

**ADMINISTRATIVE APPEAL DECISION
HAWKES PEAT COMPANY, INC.
JURISDICTIONAL DETERMINATION
FILE NO. MVP 2007-01914-DJS,
ST. PAUL DISTRICT
October 24, 2012**

Review Officer(s): Mr. Mike Vissichelli, U.S. Army Corps of Engineers, North Atlantic Division (Lead)

Ms. Tonya Acuff, U.S. Army Corps of Engineers, Mississippi Valley Division

Appellant/Applicant: Mr. Kevin Pierce, Marshall County, Minnesota

Authority: Section 404 of the Clean Water Act

Receipt of Request for Appeal: 6 April 2012

Date of Acceptance of Request for Appeal: 23 April 2012

Approved JD Appeal Conference Call: 24 July 2012

Summary of Appeal Decision: I find that one of Mr. Pierce's reasons for appeal have merit. There is insufficient documentation in the record to support the finding that the wetland on Mr. Pierce's property, along with other similarly situated wetlands adjacent to the tributary, has a significant (more than insubstantial or speculative) effect on the chemical, physical, and biological integrity of the Red River of the North. The administrative record does not support the District's determination that a significant nexus exists between the subject property wetlands and the traditional navigable water, Red River of the North. The remaining reasons for appeal have been determined not to have merit.

Background Information:

Mr. Pierce (appellant) is challenging the assertion by St. Paul District, MVP (the "District"), that the U.S. Army Corps of Engineers has jurisdiction over his property. In particular, he alleges that a significant nexus does not exist between the 155 acres of wetlands on his property and the Red River of the North, a navigable water of the United States. The property (known as the Mercil Site) is located in Section 13, Township

157 North, Range 44 West, near Newfolden, Marshall County, Minnesota.

The District contends that the onsite wetlands are adjacent to a non-Relatively Permanent Water (RPW) that flows directly or indirectly into a traditional navigable waterway (TNW) which is the Red River of the North.

The District claims jurisdiction over the wetlands via significant nexus to the downstream TNW.

Mr. Pierce's consultant, Mr. Brian Ross with Widseth, Smith, Nolting & Associates (WSN), provided information in December 2010 to the St. Paul District to establish the lack of Corps jurisdiction of the site's wetlands based on the no hydrologic connectivity to a navigable water of the U.S. There is no question that the site contains wetlands: the appellant is arguing that the wetlands are isolated and therefore, not regulated. The approved jurisdictional determination (AJD) sent to the appellant on 7 February 2012, did not identify the limits of Corps jurisdiction on the site. The consultant stated that if the site is determined to be jurisdictional, they would furnish a wetland delineation for Corps review at a later date.

Information Received During the Appeal and its Disposition:

1. The District provided a copy of the administrative record (AR), which was reviewed and considered in this request for appeal. The AR was provided on 3 May 2012.
2. The appellant's agent provided clarifying information at the time of the submittal of the RFA.
3. The District provided additional clarifying information via email dated 17 September 2012, regarding procedures used to calculate the drainage basin size at the request of the RO.

Evaluation of the Reason for Appeal/Appeal Decision Findings:

APPEAL REASON #1: There is no basis for jurisdiction because the expansion area wetland¹ is not adjacent to the ditch or the non-Relatively Permanent Water.

FINDING: This reason for appeal does not have merit.

¹ This refers to the project area which is a 155-acre expansion of the ongoing peat mining operation

ACTION: No action required.

DISCUSSION: The appellant states in the RFA that "The Corps must show a substantial nexus to the Red River of the North. In order to do so, the Corps must first connect the river to the expansion area wetland by showing that the expansion area wetland is 'adjacent' to a jurisdictional water". It further states that "there is no wetland adjacent to a 'tributary' or other jurisdictional water here that would allow for the assertion of jurisdiction." Additionally, if the expansion area wetland is to be jurisdictional, it must mean that a jurisdictional water is 'neighboring' the expansion area".

The District staff (William Baer and Craig Jarnot) made a site visit on 1 December, 2011² to the property of Mr. Jon Hirst who owns the property southeast of the expansion area. The District observed a non-jurisdictional, man-made ditch located along the northern border of the property (and adjacent to the larger wetland complex). Water flow is described as traveling through the excavated ditch and through the pasture/hayfield. The water then flows into a natural, meandering channel to the Middle River. The District notes that there were ordinary high water (OHW) indicators within the natural channel reach. The indicators were natural lines impressed upon the bank, shelving, changes in the character of the soil, sediment sorting, leaf litter disturbed or washed away, scour, deposition, bed and banks, and changes in the plant community. The rationale for the District's findings that the natural channel contained a definable OHW indicator in accordance with Regulatory Guidance letter (RGL) 05-05³ is supported in the AR. According to the AR, OHW indicators were found in the man-made ditch (matted down, bent, or absent vegetation within the majority of the ditch). However, the AR also noted that it was difficult to tell if this was due to water movement, or wildlife grazing/travel activity.

The expansion area wetland is part of a contiguous, approximately 591-acre complex of wetlands within the Snake River drainage area, HUC 0902309, as demarcated by the United States Geological Service (USGS). The District is asserting jurisdiction over the expansion area via adjacency to non-RPW located along the southern border of the wetland complex. In the Section II.B.1.(a) of the JD form, the District identifies the wetlands as being "adjacent to non-RPWs that flow directly or indirectly into TNWs".

² AR page COE000068

³ Regulatory Guidance Letter No. 05-05, Subject: Ordinary High Water Mark (OHWM), 7 December 2005

For CWA purposes, the term "adjacent" means bordering, contiguous, or neighboring as stated in 33 C.F.R. 328.3(c). Revised Rapanos guidance, released on December 2, 2008⁴, further addresses the definition of adjacency, stating that:

[T]he agencies consider wetlands adjacent if one of the following three criteria are satisfied. First, there is unbroken surface or shallow sub-surface connection to jurisdictional waters. Second, they are physically separated from jurisdictional waters by man-made barriers, natural rivers berms, beach dunes and the like, Or third, their proximity to a jurisdictional water is reasonably close, supporting the science-based inference that such wetlands have an ecological interconnection with jurisdictional waters.

The District determined that the project area is part of a larger complex, of which, a portion is adjacent to a drainage ditch and flows ultimately to the Red River of the North. The District indicated current drainage on the site flowed through the man-made ditch, through the natural stream channel, to the Middle River, and then to the Red River of the North, a TNW⁵. While the man-made ditch along the southern border of the wetland is not jurisdictional, it provides a discrete hydrologic connection from the wetland to the Red River. Using a non-jurisdictional ditch to establish adjacency to a TNW is supported by the Revised 2008 Guidance⁴, which states:

"Ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water are generally not waters of the United States because they are not tributaries or they do not have a significant nexus to downstream traditional navigable waters. Even when not jurisdictional waters subject to CWA §404, these geographic features (e.g., swales, ditches) may still contribute to a surface hydrologic connection between an adjacent wetland and a traditional navigable water."

⁴ On June 5, 2007, the U.S. Environmental Protection Agency and U.S. Army Corps of Engineers (Agencies) issued joint agency guidance regarding Clean Water Act (CWA) jurisdiction following the U.S. Supreme Court's decision in the consolidated cases *Rapanos v. United States* and *Carabell v. United States* ("Rapanos"). In response to comments received, the agencies provided revised guidance on December 2, 2008 (Revised Guidance), which remains the most current and in effect. It may be referenced at:

<http://www.usace.army.mil/Missions/CivilWorks/RegulatoryProgramandPermits/RelatedResources/CWAGuidance.aspx>, or http://www.epa.gov/owow/wetlands/pdf/CWA_Jurisdiction_Following_Rapanos120208.pdf.

⁵ Support for flow rationale is found in AR Pgs COE000020-22 [Figs 2, 3, and 4]; AR pg COE000142 [site visit]

This reason for appeal does not have merit because the District supported in the AR the rationale, in accordance with applicable law, regulation, and policy, for stating that the expansion area wetlands are adjacent to the man-made ditch and non-RPW.

APPEAL REASON #2: The Corps mapped the incorrect drainage area for the expansion.

FINDING: This reason for appeal does not have merit.

ACTION: No action required.

DISCUSSION: The appellant states in the RFA that "The Corps has incorrectly mapped the drainage area to overestimate the relevant reach and overstate its claim of any nexus to the Red River of the North. Figure 4 of the JD shows a much more inclusive drainage area for the ravine than actually exists." The appellant states that "furthermore, our analysis of the light detection and ranging (LiDAR) data shows a drainage divide at the north of the main expansion area wetland basin. The LiDAR data shows a northwest to southwest trending trough highlighted by the 1140 contours just north of the drainage divide. North of the drainage divide, there are surface water channels within the wetlands that carry the water to the southeast." The appellant states in the RFA that the drainage area is 551 acres, which is less than the 1 square mile needed to meet the District's definition of tributary "seasonal flow".

In Section III.B.1.i of the JD Form⁶, the District identified the drainage area as 2.4 square miles (or 1536 acres) and located within Hydrologic Unit Code (HUC) 09020309, as noted on AR COE000005.

The Corps mapped the drainage area using various hydrology database tools within ArcToolbox and also LiDAR data available⁷.

This reason does not have merit because the District supported in the AR the rationale and methods used in determining the drainage basin for the project area. The District used best available information in the determination of the project area's drainage basin. While the appellant stated the drainage area is

⁶ AR page COE000006

⁷ Per a clarifying email to the Review Officer dated 17 September 2012, Tim Smith, Regulatory project manager, described the drainage basin mapping techniques used by the Corps in determining the project drainage area.

incorrect, the District supported their methods of using LiDAR and associated program tools to calculate the drainage area.

APPEAL REASON #3: The "relevant reach" is not a tributary or other jurisdictional water.

FINDING: This reason for appeal does not have merit.

ACTION: No action required.

DISCUSSION: The appellant states in the RFA that "the Corps identifies a 'tributary'⁸ of the Middle River that is allegedly part of a relevant reach, but nothing in that location meets the definition of a tributary. Rather, a grassed swale leads to an erosional ravine that incises the upland plain area."

According to the Guidebook⁹, "A tributary, as defined here, is a natural, man-altered, or man-made water body that carries flow directly or indirectly into a TNW".

Both the Guidebook and the Revised 2008 Guidance state that "A tributary is the entire reach of the stream that is of the same order (ie, from the point of confluence, where two lower order streams meet to form the tributary, downstream to the point such tributary enters a higher order stream.)"

The AR identified the relevant reach on a map labeled Figure 4¹⁰. The map depicts jurisdiction being asserted through the 1,518 linear-foot natural, unnamed tributary which flows into the Middle River. The Middle River ultimately flows into the Red River of the North (TNW). The relevant reach is described in the AR¹¹ as the confluence of two first order streams which enter the Middle River (a second order stream).

In Section III.B.1.(ii)(c) of the JD form, the District documented the natural tributary used for establishing relevant reach as having both a bed and bank, and OHW indicators which included the features of clear, natural impressed lines on the bank, changes in the character of soil, shelving, leaf litter

⁸ AR page COE000022

⁹ The *U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook* is used as the U.S. Army Corps of Engineers Regulatory Program Standard Operating Procedures for conducting an approved jurisdictional determination evaluation and the documenting practices to support an approved jurisdictional determination. 2007 version, Page 40.

¹⁰ AR page COE000022

¹¹ AR page COE000016

disturbed or washed away, sediment sorting, and abrupt change in plant community.

This reason for appeal does not have merit because the District supported in the AR the rationale for the identification of the relevant reach used for jurisdiction in accordance with the Regulations.

APPEAL REASON #4: In the RFA, the appellant alleges that a significant nexus does not exist between the expansion area wetland and the Red River of the North. The following are several specific reasons for appeal relating to the District's determination:

APPEAL REASON 4(a): There is no significant chemical connection to support nexus to TNW.

FINDING: This reason for appeal has merit.

ACTION: Upon remand, the District shall reconsider the JD and provide sufficient documentation of a significant nexus on the wetlands, including an analysis of whether the wetlands have more than a speculative or insubstantial effect on the chemical integrity of the nearest traditional navigable water (TNW), the Red River of the North. In doing so, the District shall document the hydrologic, ecologic, and other functions performed by the tributary and all of its adjacent wetlands. Specifically, the District will document the volume, duration, and frequency of water flow from the wetlands to the TNW.

DISCUSSION: The appellant stated in the RFA that "the District provides no measureable or quantitative data on how the expansion area wetlands would affect the Red River of the North. The Corps only talks in generalities about the functions of headwater streams and their importance for nutrient transformation".

In the AR¹², the District described the stream chemical properties as follows:

"[S]urface flows were not observed in the tributary by the Corps staff. The contributing area to the tributary is predominantly comprised of open space with limited agricultural usage (row crops and hay) and residential dwellings. Water quality has not been formally assessed by

¹² AR page COE000008

the MPCA but is expected to be good based on adjacent land uses, amounts of wetlands in the area, and buffers from the tributary."

The District states in the additional significant nexus information¹³ that "there is no water quality data for the unnamed tributary. However, general inferences about potential pollutants can be made by evaluating the land use within, and upstream of, the drainage area of the relevant reach. The contributing area to the tributary is predominantly comprised of open spaces with limited agricultural usage (row crops and hay) and residential dwellings. In general, areas with limited impervious and agricultural use have a better water quality and are less likely to have water quality impairment. As a result, the discharges from the relevant reach would be viewed as having a beneficial effect on the downstream TNW."

The 2008 Guidance states "...agencies will consider other relevant factors, including the functions performed by the tributary together with the wetlands, and any adjacent wetlands, which affect downstream traditional navigable waters, such as the capacity to transfer nutrients and organic carbon vital to support downstream food webs (e.g., macroinvertebrates present in headwater streams convert carbon in leaf litter making it available to species downstream)..."

The AR does not contain data supporting flow regime, volume, duration, or frequency from the wetlands to the river. Additionally, the District states¹⁴ that indicators of the transport of energy, materials, and nutrients were observed during a site visit, but there is no quantitative data given to support the finding.

The District's use of the word "suggest", and "reasonable to conclude" in their descriptions of ground water influence on tributary flow implies speculation. There were no specific facts documented that could verify these assertions.

APPEAL REASON 4(b): There is no significant physical connection to support nexus to TNW.

FINDING: This reason for appeal has merit.

¹³ AR page COE000016

¹⁴ AR page COE000016

ACTION: Upon remand, the District shall reconsider the JD and provide sufficient documentation of a significant nexus on the wetlands, including an analysis of whether the wetlands have more than a speculative or insubstantial effect on the physical integrity of the nearest traditional navigable water (TNW), the Red River of the North. In doing so, the District shall document the hydrologic functions performed by the tributary and all of its adjacent wetlands. Specifically, the District will document the number of flow events per year, volume, duration, and frequency of flow events from the wetlands to the TNW.

DISCUSSION: The appellant stated in the RFA that "the physical connection between the expansion area wetland, and any wetlands in the relevant reach to the Red River of the North, is insignificant because the drainage area is small and outflow is limited by the basin orientation." The RFA further states that there is little to no runoff of water from the wetlands to the TNW, therefore there is no significant physical connection of runoff reaching the river.

The District identified a 155-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, non-RPW tributary. Per the *Rapanos* guidance, a wetland adjacent to a non-RPW requires a significant nexus evaluation¹⁵.

The 155-acre wetland in question is located within a larger 550-acre wetland complex. The complex wetlands are adjacent to a 448 linear-foot, non-jurisdictional drainage feature that flows approximately 512 feet into an unnamed tributary of the Middle River for 1518 linear feet, into the Middle River which then flows into the Red River of the North. Ultimately, the water flows through two tributaries, and 30 or more miles, before entering the TNW.

The AR included documentation regarding precipitation amounts, snowfall amounts, watershed size, drainage area, and estimated acre-feet of water storage within the wetlands¹⁶, but did not contain any estimated flow events per year. The unnamed tributary was determined by the District to have a bed and bank and an OHW indicator in accordance with RGL 05-05³.

¹⁵ 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 man-made ditch must be included in the significant nexus evaluation.

¹⁶ AR page COE000023

In regards to the "physical" nexus with the downstream TNW, the District described stream surface flow as follows:

"The District was only able to observe the tributary once on December 1, 2011. At that time, there was no surface flow in the channel but pools were observed sporadically throughout its length. These observations were made at a severe drought in this portion of Minnesota and suggest that there is a groundwater component to the flow in the channel. To further evaluate flow in the tributary, the District utilized its seasonal stream evaluation protocol. In general, tributaries that have drainage areas in excess of one square mile typically meet the agency's definition of seasonal flow (continuous flow for at least three months). The drainage area for the unnamed tributary was determined to be 2.4 square miles or almost 2.5 times the threshold identified during the District's assessment of flow duration on first and second order tributaries. Given this information, it is reasonable to conclude that the tributary has seasonal flow between ice out and mid-June. Flow may persist longer in years with normal precipitation of groundwater discharge is supplying flow to the tributary. However, additional site investigations would be required to confirm this contribution".

Additional tributary flow information was provided in the supplemental significant nexus attachment¹⁷ provided in the AJD. The District stated that:

"Flow in the unnamed tributary has not been qualitatively assessed and the only direct observations of the channel were made in December of 2011 at which time there was standing water in pools but no continuous flow. In northern Minnesota, it is expected that for this type of stream channel, velocity would typically be highest in the spring (March and April) in response to snowmelt and precipitation. Stream flow would steadily decline through late April and May and would be expected to completely dissipate by sometime in June or July when evapotranspiration rates are highest. Flow may be observed periodically outside of this time frame in response to precipitation events."

¹⁷ AR page COE000016.

The 2008 Revised Guidance states that "Principle considerations when evaluating significant nexus include the volume, duration, and frequency of the flow of water in the tributary and the proximity of the tributary to a traditional navigable water. In addition to any available hydrologic information (e.g., gauge data, flood predictions, historic records of water flow, statistical data, personal observations/records, etc.), the agencies may reasonably consider certain physical characteristics of the tributary to characterize its flow, and thus help inform the determination of whether or not a significant nexus is present between the tributary and downstream traditional navigable waters. Physical indicators of flow may include the presence and characteristics of a reliable ordinary high water mark (OHWM) with a channel defined by bed and banks. Other physical indicators of flow may include shelving, wracking, water staining, sediment sorting, and scour."

While the AR¹⁸ provides information indicating an OHW mark for the unnamed tributary exists, it does not provide sufficient evidence to establish a significant nexus that the number of flow events, volume, duration, and frequency of water flowing through the tributary are such that it has an appreciable effect on the TNW. The District stated that flow was present during the site visit; however, the District could not definitively identify any type of flow present in the channel by either precipitation runoff or by groundwater flow. Additionally, the District stated that additional site investigations would be needed to determine the site's hydrologic connectivity.

APPEAL REASON 4(c): There is no significant biological connection to support nexus to TNW.

FINDING: This reason for appeal has merit.

ACTION: Upon remand, the District shall reconsider the JD and provide additional documentation of a significant nexus on the wetlands, including an analysis of whether the wetlands have more than a speculative or insubstantial effect on the biological integrity of the nearest traditional navigable water (TNW), the Red River of the North. In doing so, the District shall document the hydrologic, ecologic, and other functions performed by the tributary and all of its adjacent wetlands.

¹⁸ AR page COE000068

DISCUSSION: The appellant states in the RFA that "the ravine and the expansion area wetland provide no fish habitat to support a biological connection. The ravine is without flowing water during a vast majority of the year, and in some years there is no flow in the ravine at all. Furthermore, the Middle River biome, a bottomland forest, is different from the Mercile wetland (expansion area), a rich fen, and so they are not connected biologically or ecologically, and they are separated by a twenty-foot vertical gradient."

The AR¹⁹ included a description of the stream channel riparian corridor from the unnamed tributary to the TNW. However, the water flow regime information was not sufficient to indicate that a significant nexus exists. As indicated in Reason 4(b), field assessments did not provide evidence of water flow.

The 2008 Guidance states "...habitat services such as providing spawning areas for recreationally or commercially important species in downstream waters, and the extent to which the tributary and adjacent wetlands perform functions related to maintenance of downstream water quality such as sediment trapping."

The District also did not indicate if the expansion area wetland supports any aquatic/wildlife diversity. The AR²⁰ mentioned aquatic species that the Red River of the North supports, but no mention of species being located within the tributary or wetland. Additional information is needed to indicate if the wetland provides any significant biological/ecological contribution to the TNW.

CONCLUSION:

In discussing the significant nexus in the Rapanos memo, Justice Kennedy stated: "The required nexus must be assessed in terms of the status's goals and purposes. Congress enacted the Clean Water Act (CWA) to 'restore and maintain the chemical, physical, and /or biological integrity of the Nation's waters...". Consistent with Justice Kennedy's instruction, EPA and the Corps will apply the significant nexus standard in a manner that restores and maintains any of these three attributes of traditional navigable waters. While the District does not need to clearly support all three attributes, they do need to clearly support that the onsite wetlands and tributary provide more than

¹⁹ AR page COE000008

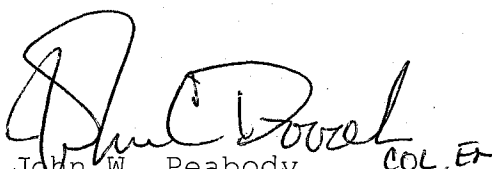
²⁰ AR page COE000018

a speculative or insubstantial effect on the physical, chemical, or biological integrity of the Red River of the North. The decision is being remanded to document whether a significant nexus does indeed exist between the onsite wetlands and tributary and the Red River of the North for any of the attributes.

Based on the information contained in Reason #4 (a), (b), and (c), the AR does not provide sufficient documentation to establish a significant nexus between the expansion area wetlands and the Red River of the North based on the information provided.

The District speaks to the overall functions provided by stream headwaters, the similarly situated wetlands, and wetlands in general, within the review area. However, they do not speak to how the functions that the specific onsite wetland and tributaries have a significant nexus that is more than speculative or insubstantial on the chemical, physical, or biological integrity of the downstream TNW.

For the reasons stated above, I find that the appeal has merit since the District's AR does not support its determination that the subject property contains jurisdictional wetlands and waters. I am remanding the AJD back to the District for reconsideration in light of this decision. The District shall complete these tasks within 60 days from the date of this decision and upon completion, provide the Division office and appellant with its decision document and final AJD.

FOR  *COL, EN*
John W. Peabody
Major General, U.S. Army
Commanding