ADMINISTRATIVE APPEAL DECISION
PARRIS JURISDICTIONAL DETERMINATION
ST. LOUIS DISTRICT
CORPS FILE NUMBER 2007-250
MAY 15, 2008

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

Appellant: Mr. Mitch Parris, Cape Girardeau, Missouri

Authority: Section 404 of the Clean Water Act

Approved Jurisdictional Determination Conference: 30 January 2008

Summary of Appeal Decision: The Appellant is challenging the assertion by St. Louis District (MVS) that the U.S. Army Corps of Engineers has jurisdiction over a segment of Barhart Branch on his property. In particular he asserts that a significant nexus does not exist between this stream segment and the Mississippi River, a navigable water of the United States. I find that two of the Appellant's three reasons for appeal have merit. There is insufficient documentation in the record to support the MVS finding that the stream on the Appellant's property has a significant (more than insubstantial or speculative) effect on the physical, chemical and biological integrity of the Mississippi River.

Background Information: The Appellant contacted the Missouri Department of Transportation (MODOT) requesting permission to use an existing 5' by 10' box culvert under Route 51 near County Road 918 in Bollinger County, Missouri, as a cattle crossing. The project would also involve the relocation of a section of Barhart Branch. By letter dated 8 May 2007, MODOT informed the Appellant that he would need approval from the U.S. Army Corps of Engineers to relocate the stream. The Appellant contacted a consultant, Christopher Buerck of Bowen Engineering and Surveying, Inc., who contacted Mr. Gary Lenz of the Corps' St. Louis District via electronic mail on 22 May 2007, and requested a meeting at the site. After several electronic mail exchanges between Mssrs. Lenz and Buerck regarding potential mitigation, project drawings and scheduling, Mr. Lenz held a meeting at the site with Mr. Buerck and the Appellant on 25 July 2007. Notes taken by Mr. Lenz during the site visit and a summary of the site visit are in the administrative record[1].

[1] Tab 4. Handwritten notes

While the Appellant's proposed project was under consideration by MVS, a coordination memo[2] between the Corps and the U.S. Environmental Protection Agency (EPA) stated that all jurisdictional determinations involving a significant nexus evaluation per the Rapanos guidance (see below) required coordination with the regional office of EPA. In accordance with the memo, the district forwarded the jurisdictional determination form (JD Form) for the Appellant's site to the EPA Region 7 office via electronic mail on 3 August 2007. According to procedure, EPA had 15 days to comment on the contents of the JD Form. EPA did not comment thereby implying concurrence with the MVS JD.

By letter dated 5 October 2007, MVS issued an approved JD to the Appellant and included a copy of the JD Form, a completed Notification of Appeals Process form, and a blank Request for Appeal (RFA) form. The Appellant submitted a completed RFA form, dated 24 October 2007, to MVD which was received on 29 October 2007. MVD accepted the appeal by letter dated 23 November 2007. A site visit and appeal meeting were conducted by the RO on 30 January 2008.

Rapanos Background: As a result of Supreme Court decisions in *Rapanos v. U.S.* and *Carabell v. U.S.*, EPA and the Corps, in coordination with the Office of Management and Budget and the President's Council on Environmental Quality, developed the memorandum *Clean Water Act Jurisdiction Following Rapanos v. United States* dated 5 June 2007(Memorandum). The Memorandum requires the application of two new standards, as well as a greater level of documentation to support an agency JD for a particular water body.

The first standard, based on the plurality opinion in *Rapanos*, 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

[2] Grumbles, Benjamin H. and John Paul Woodley, Jr., June 5, 2007, Memorandum for Director of Civil Works and U.S. EPA Regional Administrators. U.S. Environmental Protection Agency and U.S. Army Corps of Engineers Coordination on Jurisdictional Determinations Under Clean Water Act Section 404 in Light of the *SWANCC* and *Rapanos* Supreme Court Decisions. 7 p.

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), and (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 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 (Kennedy test) are: (1) non-navigable tributaries that do not typically flow year-round or have continuous flow at least seasonally, (2) wetlands adjacent to such tributaries, and (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 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., can be found at http://www.usace.army.mil/cw/cecwo/reg/.

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

1. With a cover letter dated 18 December 2007, MVS provided a copy of the administrative record to the RO and the Appellant. The administrative record is limited to information contained in the record by the date of the NAP form, which in this case was 5 October 2007.

2. A site visit and appeal meeting was held on 30 January 2008. During the site visit, the RO took 14 digital photographs which were included as Exhibit 1 in the Memorandum for Record[3] prepared

[3] A draft dated 19 February 2008 was sent to MVS and to the Appellant. MVS suggested minor changes which were incorporated into the final document. The RO requested the Appellant supply corrections or additions by 10 March 2008. No comments were received, and the RO issued the final memo on 11 March 2008.

by the RO summarizing the site visit and appeal meeting. The memorandum and photographs are deemed clarifying information.

Basis for Appeal as Presented by Appellant

Appellant's Verbatim Reasons for Appeal

1. Section III:B. We take issue with this section in its entirety and this branch being evaluated as an RPW. It is a wet weather branch, i.e. flow only occurs due to rain events. The only time there is flow is during heavy rain events (3" plus) or following less events (1" to 2") in late winter and early spring when the ground is saturated and the ponds are full. Even then, the flow is only continuous a day or two following the event and these rain events do not number 20 or greater. We also disagree with the findings of vegetation matted down and leaf litter washed away, a clear natural line being impressed on the banks, as well as several other items in this section. The minnows observed were in a small, dished out area in the hardpan which holds water for some time. They can be attributed to water breaching the spillway on one of our ponds (There was a 4" rain in May).

FINDING: This reason for appeal has merit. MVS has not provided sufficient documentation to establish that the tributary in question is a RPW with seasonal flow.

DISCUSSION: Section III(B)(1) of the JD Form is used to describe general area conditions and the physical, chemical and biological characteristics of a non-TNW that flows directly or indirectly into a TNW.

Subsection (i) is used to describe the general area conditions. MVS did not quantify the watershed size but determined the drainage area to be 507 acres, listed the average rainfall as 48.47 inches and the average snowfall as 13.2 inches.

Subsection (ii)(a) of the form is used to describe the physical relationship of the non-TNW with the TNW. MVS did not complete this part of the form. Subsections (ii)(b) and (ii)(c) are used to record the determination of the presence of CWA section 404 waters of the U.S. MVS described the tributary as natural with an average width of 20 feet, an average depth of 4.5 feet, average side slopes of 2:1, substrate of bedrock and gravel, meandering geometry and an average slope of greater than 1%. These characteristics were observed during the field trip on 25 July 2007. In section III(B)(1)(ii)(c), MVS further described the tributary as having seasonal flow with more than 20 flow events per year. This information could not be determined by a single field trip, and though there are known

sources to obtain these kinds of data, no data sources are cited on the JD Form. Consequently, there is nothing in the administrative record to support MVS statements about flow frequency. In addition, the Appellant stated during the appeal conference that there are no nearby stream gages. Nothing in the AR addresses the presence or absence of gage data. The AR does not support the MVS statement that the tributary has 20 or greater flow events per year.

In section III(B)(2)(b), MVS described surface flow as confined and stated that subsurface flow exists "as evidenced by the presence of fish, which require almost perennial flow conditions." MVS then described the tributary as having a bed and banks and 12 of the 14 indicators of an ordinary high water mark (OHWM) listed on the JD Form. However, the only indictors of OHWM in the field notes are wrack lines, sediment deposits and shelving. During the appeal meeting, the Appellant expressed his particular disagreement with MVS on the occurrence of matted-down vegetation as an indicator of an OHWM. The Appellant stated that there was insufficient flow to have that effect. Nothing in the AR supports the MVS assertion of the occurrence of matted-down vegetation as an indicator of an OHWM.

The appellant also pointed out that Section III(B)(1)(iii) of the form was not completed by MVS. This part of the form is used to describe the chemical characteristics of the tributary, and this description is required in order to address the impact of Barhart Branch on the chemical integrity of the nearest downstream TNW (Mississippi River).

Subsection III(B)(1)(iv) of the form is used to describe the biological characteristics of the non-TNW. MVS indicated that the tributary has a riparian corridor and provides habitat for aquatic/wildlife diversity, noting that "at least two species of fish [were] observed in the tributary." The Appellant has asserted that the source of fish is the occasional (after large rain events) flow over the spillway of the stock/fish pond upstream of the tributary. The AR does not indicate which species of fish were observed and does not address whether or not the overflow from the upstream fish ponds could be the source of the fish in the tributary. This issue should have been addressed by MVS in order to establish whether the fish observed were part of a natural population or were incidental to a storm event. Nothing in the AR addresses the source of the fish observed in the tributary.

ACTION: The JD is remanded to the District for reevaluation, reconsideration and additional documentation.

2. Section III:D. We do not feel it has been shown to be an RPW nor has a significant nexus been shown between it and a TNW, as identified in Rapanos.

FINDING: This reason for appeal has merit. MVS has not demonstrated that a significant nexus exists between the tributary in question and the Mississippi River, a navigable water of the United States.

DISCUSSION: As cited above, Section III(B)(1)(iii) of the form was not completed by MVS. This description is required to address the impact of Barhart Branch on the chemical integrity of the nearest downstream TNW (Mississippi River) and is a critical part of the determination whether a significant nexus exists between these two water bodies[4].

Section III(C) of the JD Form is used to document the significant nexus determination, and Part D contains the determination of jurisdictional findings. MVS did not complete Part C. In Part D, MVS indicates that the tributary in question has seasonal flow, and when prompted to supply a rationale to support the determination, none is given. In addition, no data sources other than maps, plans, etc. supplied by the applicant, are cited in Section IV (Sources of Data).

The AR does not support the MVS determination that a significant nexus exists between the tributary on the Appellant's property and the nearest downstream TNW.

ACTION: The JD is remanded to the District for reevaluation, reconsideration and additional documentation.

3. Section III:F. It is not jurisdictional. We would therefore ask that the determination be overturned and that the Corps cease in its claim of jurisdictional control.

FINDING: This reason for appeal does not have merit.

DISCUSSION: According to regulations at 33 CFR 331.9, it is not the role of the Division Engineer to overturn a decision or substitute his judgment for that of the District Engineer. When there is not substantial evidence in the administrative record to support the District Engineer's decision, the Division Engineer may direct the District Engineer to reconsider the

[4] From U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook (June 1, 2007), page 7: "A significant nexus exists if the tributary, in combination with all of its adjacent wetlands, has more than a speculative or an insubstantial effect on the chemical, physical, and/or biological, integrity of a TNW.

decision where any essential part was not supported by accurate or sufficient information or analysis.

ACTION: No action is required

CONCLUSION:

I find that two of the three reasons for appeal forwarded by the Appellant have merit. I am remanding the Appellant's jurisdictional determination to MVS 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 MVS District Engineer's decision made pursuant to my remand.

Michael J. Walsh
Brigadier General, U.S. Army
Division Engineer