹ In the "Questions and Answers" section of the *U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook*, the answer to question number 46 states "[t]he Corps will not revisit jurisdictional determinations that were completed prior to the Rapanos decision." The Appellant's original approved JD was dated 28 April 2006. The Rapanos decision was issued by the Supreme Court on 19 June 2006.

² Dr. John Bruza, personal communication

provides an adequate and reasonable basis to support the District Engineer's decision.

1. MVN provided a copy of the administrative record to the RO and to Mr. Hogan. The administrative record is limited to information contained in the record by the date of the NAP form, in this case, 19 September 2007.

2. In an email sent to Mr. Hogan and MVN on 21 November 2007, the RO provided a set of questions for discussion at the appeal meeting. These questions are shown as Exhibit 1 to the 11 December 2007 MFR documenting the approved JD meeting and site visit. These questions and their answers are deemed clarifying information and were considered in reaching the appeal decision.

3. At the appeal meeting, MVN and Mr. Hogan provided written responses to the questions. The written responses are deemed clarifying information and are contained in Exhibits 2 and 3 to the appeal meeting MFR.

4. Via facsimile on 28 November 2007, Mr. Hogan provided a summary of his comments and responses at the appeal meeting. This document is considered clarifying information and was considered in reaching the appeal decision.

5. By email dated 20 December 2007, the RO requested from MVN an explanation of EPA's involvement in preparing the significant nexus evaluation. MVN's response, received on the same day, is considered clarifying information³.

6. By email dated 2 January 2008, the RO requested that MVN clarify their entry in part II.B.1.b. of the JD Form. By email and teleconference on 7 January 2008, Mr. Zerinque provided clarification, stating that MVN mistakenly included the small ditch as a jurisdictional "non-wetland water". This response is considered clarifying information.

JD Form and Significant Nexus Evaluation Background:

As a result of the U.S. Supreme Court decisions in *Rapanos v. U.S.* and *Carabell v. U.S.* (hereinafter referred to as *Rapanos*)⁴, the U.S. Environmental Protection Agency (EPA), the U.S. Army Corps of Engineers (Corps), in coordination with the Office of Management and Budget and the President's Council on

³ Quoting email from Dr. Bruza: "We had a meeting at our office with EPA [about the significant nexus] determination and we (COE and EPA) concurred. In reality, the form was completed jointly. We agreed on every aspect."

⁴ 126 S.Ct. 2208 (2006).

Environmental Quality, developed the memorandum *Clean Water Act Jurisdiction Following Rapanos v. United States* (Memorandum). The Memorandum requires the application of two new standards, as well as a greater level of documentation, to support an agency jurisdictional determination (JD) for a particular water body.

The first standard, based on the plurality opinion in the *Rapanos* decision, recognizes regulatory jurisdiction over a water body that is not a traditional navigable water (TNW) if that water body is "relatively permanent" (i.e., it flows year-round, or at least "seasonally") and over wetlands adjacent to such water bodies if the wetlands directly abut the water body.

The second standard, for tributaries that are not relatively permanent, is based on the concurring opinion of Justice Kennedy and requires a case-by-case "significant nexus" analysis to determine whether waters and their adjacent wetlands are jurisdictional. A significant nexus may be found where a tributary, including its adjacent wetlands, has more than a speculative or insubstantial effect on the chemical, physical and biological integrity of a TNW.

Rapanos guidance, implemented jointly by EPA and the Corps on 5 June 2007, provides a methodology to ensure jurisdictional determinations under the Clean Water Act (CWA) are consistent with the Supreme Court decision in *Rapanos* and implement the standards required in the Memorandum. Consequently, the Corps and EPA may only assert jurisdiction over the following categories of water bodies (Plurality test):

- 1) TNWs
- 2) All wetlands adjacent to TNWs
- 3) Non-navigable tributaries of TNWs that are relatively permanent waters (RPW)
- 4) Wetlands that directly abut non-navigable tributaries of TNWs

In addition, the agencies may assert jurisdiction over every water body that is not a relatively permanent water (RPW) if that water body is determined (on the basis of a fact-specific analysis) to have a significant nexus with a TNW. The classes of water body that are subject to CWA jurisdiction only if such a significant nexus is demonstrated are (Kennedy test):

- 1) Non-navigable tributaries that do not typically flow year-round or have continuous flow at least seasonally
- 2) Wetlands adjacent to such tributaries

- 3) Wetlands that are adjacent to but that do not directly abut a relatively permanent, non-navigable tributary.

Factors considered in the significant nexus evaluation include flow characteristics and functions of the tributary itself in combination with the functions performed by any wetlands adjacent to the tributary to determine their effect on the chemical, physical and biological integrity of TNWs. Hydrologic factors considered include volume, duration, and frequency of flow, including consideration of certain physical characteristics of the tributary (proximity to the TNW, size of the watershed, average annual rainfall). Ecologic factors considered include the ability for tributaries to carry pollutants and flood waters to TNWs. Ecologic factors also include the ability of a tributary to provide aquatic habitat that supports a TNW, the ability of wetlands to trap and filter pollutants or store flood waters, and maintenance of water quality.

Implementation of the *Rapanos* decision requires EPA and the Corps to be more thorough and consistent in documenting their jurisdictional determinations (JD). To meet this requirement the Corps now uses a standardized JD form. Instructions for completing the form are found in *U.S. Army Corps of Engineers Jurisdictional Form Instructional Guidebook* (Guidebook). The Guidebook clarifies terms commonly used in the form, presents an overview on jurisdictional practices, and supplements the form instructions. Information on *Rapanos* related memoranda, guidance, forms, guidebooks, etc., may be found at <http://www.usace.army.mil/cw/cecwo/reg/>.

Basis for Appeal as Presented by Appellant (referenced sections correspond to specific parts of the MVN JD Form):

Appellant's Verbatim Reasons for Appeal:

1. Section II, B, 1, a. There is no flow directly or indirectly into a [TNW] without the use of pumps. Power out = no flows.

FINDING: This reason for appeal does not have merit.

DISCUSSION: The canal system and pump station have taken the place of the natural drainage system of the area. The canal system and pump station are maintained by the Sunset Drainage District and are operated to prevent flooding in the service area. Power outage is not a normal circumstance for the service area. Under normal circumstances, the pump station has power,

and when water levels rise above a certain level (-8 ft NGVD per information supplied by the Appellant) in Crawford Canal, the pumps operate and maintain a hydrologic connection between Crawford Canal and Bayou Gauche.

ACTION: No action is required.

2. Section II, B, 1, b. There is no water in the ditch which is claimed to [be] non-wetland waters. There is only flow after some rain events then it is gone.

3. Section III, B, 1, ii, b. Tributary (the ditch) is but 4 ft wide and barely 1 foot deep and never flows full.

4. Section III, B, 1, ii, c. The banks of the ditch are denuded due to the spraying of a weed killer, not water or its flowing as implied. It never has water standing for a long period of time as claimed in the JD. There is no clear, natural line impressed on the bank of the ditch. There is no destruction of vegetation by flowing water.

FINDING: The above three reasons for appeal do not have merit, since MVN did not intend to assert jurisdiction over the small ditch.

DISCUSSION: In Section II.B.1.b. of the JD Form (AR page 7-3A), MVN identified a small "mosquito ditch" as a jurisdictional "non-wetland water" (identified in AR - page 10-5, upper right photograph) with dimensions of "150 linear feet" by "4 width (ft)". During the site visit on 27 November 2007, the RO inquired about this small ditch. MVN informed the RO that they did not consider this ditch to be jurisdictional. This fact was confirmed by email and teleconference on 7 January 2008 with Mr. Zeringue of MVN⁵. The tributary used by MVN for the significant nexus determination is the roadside collector adjacent and parallel to the highway, not the small ditch perpendicular to the highway.

ACTION: MVN shall correct the JD Form to accurately reflect jurisdictional areas on the Appellant's property.

⁵ Quoting from the email: "This small "mosquito ditch" is not a water of the U S, and did not figure into our decision as to the jurisdictional nature of the wetlands on the site. This is evidenced by the fact that it was not referenced in our JD letter or the legend on the map."

5. Section III, B, 1, ii, b. There are no various small fish in the wetland area nor in the ditch. These areas are dry except after rain events. Water is not on the site long enough for a fish population to be established.

FINDING: This reason does not have merit.

DISCUSSION: The small fish and tadpoles observed by MVN during their site visit on 27 July 2007 were found in the tributary (roadside collector) and not in the small ditch.

See Appellant's Reason for Appeal Number 7 below for additional discussion of the wetland area.

ACTION: See Appellant's Reason for Appeal Number 7 below.

6. Section III, B, 2, i, c. The wetland was identified as directly abutting a non-TNW. It does not.

FINDING: This reason for appeal does not have merit.

DISCUSSION: While the wetland on the Appellant's property does not abut the non-TNW (tributary) within the Appellant's property boundaries, it is part of a larger wetland which abuts the tributary immediately south of the Appellant's property. This is shown on the map prepared by the Appellant's consultant and confirmed as accurate by MVN (AR 2-2).

ACTION: No action is required.

7. Section III, B, 2, ii, c⁶. The claim of various small fish is preposterous. There are not, nor have there been fish on this property or the ditch.

FINDING: This reason for appeal does not have merit since the ditch to which it refers is not the jurisdictional ditch, but additional documentation is needed to clarify on-site observations of aquatic/wildlife diversity.

DISCUSSION: MVN noted that during their last field inspection, they observed small fish and tadpoles in the tributary. In the wetland area, MVN indicated the presence of aquatic/wildlife diversity in the form of "various small fish, reptiles, amphibians, and crustaceans as well as migratory birds and

⁶ The assumption is made that the Appellant meant Section III, B, 2, iii

mammals", though it is not specifically stated whether this is based on actual observation. In response to the RO's question concerning field observations of "various fish" (Exhibit 3, MFR from appeal meeting), MVN stated "Mosquito fish and tadpoles were observed in the collector along the entire length of the property with higher concentration in the area of the connection with the J.B. Green roadside drain. They were also observed in the remnant channel within the wetlands on the site."

ACTION: MVN shall clarify the JD Form and include a more detailed description of on-site observations of mosquito fish and other fauna and provide more detail on whether the other aquatic/wilflife species mentioned on the JD Form were observed during field visits.

8. Section III, C, 2. Two claims are made in this one statement that are contradictory: Pollutants are trapped buffering Bayou Gauche and wetland[s] accumulate and process biomass that are transported downstream to support foodwebs in Bayou Gauche. It [is] either bad or good. It's good in this case. There are no pollutants. Even if there were, it would be filtered out in the canal on the other side of the box culvert that is filled with vegetation.

FINDING: This reason for appeal does not have merit, but the JD is remanded to the District for clarification and additional documentation.

DISCUSSION: The RO requested clarification of this statement from Section III,C,2 of MVN's JD Form in the questions provided to MVN prior to the appeal conference. MVN supplied a written answer (see Exhibit 3 in the MFR from the appeal meeting) and discussed this statement during the appeal conference.

ACTION: MVN shall further document their JD Form by including the written answer to the RO's question and any other pertinent clarifying information concerning functions of the subject wetlands in Section III,C,2.

9. Section III,D. There is no significant nexus as claimed with this site. There is only some flow off the site during a rain event and it in no way can be considered significant by any means. In this section, why does the report leave out the insignificant ditch no more than 4 feet wide and 12" deep that never flows full?

FINDING: This reason for appeal has partial merit.

DISCUSSION: The small ditch was not considered jurisdictional by MVN (see Discussion in Reasons for Appeal Numbers 2-4 above).

MVN identified a 4.3-acre forested wetland on the Appellant's property, and determined that this wetland area is part of a larger wetland complex that is adjacent to an unnamed tributary (roadside "collector" running alongside U.S. Highway 90), a non-RPW. Per the *Rapanos* guidance, a wetland adjacent to a non-RPW requires a significant nexus evaluation⁷.

The JD Form includes a significant nexus determination section, and it is divided into categories for the evaluation of the physical, chemical and biological characteristics of the tributary and its adjacent wetlands.

Physical Characteristics (Tributary): As described on the MVN JD Form, the tributary (man-made roadside collector) flows through a box culvert under the highway into Canal Number 17 (RPW), which flows into Crawford Canal (RPW), which has a hydrological connection to Bayou Gauche, a traditional navigable water. The area receives 77 rain events per year with an average annual rainfall of 66 inches⁸. MVN identified an 800-acre drainage area of the roadside collector (determined using the Guidebook to identify the relevant "similarly situated" wetlands) within a 2460 square mile watershed (East Central Louisiana/Coastal Louisiana USGS Hydrologic Unit⁹). The tributary has an average width of ten feet, an average depth of four feet, an average slope of 2:1, and a substrate of silts and silty clay loams, according to the MVN JD Form. The tributary is intermittent but not seasonal, and MVN estimated that there are 20+ flow events per year. According to MVN, flow is expected "at every measurable rain event and for several days following large events." Surface flow is described as follows:

Water sheetflows from higher, generally urbanized land into the wetlands where it accumulates and then

⁷ In his concurring opinion in *Rapanos*, Justice Kennedy 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 other covered waters more readily understood as 'navigable'". According to the *Rapanos* guidance, similarly situated wetlands include all wetlands adjacent to the same tributary, thus in this case, all wetlands adjacent to the roadside collector must be included in the significant nexus evaluation.

⁸ Source: www.wcc.nrcs.usda.gov/climate/wetlands.html

⁹ The U.S. Geologic Survey divides and sub-divides the United States into hydrologic areas which are arranged within each other, from the smallest (cataloging units) to the largest (regions). Each cataloging unit is identified by a unique hydrologic unit code (HUC) consisting of eight digits (see USGS web page at <http://water.usgs.gov/GIS/huc.html>). The Appellant's property lies within the East Central Louisiana Coastal Louisiana HUC unit, code number 08090301.

flows overland or through small channels into the tributary. It is then fed through large box culverts under Hwy. 90 into Canal No. 17 and along with other canals feeds Crawford Canal which is then pumped into Bayou Gauche. Tributary has denuded bed and bank with gentle slope indicating presence of water for substantial periods of time. Additionally, vegetated area above bare area shows rack lines and bent over vegetation demonstrating the frequent flash events caused by larger rain events. On the date of the last Field Site inspection, water in the tributary was confined to the bare channel and there was a flow of clear water.

Even though MVN addressed the flow condition at the time of the field inspection, no data is given for the most recent rain event. The tributary was determined by MVN to have an ordinary high water mark.

Physical Characteristics (Wetlands): Per MVN, there are 4.3 acres of ponded, seasonally inundated bottomland hardwood wetlands on the Appellant's property. The wetland on the Appellant's property is part of a larger 21-acre wetland complex identified as W4 in Items 7-5a and 18-1 of the AR. General flow is overland sheetflow, is intermittent and after most rain events, water accumulates and overflows into the tributary. The wetland complex directly abuts the tributary (see map, AR item 2-2, 13) and is 4.3 canal miles from the TNW.

Chemical Characteristics (Tributary): According to the JD Form, MVN "expect[s] water to carry some sediment, organic matter, and pollutants commensurate with area land use. During last field inspection the water was clear and supported a population of small fish and tadpoles. Sedimentation was visible at the mouth of small channels entering the tributary. Concerning pollutants, MVN stated that they would "[e]xpect pollutants associated with homes, lawns, driveways, parking lots, businesses, and associated land use."

Chemical Characteristics (Wetlands): According to MVN, water in the wetland "appeared clear and tea colored from tannin with various small fish and tadpoles. No oil films were observed during the initial site visit. Concerning pollutants, MVN stated that they would "[e]xpect pollutants associated with homes, lawns, driveways, parking lots, businesses, and associated land use."

Biological Characteristics (Tributary): MVN indicated on the JD Form that the tributary supports a riparian corridor and habitat for aquatic/wildlife diversity. MVN specifically mentions "various small fish, reptiles, amphibians and crustaceans as well as migratory birds and small mammals in the riparian zone." In the Chemical Characteristics section, MVN stated that the water in the tributary was "clear and supported a population of small fish and tadpoles."

Biological Characteristics (Wetlands): MVN characterized the wetlands as mixed bottomland hardwoods with aquatic/wildlife diversity including "various small fish, reptiles, amphibians, and crustaceans as well as migratory birds and small mammals."

Similarly Situated Wetlands: MVN also identified seven other wetland areas adjacent to the roadside collector, from approximately 2.5 miles north to 0.8 mile south of the Appellant's property, a length of 18,700 feet. The eight wetland areas total 334 acres, per MVN calculations based on offsite methods. MVN summarized the overall physical, chemical and biological functions being performed by all eight wetlands as follows:

The drainage area is approximately 800 acres of houses and lawns and businesses and a petroleum refinery with oil well sites scattered throughout. The rainfall and resultant runoff contain a myriad of chemical pollutants associated with these land uses flow downslope into the wetlands where they accumulate and filter through the system. As quantities become sufficient the waters flow into the tributary and downstream into the TNW. The wetlands, through various biological and chemical processes, will have a significant positive effect on the final chemical, physical and biological composition of the water flowing into the tributary and the receiving TNW.

SUMMARY:

Physical Characteristics: Per MVN calculations, the wetland in question in addition to other similarly situated wetlands constitute approximately 334 acres (42%) of the 800-acre drainage area. This factor, combined with the occurrence of 77 rain events and 20+ flow events per year, the presence of an ordinary high water mark in the tributary, and the relative closeness of the TNW, tends to support MVN's determination that the impacts to the physical integrity of the TNW (Bayou Gauche)

are more than speculative and are not insubstantial. However, MVN has not provided a description of the Sunset Drainage District service area as a whole, including the conversion from a natural to a man-made drainage system (levees, canals, pumps, relationship to previous drainage patterns, etc.). Canal Number 17 is only one of several canals that flow into Crawford Canal. MVN has not documented the relative importance of the tributary and Canal Number 17 to the physical characteristics of Bayou Gauche as related to other flow sources within the Sunset Drainage District service area.

Chemical Characteristics: MVN's use of the term "expect" in their description of the tributary and of the adjacent wetlands implies speculation. MVN stated that they "expect water to carry some sediment, organic matter, and pollutants commensurate with area land use". However, MVN did observe "sedimentation ... at the mouth of small channels entering the tributary" to support their expectations. Concerning pollutants, MVN asserted that they "expect pollutants associated with homes, lawns ...". Additional documentation is needed to support these assertions.

Biological Characteristics: MVN asserted that the wetland supports aquatic/wildlife diversity, including "various fish, reptiles, amphibians, and crustaceans as well as migratory birds and small mammals." MVN stated that they observed a population of small fish and tadpoles in the tributary during a field visit. Additional documentation is needed to support a claim of other aquatic/wildlife diversity in the wetland area.

ACTION: The JD is remanded to the District for additional documentation as detailed above.

CONCLUSION:

I find that the reasons for appeal forwarded by the Appellant have partial merit. I am remanding the Appellant's jurisdictional determination to MVN for reevaluation, reconsideration and additional documentation to assure that the administrative record provides a reasonable basis for asserting jurisdiction. The final Corps decision will be the MVN District Engineer's decision made pursuant to my remand.



Robert Crear
Brigadier General, U.S. Army
Division Engineer