

**ADMINISTRATIVE APPEAL DECISION  
MOESA, LLC. JURISDICTIONAL DETERMINATION  
NEW ORLEANS DISTRICT  
CORPS FILE NUMBER MVN-2007-04564-SG  
DECEMBER 15, 2008**

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

**Appellant:** MOESA, LLC. (Mr. James Morrison), St. Tammany Parish, Louisiana

**Authority:** Section 404 of the Clean Water Act

**Approved Jurisdictional Determination Conference:** 2 July 2008

**Summary of Appeal Decision:** MOESA, LLC. is appealing a New Orleans District jurisdictional determination for property in St. Tammany Parish, Louisiana. The appeal has partial merit and is remanded to New Orleans District for reevaluation, reconsideration, and additional documentation.

**Background Information:** On 17 December 2007, Hydrik Wetland Consultants (Hydrik) provided a wetland delineation report<sup>1</sup> to New Orleans District (MVN) for a 19.75-acre tract on Brownsitch Road, in Section 27, Township 8 South, Range 14 East, St. Tammany Parish, Louisiana. The report was submitted by Mr. Michael Henry of Hydrik on behalf of Mr. James Morrison (representing MOESA, LLC.). Hydrik requested that MVN review the report and issue an approved jurisdictional determination (JD). MVN conducted a field inspection of the property on 18 January 2008 and issued an approved JD letter on 24 January 2008. The letter stated that jurisdictional waters of the United States (including wetlands) regulated by the U.S. Army Corps of Engineers pursuant to Section 404 of the Clean Water Act occurred on the property. MVN confirmed that the map supplied by Hydrik<sup>2</sup> accurately depicted the extent of wetlands (16.23 acres) and other waters (0.11 acre). The JD letter included three JD forms, one for each waterbody (identified as Water 1, Water 2, and Water 3). Wetlands on the property were determined to abut Water 1 and were included on the JD form for that waterbody. Also included with the letter was a Notification of Appeal Options and Request for Appeal form (NAO/RFA).

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<sup>1</sup> Administrative Record (AR), pages 3-1 to 3-21.

<sup>2</sup> The wetland/other water delineation in the Hydrick wetland report (AR, page 3-15) and on the map provided with MVN approved JD letter (AR, page 1-2) are identical.

A completed Request for Appeal (RFA) form dated 2 March 2008 was submitted to Mississippi Valley Division by Mr. Henry on behalf of MOESA, LLC./James Morrison. The RFA was received by Mississippi Valley Division on 10 March 2008 and determined to be timely, complete, and contain acceptable reasons for appeal.<sup>3</sup> A letter accepting the appeal was sent by the Division Engineer to Mr. Henry on 11 April 2008. A site visit and appeal meeting was held by the Review Officer on 2 July 2008. A summary of the site visit and appeal conference can be found in the Memorandum for Record<sup>4</sup> dated 22 July 2008 prepared by the Review Officer.

#### **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 a denied permit, declined permit, or jurisdictional determination, as that authority remains with the District Engineer. Upon appeal of the District Engineer's decision, the Division Engineer or his Review Officer (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. § 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. MVN provided a copy of the administrative record (AR) to the RO and the Appellant. The RO received the AR on 9 June 2008.

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<sup>3</sup> As defined at 33 C.F.R. § 331.5.

<sup>4</sup> A draft Memorandum for Record (MFR) dated 16 July 2008 was sent to MVN, the Appellant and the Appellant's agent with a comment suspense date of COB 21 July 2008. No comments were received from MVN or the Appellant's agent. The Appellant provided comments via electronic mail, and the comments were incorporated into the final document as Exhibit 4. The final MFR was issued on 22 July 2008.

The administrative record is limited to information contained in the record by the date of the NAO/RFA form, which in this case was 30 January 2008.

2. In an email to MVN on 26 June 2008, the RO provided a set of possible questions for discussion at the appeal meeting. At the meeting, MVN provided a written copy of their responses to the RO and to the appellant. These questions and answers are included as Exhibit 2 in the 22 July 2007 Memorandum for the Record (MFR) documenting the appeal meeting and site visit. They are deemed clarifying information and were considered in reaching the appeal decision.

3. A site visit and appeal meeting was held on 2 July 2008. During the site visit, the RO took five digital photographs which were included as Exhibit 3 in the MFR and are deemed clarifying information.

4. During the appeal meeting, the RO requested that MVN provide dates for some of the images in the administrative record (pages 4-1, 5-1, 6-1, 7-1, and 8-1) and the scale of the image on page 9-1. By email on 3 July 2008, MVN provided the requested information. This document is included as Exhibit 1 in the MFR and is deemed clarifying information.

4. By email on 22 July 2008, the Appellant provided additional comments and three digital photographs which are considered clarifying information.

#### **Jurisdictional Determination Background: Regulations, Guidance, and Court Cases**

In 1985, the U.S. Environmental Protection Agency (EPA) General Counsel signed the Migratory Bird Memo, which opined that movement of migratory birds across state boundaries could be used as a link to interstate commerce. The Corps, in preamble language to its 1986 regulations, adopted the EPA legal memo as the "Migratory Bird Rule" (MBR).<sup>5</sup> The MBR generally allowed the Corps to assert Clean Water Act (CWA) jurisdiction over nearly all natural water bodies, including wetlands that were used or could be used as habitat by migratory birds. In 2001, the MBR was invalidated by the U.S. Supreme Court's decision in the *Solid Waste Agency of Northern Cook County (SWANCC) v. Corps*, which held that isolated, intrastate, non-navigable waters could

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<sup>5</sup> The "Migratory Bird Rule" is not a rule or a part of any Corps or EPA regulation, but instead consisted of examples in a preamble published in the Federal Register. The preamble language was never subject to notice and comment rulemaking procedures under the Administrative Procedures Act, and was never codified in the Code of Federal Regulations (CFR). Instead, it was advanced as a basis for asserting jurisdiction in a guidance memo.

not be regulated under the CWA based solely on the presence of migratory birds. Following the *SWANCC* decision but prior to the decision in *Rapanos* (discussed below), it generally was believed that a water body (including a wetland) was subject to CWA jurisdiction if the water body was part of the U.S. territorial seas, or a traditional navigable water, or any tributary to a traditional navigable water, or a wetland adjacent to any one of the above. In addition, isolated wetlands and other waters might be considered jurisdictional where they had the necessary link to either navigable waters or interstate commerce. In 2003, the EPA and the Corps provided joint guidance in Appendix A<sup>6</sup> of the Advanced Notice of Proposed Rulemaking on the CWA Regulatory Definition of "Waters of the United States."

Subsequently, as a result of the U.S. Supreme Court decisions in *Rapanos v. U.S.* and *Carabell v. U.S.* (hereinafter *Rapanos*),<sup>7</sup> 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* (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, based on

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<sup>6</sup> 68 FR 1995-1998.

<sup>7</sup> 126 S. Ct. 2208 (2006).

the plurality decision, the Corps and EPA may assert jurisdiction over the following categories of water bodies: (1) traditionally navigable waters, (2) all wetlands adjacent to traditionally navigable waters, (3) relatively permanent non-navigable tributaries of traditionally navigable waters, and (4) wetlands that directly abut relatively permanent, non-navigable tributaries of traditionally navigable waters.

In addition, under the Kennedy opinion, 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 if such a significant nexus is demonstrated 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.

Implementation of the *Rapanos* decision requires EPA and the Corps to strive for more thoroughness and consistency in the documentation of their jurisdictional determinations. 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**

#### **Appellant's Verbatim Reasons for Appeal**

**1. The p[r]operty does not hold wetlands subject to jurisdiction of the Corps and/or regulation under the clean water act.**

**FINDING:** This reason for appeal has partial merit.

**DISCUSSION:** In order to determine whether an area contains a wetland subject to Corps jurisdiction, a Corps district must first establish whether or not the area meets the criteria for a wetland as defined by regulation.<sup>8</sup> Explicit in the definition is

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<sup>8</sup> "The term *wetlands* means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas." 33 CFR 328.3(b)

the consideration of three environmental parameters: hydrology, soils, and vegetation. Positive wetland indicators of all three parameters are normally present in wetlands. Procedures for determining whether these parameters are present in an area are found in the *Corps of Engineers Wetlands Delineation Manual*<sup>9</sup> and related guidance (87 Manual). In the subject case, the administrative record supports the determination by MVN that the site in question contains wetlands. This is based on field data collected by Hydrik (using methodology in the 87 Manual) and confirmed by a site visit by MVN on 18 January 2008. Data forms<sup>10</sup> found in the administrative record confirm the presence of indicators of all three required wetland parameters.

Once the occurrence of wetlands is established, a determination must be made whether or not the wetlands are subject to federal jurisdiction pursuant to the Clean Water Act. This determination is guided by the statute itself, regulations promulgated pursuant to the statute, official policy, and decisions by the federal courts, as described in "**Jurisdictional Determination Background**" above.

MVN determined that Water 1 is a relatively permanent water that flows directly or indirectly into a traditionally navigable water (Bayou Vincent). MVN also determined that all wetlands on the property abut Water 1<sup>11</sup>. Water 2<sup>12</sup> and Water 3<sup>13</sup> flow into Water 1 and were determined to be relatively permanent waters with seasonal flow and 20 (or greater) flow events. Provided the MVN determination that Water 1 is relatively permanent is correct, a significant nexus analysis was not required.<sup>14</sup>

However, the administrative record must include data to support the determination that waters on the site are relatively permanent. Per instructions in the guidebook, MVN did not need to complete Section III.B of the JD Form for Water 1, since they determined it to be perennial. However, they were still required to document site conditions to support the flow

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<sup>9</sup> Environmental Laboratory. 1987. *Corps of Engineers Wetlands Delineation Manual*. Technical Report Y-87-1. U.S. Army Waterways Experiment Station. Vicksburg, MS.

<sup>10</sup> AR 3-16 to 3-19.

<sup>11</sup> AR 1-3.

<sup>12</sup> AR 1-7, 1-8.

<sup>13</sup> AR 1-11, 1-12.

<sup>14</sup> Grumbles, Benjamin H. and John Paul Woodley, Jr. June 5, 2007. *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States and Carabell v. United States*. Summary of Key Points, p. 1.

determination<sup>15</sup> and similar information to that found in Section III.B.1 should be included in the administrative record, if not on the JD Form itself. There is no information in the record about flow conditions in Water 1. On the JD Form, Section III.D.2 is used to provide data and rationale indicating that a tributary is perennial. On the JD Form for Water 1, MVN made the following statements:

- (1) The man-made tributary replaced a natural tributary.
- (2) Water is visible in the tributary on several aerial photos.
- (3) Based on personal observation.

These three statements are considered below.

The *U.S. Army Corps of Engineers Jurisdictional Determination Instruction Guidebook* (Guidebook) states that geographical features such as ditches and canals that transport relatively permanent (continuous, at least seasonal) flow directly or indirectly into TNWs are jurisdictional waters regulated under the CWA.<sup>16</sup> MVN's statement that the ditch replaced a natural tributary does not necessarily mean that Water 1 is perennial, since no supporting documentation was provided.

The administrative record includes five aerial photographs.<sup>17</sup> In response to a question from the RO during the appeal meeting, MVN clarified that these images were taken in 1995, 1998, 2004, 2005 and 2006.<sup>18</sup> The MVN statement that water is visible on these photos does not prove that flow is continuous and/or perennial. No inference may be made about duration or frequency of flow based on the occurrence of water on a given day in five different years.

During the appeal meeting, when asked to elaborate on the statement that Water 1 is perennial "based on personal observation", the project manager stated that the observations were made during previous field trips in the area. However, since there are no data in the record to document these

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<sup>15</sup> *U.S. Army Corps of Engineers Jurisdictional Determination Form Instruction Guidebook* (Guidebook). On page 8 (Figure 1A), it is stated that when the determination is made that a particular tributary is a relatively permanent water with perennial flow, site conditions to support the flow determination must be documented. Also reference instructions for completing Section III.D.2 of the JD Form which require a District to "[p]rovide data and rationale indicating that [a] tributary is perennial."

<sup>16</sup> Guidebook, p.16.

<sup>17</sup> AR 4-1, 5-1, 6-1, 7-1 and 8-1.

<sup>18</sup> See Exhibit 1 in the Memorandum for Record prepared by the RO dated 22 July 2008.

observations, this statement is anecdotal and provides no basis for the conclusion that Water 1 is relatively permanent.

ACTION: The jurisdictional determination is remanded to MVN for reconsideration, reevaluation and additional documentation. There is insufficient data, evidence, explanation of rationale or other information in the administrative record to support the conclusion by MVN that Water 1 is relatively permanent with year-round (perennial) flow.

**2. The site does not have a significant nexus (as defined by the majority in *Rapanos v U.S.*) to navigable waters and i[s] therefore not subject to regulation or jurisdiction of the Corps under the Clean Water Act.**

FINDING: This reason for appeal does not have merit.

DISCUSSION: Based on the MVN determination that Water 1 is relatively permanent, a significant nexus evaluation was not required. Since MVN did not conduct a significant nexus evaluation, it cannot be determined whether such a nexus exists. However, since there is insufficient information in the administrative record to support the determination that Water 1 is relatively permanent, the jurisdictional determination is being remanded for reasons stated above.

ACTION: Upon reconsideration, if MVN determines that Water 1 is not relatively permanent (at least seasonally), a significant nexus evaluation must be conducted. Otherwise, no action is required.

**3. The property and the drains and ditches draining it are remote from any navigable-in-fact water and carry only minor water volumes towards such and as such are not subject to regulation or jurisdiction of the Corps under the Clean Water Act.**

FINDING: This reason for appeal has partial merit.

DISCUSSION: When determining whether a water body qualifies as a "traditional navigable water," relevant considerations include whether a Corps district has determined that the water body is a navigable water of the United States pursuant to 33 C.F.R. § 329.14, or the water body qualifies as a navigable water under any of the tests set forth in 33 C.F.R. § 329, or a federal court has determined that the water body is "navigable-in-fact" under federal law for any purpose, or the water body is "navigable-in-fact" under the standards that have been used by



the federal courts.<sup>19</sup> According to the JD Forms completed by MVN for the site under appeal, Water 2 and Water 3 both flow into Water 1 which flows into Bayou Vincent, determined to be a traditionally navigable water. Water 1 flows into Bayou Liberty approximately 2800 feet west of where Water 1 exits the site. During the appeal meeting, the RO asked if Bayou Liberty had been determined to be a navigable water of the United States subject to regulation under Section 10 of the Rivers and Harbors Act of 1899. MVN responded affirmatively.<sup>20</sup>

Remoteness and the influence of flow and water volume on downstream traditional navigable waters were addressed by Justice Kennedy in his concurring opinion in *Rapanos*:

The Corps deems a water a tributary if it feeds into a traditional navigable water (or a tributary thereof) and possesses an ordinary high-water mark, defined as a line on the shore established by the fluctuations of water and indicated by [certain] physical characteristics, §328.3(e). . . This standard presumably provides a rough measure of the volume and regularity of flow. Assuming it is subject to reasonably consistent application . . . it may well provide a reasonable measure of whether specific minor tributaries bear a sufficient nexus with other regulated waters to constitute navigable waters under the Act. Yet the breadth of this standard, which seems to leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water-volumes towards it, precludes its adoption as the determinative measure of whether adjacent wetlands are likely to play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood.<sup>21</sup>

In this part of his concurring opinion, Justice Kennedy is addressing the need for a significant nexus evaluation of water bodies that are not relatively permanent, particularly those remote channels which carry only minor volumes of water. Since MVN determined that all the waters on the site were relatively permanent (at least seasonally), a significant nexus evaluation

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<sup>19</sup> Guidebook, Appendix D, p. 5.

<sup>20</sup> See answer to Question 6, Exhibit 1, Memorandum for Record dated 22 July 2008 prepared by the RO summarizing the appeal meeting.

<sup>21</sup> 547 U. S. 24-25 (2006), Kennedy, J., concurring in judgment

was not required. However, since there is insufficient information in the administrative record to support the determination that Water 1 is relatively permanent, the jurisdictional determination is being remanded for reasons stated above.

During the appeal conference, the appellant made reference to the sewage treatment facility located adjacent to the site on the east which discharges into Water 2. He suggested that this discharge was responsible for any flow exiting the site via Water 1. The administrative record does not address the impact of this treatment facility on flow in Water 1.

ACTION: Upon reconsideration, if MVN determines that Water 1 is not relatively permanent (at least seasonally), a significant nexus evaluation must be conducted. Otherwise, no action is required.

CONCLUSION: The appellant's first reason for appeal has partial merit. The jurisdictional determination is remanded to the New Orleans District with the instructions stated above. The appellant's other two reasons for appeal will be addressed depending on the result of the district's reconsideration and reevaluation of the first reason for appeal. The final decision will be the District Engineer's decision made pursuant to my remand.



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