

**ADMINISTRATIVE APPEAL DECISION
CLEAN WATER ACT
MARY SHIELDS GOWER - FILE NO. POA-2009-00538
PROFFERED PERMIT
ALASKA DISTRICT**

Review Officer: Mike Vissichelli, U.S. Army Corps of Engineers, North Atlantic Division

Appellant: Mary Shields Gower

Permit Authority: Section 404 of the Clean Water Act (33 U.S.C. 1344 et seq.)

Receipt of Request for Appeal (RFA): December 18, 2012

Appeal Meeting Date: June 25, 2013

1. ACCEPTED REASONS FOR APPEAL. The U.S. Army Corps of Engineers (USACE) Pacific Ocean Division (POD) accepted the following reasons for appeal (RFA) submitted by Mary Shields Gower (Appellant) on December 18, 2012:

1.1 The Alaska District's (the District) decision omitted material facts.

1.2 The District's decision did not correctly apply the current regulatory criteria and associated guidance in determining that there are waters of the United States on the subject property.

2. SUMMARY OF DECISION. One of the Appellant's two reasons for appeal has merit. The administrative record (AR) does not contain substantial evidence to support the District's decision that the onsite wetlands are subject to Federal jurisdiction and regulation as waters of the United States under Section 404 of the Clean Water Act.¹ I am remanding the proffered permit back to the District for reconsideration in light of this decision.

3. BACKGROUND INFORMATION. The Appellant's property is located on the southwest side of the Richardson Highway in the Bradway-Clear Creek Community, North Pole, Alaska. In December 2010, the District issued an individual permit to Mr. Kevin Shields. The property was subsequently foreclosed upon and in April 2012 the permit was transferred to the Appellant. In June 2012, the Appellant provided the District with information that suggested the site is uplands. On October 22, 2012, the District revisited the site to confirm the presence of wetlands.² The District determined

¹33 United States Code (USC) 1344.

²AR, p. 43.

that, although the site had been previously disturbed, it still contained jurisdictional wetlands and that the June 1, 2009 AJD remained accurate.³

The original AJD said that the wetlands were not directly abutting a non-Traditional Navigable Water (TNW) in section III(B)(2)(i)(c).⁴ On June 15, 2012 the District revised the AJD with a note in this section confirming that the wetlands were directly abutting a non-TNW and the District, in error, previously noted the wetlands as not directly abutting the non-TNW.⁵ The District further supported this change with a memorandum for the record (MFR) dated June 20, 2012.^{6,7}

On June 25, 2012, the Appellant submitted an objection to the initial proffered permit regarding jurisdiction and compensatory mitigation requirements.⁸ In a July 26, 2012 e-mail the Appellant requested a change to the special condition in the initial proffered permit.⁹ On October 19, 2012 the District issued an MFR stating that wetlands have low functions and agreed to change the special condition from 1.5:1 compensatory mitigation to a 10-foot vegetated buffer on the east to west property line on the south side of the property.¹⁰ Appellant disagreed with the District's finding of jurisdiction in its objection but was informed that jurisdiction should be included in an administrative appeal. On October 22, 2012, the District issued a proffered permit with the Appellant's requested revision to the special condition.¹¹ The AJD associated with the proffered permit is the subject of this appeal.

4. INFORMATION RECEIVED DURING THE APPEAL AND ITS DISPOSITION.

4.1. The District provided a copy of the AR, which was considered in this appeal.

4.2. With the RFA, the Appellant provided documents containing its comments and analysis of the District's AJD. The submittals were accepted as clarifying information in accordance with 33 Code of Federal Regulation (CFR) 331.7 (f). The Appellant also provided flow measurements with the RFA that were not part of the AR¹² and therefore were not considered during this appeal.

³AR, p. 41.

⁴AR, p. 142.

⁵AR, p. 36.

⁶AR, p. 28.

⁷In the MFR it appears that the District incorrectly identified the section where the changes were made in the file as "section III D(4)" when it was actually III(B)(2)(i)(c). In addressing the remand, the District should correct the AR to accurately reflect where the changes were made.

⁸AR, p. 24-25.

⁹AR, p. 21.

¹⁰AR, p. 17-18.

¹¹AR, p. 5-14.

¹²The flow measurements are new information that the District did not have when it issued the AJD.

5. EVALUATION OF THE REASONS FOR APPEAL.

5.1 Appeal Reason 1: The District's decision omitted material facts.

5.1.1 Finding: This reason for appeal does not have merit.

5.1.2 Action: No action required.

5.1.3 Discussion: The Appellant contends that the District omitted material facts when it incorrectly characterized a manmade ditch, partially constructed in uplands that extends from the southern boundary of the site west to Channel B, as a Relatively Permanent Water (RPW).

The Appellant states that the District failed to demonstrate that a continuous surface connection exists between the onsite wetlands and a RPW or TNW. The Appellant predicates its argument upon its belief that the District called the onsite wetlands jurisdictional because they abut an unnamed ditch. The Appellant states that the ditch is not a RPW and that it cannot support a continuous surface connection to the nearest RPW (Channel B) because topographical changes that exist between the site and Channel B prohibit such a connection. The Appellant alleges that the District did not consider these facts in making its determination.

The AR does not use the ditch as a connection between the onsite wetlands and Channel B. The District was clear in its discussions at the appeal meeting that it was their finding that the onsite wetlands directly abut Channel B and that the ditch was not considered as part of that determination.

The Appellant is correct that the District did not consider whether the unnamed ditch is a RPW or if the ditch maintained a continuous surface connection between the onsite wetlands and Channel B. However, the status of the ditch is not relevant because the District never used the ditch to support its determination that the wetlands were subject to Federal jurisdiction and regulation as waters of the United States under Section 404 of the Clean Water Act.⁴ This reason for appeal does not have merit.

5.2 Appeal Reason 2: The District's decision was based on an incorrect application of policy, guidance, law or regulations.

5.2.2. Finding: This reason for appeal has merit.

5.2.3. Action: The District shall re-evaluate the permit decision, specifically the AJD upon which it is based. The District shall reconsider the AJD and provide clear

documentation, analysis and rationale, in the AR and on the AJD form, in accordance with the Rapanos Guidance¹³ and the Jurisdictional Determination Form Instructional Guidebook to support the AJD.¹⁴ The District's analysis shall address issues raised by the Appellant in the RFA regarding isolation because of topography and wetlands being adjacent to other wetlands. If the re-evaluation results in a modification of the AJD, the District shall revise the permit decision accordingly.

5.2.4. Discussion: The Appellant contends that the District did not clearly demonstrate, in accordance with existing regulation and policy, that the onsite wetlands abut a RPW. The Appellant argues that the wetlands at the site are isolated and are not subject to jurisdiction under the Clean Water Act.¹

In accordance with the *Rapanos* Guidance:¹²

Federal agencies will assert jurisdiction over relatively permanent non-navigable tributaries of traditional navigable waters without a legal obligation to make a significant nexus finding. In addition, Federal agencies will assert jurisdiction over adjacent wetlands that have a continuous surface connection with a relatively permanent, non-navigable tributary, without the legal obligation to make a significant nexus finding. The *Rapanos* plurality opinion and the dissent agree that such wetlands are jurisdictional. The plurality opinion indicates that "continuous surface connection" is a "physical connection requirement." Therefore, a continuous surface connection exists between a wetland and a relatively permanent tributary where the wetland directly abuts the tributary (e.g., the wetland and the tributary are not separated by uplands, a berm, dike, or similar feature).

The District determined that the site is a wetland based on site visits and analysis of National Wetland Inventory (NWI) maps, local USACE wetland mapping, NWI geographic information system (GIS) mapping and soil survey documentation.¹⁴ The District stated at the appeal meeting that the onsite wetland directly abuts Channel B which is a RPW.

Section III(D)(4) of the AJD form has two separate requirements for documentation to support the District's findings that the onsite wetland directly abuts a RPW that flows

¹³December 2, 2008 Joint Memorandum between the Environmental Protection Agency (EPA) and Department of the Army entitled "Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v United States & Carabell v United States*."

¹⁴AR, p. 28.

directly or indirectly into a TNW.¹⁵ Section III(D)(2) of the AJD form requires the District to provide data and rationale indicating that the tributary is perennial. Section III(D)(4) states that the District shall provide rationale indicating that the wetland is directly abutting a RPW.

The District stated in Section III(D)(2) of the AJD form that this section is “not applicable.” This response is not consistent with either the requirements of the form¹⁶ or the District’s assertion that Channel B is a perennial RPW.

In Section III(D)(4), the District stated that there is perennial flow in the wetland identified as POA-2009-00539, Channel B, and that, these findings are based upon “personal observation and aerial photos that show water in the B Channel year round.” Additionally, the District asserted that “the wetlands directly abut RPWs that flow directly or indirectly into TNWs.” In both cases, it appears the District referred to both the tributary (the RPW) and the wetland with the same name and did not provide a rationale to support its finding that the wetland is directly abutting the RPW, as the *Rapanos* guidance requires.

The District’s decision document states that “like most of the surrounding land, the project area is abutting wetlands to Channel B and/or adjacent to the Tanana River and classified as palustrine scrub shrub wetlands.”¹⁷ However, as with the previous example from the District’s AJD form, this conclusion lacks a rationale to support the finding that the onsite wetlands directly abut a RPW.

The Appellant does not dispute that the site contains areas that would meet the Corps’ definition of wetlands. However, the Appellant alleges that the wetlands do not directly abut Channel B, but are adjacent to wetlands that abut Channel B. At the site visit and in the RFA, the Appellant argued that there is an upland berm that separates the onsite wetland from the adjacent wetlands that abut Channel B and that this break in connection is supported by topography that shows the site is lower than its surrounding areas.

¹⁵The AJD form contained in the AR is from the USACE electronic data tracking system called ORM2. The cited directions are not on the printed out ORM form; see the original AJD form for referenced guidance.

¹⁶Based on the May 30, 2007 U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook, page 52: “If the RPW has perennial flow, complete only Section III.D.2 because a significant nexus finding is not required as a matter of law or policy. If the aquatic resource is a wetland directly abutting a RPW with perennial flow, complete Sections III.D.2 and III.D.4 because, as above, a significant nexus finding is not required as a matter of law or policy.”

¹⁷AR, p. 87.

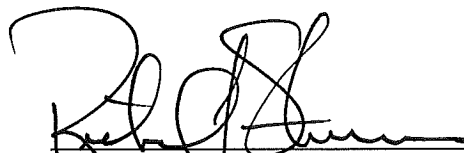
The Appellant alleges that the District took jurisdiction over wetlands that are adjacent to other wetlands, which is not allowable under the regulations.¹⁸ As stated above, it is not clear what the District's rationale was to support its determination that the onsite wetlands abut Channel B.

The AJD did not correctly apply the current regulatory criteria and associated guidance in determining that there are waters of the United States on the subject property. This reason for appeal has merit because the AR lacks the required rationale to support the District's assertion that the onsite wetland abuts Channel B and that Channel B is a RPW.

6. OVERALL CONCLUSION: I find that the first reason for appeal does not have merit while the second reason for appeal does have merit. I find that the AR does not contain substantial evidence to support the District's decision that the onsite wetlands are subject to Federal jurisdiction and regulation as waters of the United States under Section 404 of the Clean Water Act.⁴ I am remanding the proffered permit back to the District for reconsideration in light of this decision. The final USACE decision in this case will be the Alaska District Commander's decision made pursuant to my remand.

This concludes the administrative appeal process. The District shall complete these tasks within 90 days from the date of this decision and upon completion, provide this office and the appellant with its final decision document.

24 Jan 2014
Date


RICHARD L. STEVENS
Major General, USA
Commanding

¹⁸33 CFR 328.3(a)(7) says wetlands adjacent to waters (other than waters that are themselves wetlands) identified in 33 CFR 328.3(a) are jurisdictional.