

**ADMINISTRATIVE APPEAL DECISION  
CLEAN WATER ACT  
LANAI RESORTS, LLC – FILE NO. POH-2013-00035  
JURISDICTIONAL DETERMINATION  
HONOLULU DISTRICT**

**Review Officer (RO):** Mary Hoffman, U.S. Army Corps of Engineers, Northwestern Division, on behalf of Pacific Ocean Division (POD)

**Appellant:** Lanai Resorts, LLC (Appellant).

**Permit Authority:** Section 404 of the Clean Water Act (33 USC 1344 et seq.)

**Receipt of Request for Appeal (RFA):** July 29, 2013<sup>1</sup>

**Site Visit/Appeal Meeting:** October 3, 2013

Attendees at the site visit and informal appeal meeting included representatives of the Appellant: Ms. Lisa Bail, Goodsill Anderson Quinn & Stifel (Appellant's legal counsel), Mr. Jonathan Rivin, Dudnick Detwiler Rivin & Stikker (Appellant's legal counsel), and Cary Kondo, Belt Collins Hawaii, LLC (Consultant, Senior Project Manager, Civil/Sanitary Engineer). Representing the U.S. Army Corps of Engineers, Honolulu District (the District) was Ms. Jessie Paahana (Regulatory Project Manager); and representing the Division Engineer were Ms. Mary Hoffman, Administrative Appeal Review Officer (Northwestern Division), Ms. Cindy Barger, Regulatory Program Manager (POD), and Mr. Brian Smith, Division Counsel (POD).

**Summary of Appeal Decision:** The Appellant is challenging the District's approved Jurisdictional Determination (JD), which concluded Clean Water Act (CWA) jurisdiction over an unnamed channel located on the property of Lanai Resorts, LLC. The RFA cites 6 reasons:

- "There is no significant nexus because implementation of the 2004 *Drainage Master Plan* controls sediment transport to the ocean";
- "The District did not properly apply the criteria found in the 2008 Corps/EPA joint implementation guidance memorandum entitled, *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States and Carabell v. United States*, dated December 2, 2008";
- "The District changed its independent findings to support the [U.S. Environmental Protection Agency] EPA's unfounded request for a significant nexus determination";

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<sup>1</sup> POD received the initial RFA on July 22, 2013. The Appellant modified and resubmitted the RFA, which was received by POD on July 29, 2013.

- “The District acted arbitrarily and capriciously in reaching a conclusion counter to the evidence”;
- “The District reversed its position on jurisdiction based solely on EPA’s unsubstantiated conclusions”; and
- “Jurisdiction should not be exerted in the absence of an ordinary high water mark”.

Under this appeal, following review of the Administrative Record (AR) and clarifications provided by the District and Appellant during the site visit, it has been determined that the AR does not contain sufficient documentation to support a finding of Clean Water Act (CWA) jurisdiction pursuant to Section 404. Specifically, the AR does not sufficiently support the District’s finding that the unnamed channel is a water of the United States (WOUS). The AJD is remanded to the District Engineer for additional analysis, further consideration, and final action.

### **Background Information:**

The Appellant requested a determination of jurisdiction on February 4, 2013. The District notified the Appellant of its jurisdictional finding by letter dated May 24, 2013. The JD is a field determination, in which the District visited the site on April 17, 2013, prior to determining jurisdiction.

The Appellant submitted an initial RFA to POD on July 22, 2013. POD determined the RFA included new information<sup>2</sup> which the District did not consider under the JD evaluation. The Appellant was provided an option of withdrawing the RFA, and submitting the new information to the District with a request for a new JD evaluation. A second option was for the Appellant to modify the initial RFA to exclude the new information. The Appellant opted to modify, and resubmitted a redacted version of the RFA to POD July 29, 2013. POD determined the redacted RFA was acceptable and notified the Appellant in a letter dated August 5, 2013. The District provided copies of the AR to the RO and the Appellant on August 5, 2013.

The Appellant, Lanai Resorts, LLC is represented by Goodsill, Anderson, Quinn & Stifel, LLP, Ms. Lisa A. Bail, legal counsel, who serves as the primary point of contact on this administrative appeal of the JD. The subject water considered in the JD is an unnamed channel located near Manele Bay, on the Island of Lanai, Hawaii. The unnamed channel lies on the east side of the Four Seasons Resort Lanai at Manele Bay, on land owned by the Appellant

The District learned that a prior preliminary JD was completed for the subject channel in 2005 under POH-2005-234. Although the final 2005 preliminary JD document was not located, e-mail correspondence between the landowner’s

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<sup>2</sup> In accordance with 33 CRF 331.7(f), neither the appellant nor the U.S. Army Corps of Engineers may present new information not already contained in the AR at the time the decision was made.

consultant and the District indicate that a 2005 conclusion of non-jurisdiction of the unnamed channel was, in fact, reached. The previous landowner constructed a sediment retention structure in 2005-06 within the channel, upstream of the relevant channel reach, based on his understanding that the channel was not jurisdictional or regulated under CWA.

As a result of the *Rapanos* Supreme Court decision, the EPA and the U.S. Army Corps of Engineers (Corps), in coordination with the Office of Management and Budget and the President's Council on Environmental Quality, developed the memorandum entitled *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States*, dated June 5, 2007 and amended December 2, 2008 (Rapanos Guidance). The Rapanos Guidance requires the application of new standards, as well as a greater level of documentation to support an agency JD for a particular waterbody.

Under the current (2013) JD evaluation, the District's Approved Jurisdictional Determination Form (JD Form) contains the conclusion that the relevant reach, a 1483-foot unnamed channel, is a non-relatively permanent water (non-RPW) that flows directly into a traditionally navigable water (TNW). The unnamed channel is physically connected to the Pacific Ocean, at Manele Bay, a TNW. The JD Form states that the limits of jurisdiction could not be established because the ordinary high water mark (OHWM) could not be identified or inferred in the field on April 17, 2013. The JD form stated:

"Upstream of the given coordinate [the relevant reach of the unnamed channel] exists a man-made impoundment constructed in 2005/2006 to mitigate for recent flooding in the area (2002) after a negative pre-Rapanos JD was given for the gulch, allowing for the upstream fill. The basin volume is 6.8 acre feet and was designed for the 100-year flood/rain event."

It is noted that the unnamed channel is referred to as a "stream," "drainageway," "gulch," and "dry gulch" in various sections of the JD Form.<sup>3</sup>

According to the JD Form the channel within the relevant reach measures 40 feet wide, with an average depth of 15 feet. Substrate is composed of cobbles, sands, gravel and large 2-foot diameter boulders. Gradient is approximately 8%. Flow is characterized as ephemeral. However, it is noted elsewhere in the JD form that while there is a defined bed and bank there is no evidence of recent flow nor is an OHWM evident within the channel. Surface flow is characterized as, "confined with a defined bed and high banks that confine the flow within the stream. The upstream manmade impoundment prevents downstream flow as the retention basin can only lend to downstream flow to the adjacent TNW once it sustains enough flow to be overtopped." Subsurface flow is characterized as

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<sup>3</sup> The term "channel" is used in this appeal decision unless text from the AR is directly quoted.

“unknown,” noting that “there still exists the opportunity for subsurface flow as the retention basin is unlined and pervious, however, subsurface flow was not detected during the site visit.” The JD form stated that due to historic, now ceased, agricultural activities, “decades of pesticide and fertilizer use has infiltrated and is retained in the upland soils. . . topography directs surface runoff through the agricultural plateau which can solubilize and transport old pesticides and fertilizers through dry gulches around the island out to the ocean.” The JD form notes that there was, “no evidence of recent flow downstream of the sediment retention structure, therefore chemicals were prevented from reaching the ocean.” In reference to biological characteristics, the JD Form states, “the channel does not support aquatic wildlife at any lifestage because there is no flow under normal conditions.”

Current joint Corps/EPA CWA guidance requires interagency coordination of decisions declining jurisdiction and on April 23, 2013, the District coordinated its draft JD (which proposed to decline jurisdiction) with the EPA, Region IX office. Following receipt of EPA’s comments and non-concurrence with the draft JD, the District modified its conclusion to take jurisdiction and provided a final JD to Lanai Resorts, LLC maintaining that the subject channel “meets the significant nexus criteria and is a water of the U.S.”

During the appeal site visit the unnamed channel was observed at several points. Above the sediment detention structure the area appeared graded with fine dirt/gravel substrate and sporadic shrubs established within the bed and banks. Looking downstream from the detention structure, within the relevant reach, the channel substrate was composed of grouted riprap at the structure followed by boulders, cobbles, finer materials, and established shrubs and herbaceous vegetation. Downstream (at the footpath bridge) the channel exposed areas of bedrock with intermixed gravel, sand, cobbles and boulders as well as established shrubs and herbs. At the mouth, its confluence with the Pacific Ocean, the channel gradient flattened out and widened into a fan of sandy beach, with sporadic cobbles, to the ocean.

Minimal debris was randomly distributed, indicating an extended period without flowing water. There were no identifiable wrack lines or other physical indications of flowing water or of an OHWM. Observations of the density and composition of the vegetation bordering the channel and within the channel seem to suggest a lack of consistent flowing or standing water.

#### **INFORMATION RECEIVED AND ITS DISPOSITION DURING THE APPEAL REVIEW:**

The Division Engineer has the authority to consider appeal of this JD.<sup>4</sup> 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

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<sup>4</sup> 33 CFR §331.3(a)(2).

Engineer. Upon appeal of the District Engineer's decision, the Division Engineer or his delegate conducts an independent review of the AR to address the reasons for appeal cited by the Appellant. The AR 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 Code of Federal Regulations (CFR.) §331.7(f), no new information may be submitted on appeal by the Appellant or the District. 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 AR. Such interpretation, clarification, or explanation does not become part of the District's AR, 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 AR provides an adequate and reasonable basis to support the District Engineer's decision.

The District provided a copy of the AR to the RO and the Appellant on August 5, 2013. The RO determined that pages 21 – 47 should not be included as part of the AR because they were received after the District reached its decision. As a result, pages 21-47 were excluded from the appeal review.

The RO convened a site visit and informal meeting with representatives of POD, the Appellant, and the District. The RO circulated notes from the informal meeting, and provided an opportunity to participants to submit copies of their notes from the meeting for inclusion in the appeal record. This information was used in the appeal decision process.

#### **APPEAL EVALUATION, FINDINGS, AND INSTRUCTIONS TO THE HONOLULU DISTRICT ENGINEER:**

For purposes of evaluating this Appeal, the Appellant's stated reasons for appeal have been reordered, and/or consolidated.

**Reason for Appeal 1:** "Jurisdiction should not be exerted in the absence of an ordinary high water mark (OHWM)."

**Finding:** This reason for appeal has merit.

**Action:** The RFA is remanded to the District for additional analysis and further consideration.

**Discussion:** The District's AR for the JD states that an "OHWM could not be identified or inferred in the field on 17 April 2013"<sup>5</sup>. The AR also states, "[w]hile there is a defined bed and bank, recent flow to create an OHWM was not evident. There was a historic OHWM, as defined by shelving and scouring of the

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<sup>5</sup> AR Bates Stamp page 053.

bedrock and hard substrate. However, terrestrial woody vegetation and grasses have since taken root within the stream and does not lend to a change in vegetation from the bed to the top of the bank. There are pockets of fine sediments throughout the streambed that have accumulated and not been washed out; there was no evidence of recent flow within the drainageway."

According to Corps regulations, the term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.<sup>6</sup> Further, "the limits of jurisdiction of non-tidal waters, in the absence of adjacent wetlands, extend to the ordinary high water mark."<sup>7</sup>

The District's analysis revealed that although the channel exhibits a bed and bank, it lacks evidence of water flow and an OHWM. In the absence of an OHWM on a channel, and absence of abutting wetland, the extent of CWA jurisdiction cannot be established.

Further investigation and analysis of the channel is necessary to distinguish it as an erosional feature (i.e., gully) which lacks an OHWM, and thus is not a waterbody, or as an ephemeral stream which warrants further analysis under the Rapanos Guidance to determine whether the channel is a WOUS.<sup>8</sup>

As a result, this reason for appeal has merit and is remanded for further evaluation and consideration.

**Reason for Appeal 2:** "The Corps did not properly apply its own guidance criteria."

**Finding:** This reason for appeal has merit.

**Action:** The RFA is remanded to the District for further consideration.

**Discussion:** As stated above, the 2008 Rapanos Guidance<sup>9</sup> requires the application of new standards, as well as a greater level of documentation, to support an agency JD for a particular waterbody. The Rapanos Guidance provides a methodology to ensure CWA jurisdictional determinations are consistent with the Supreme Court decision in *Rapanos*.

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<sup>6</sup> 33 CFR 328.3(e)

<sup>7</sup> 33 CFR 328.4(c)(1)

<sup>8</sup> *U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook*, p.15-16

<sup>9</sup> The Rapanos Guidance.

The Corps and EPA assert jurisdiction over TNW and all wetlands adjacent to TNWs. CWA regulatory jurisdiction also includes relatively permanent waterbodies (RPW) that are not TNWs, if that waterbody flows year-round, or at least "seasonally," and wetlands adjacent to such waterbodies, if the wetlands directly abut the waterbody.

In addition, the agencies may assert jurisdiction over a waterbody that is not an RPW if that waterbody is determined (on the basis of a fact-specific analysis) to have a significant nexus with a TNW. Waterbodies that require a significant nexus determination include: (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 an RPW.

Per the findings under Reason for Appeal 1 above, the AR does not support the District's finding that the unnamed channel is a waterbody, hence a finding of jurisdiction based on a significant nexus determination is not relevant. However, should the District find, on remand, that the subject unnamed channel is a waterbody, its significant nexus determination would have a bearing on the CWA jurisdictional finding. Therefore, the significant nexus determination contained in the JD Form is being examined in this appeal.

The Districts significant nexus determination is:

"There exists a significant nexus between the unnamed drainageway and the downstream TNW when there is flow to support this connection which, under normal conditions, there is no flow (see Section III.B.ii(c)). Based on anecdotal information, I was informed the south side of the island of Lanai is generally dry and hot, with very few rain events, if any, per year. Based on the harbor master's experience with the region, she claims that the area actually used to receive significantly more precipitation than it has received in the past few years. Flooding occurred in 2003 when a 20-year rain event downpoured on the island. As a result, efforts to mitigate for flooding in the area were pursued and structures designed to capture and retain flows in some of the dry gulches. The subject drainageway was a recipient of these funds and a retention basin and culvert system was erected on the upstream end. The retention basin was designed for the 100-year flood event with a holding capacity of 6.8 acre feet bounded on the downstream end by an approximately 8-foot high concrete berm leading to three culverts conveying flow to the downstream natural drainageway. Based on the limited amount of precipitation on the island and specifically in the Manele area in conjunction with the large size and holding capacity of the upstream diversion, flow to the downstream drainegeway is almost, but not entirely, cut off.

“Based on an inspection of the site in April 2013, there was no evidence or indication of recent flow in the drainageway. Instead, the bed and banks supported upland tree species, there were large pockets of dirt and fine sediments that would have been washed out if there was flow, there were no traces of flow in the culverts, no staining, etc., supporting my determination that the manmade impoundment prevents down stream flow under normal conditions and it would require a moderate to heavy rain event to produce enough surface flow upstream to convey water downstream, beyond the retention basin.

“The land upstream of the dry gulch, where precipitation originates on the island, was once heavily manipulated for agricultural and pastoral [sic] purposes. Undoubtedly, after decades of pesticide and fertilizer use, trace amounts of pollutants may be detected in the soil. The topography of the island supports surface flow over the fallow fields, down the sea cliffs and/or dry gulches to the ocean. The surface flow certainly has the capacity to solubilize and transport pollutants from the agricultural fields downstream to the ocean. However, in the case of the subject drainageway, the upstream manmade impoundment has interrupted the normal flow patterns in the drainage channel and flow does not, under normal circumstances make its way out to the ocean through the subject drainageway. There is a potential for subsurface flow and conveyance and/or filtration of these pollutants to the ocean as the retention basin is unlined.

“During the site visit, there was no evidence of flow within the channel or indications of a sustained aquatic habitat within the drainageway that could support a portion of or the entire lifecycle of aquatic biota. The low elevation and heavy human traffic over and around the drainageway is not suitable habitat for endangered breeding and/or nesting seabird populations in the Pacific.

“While sparse, the area does sustain some vegetation and wildlife that could provide organic carbons and nutrients to the subject drainageway. Therefore, the subject drainage way could, with flow, transport organic carbons and nutrients to downstream foodwebs of the TNW. There is not [sic] evidence to suggest that the portion of the drainageway downstream of the manmade drainage basin sustains flow more than ephemerally.

Due to the downstream TNW and the low, but imminent precipitation in the area, the drainageway has a direct connection to the downstream TNW. However, with the construction of the massive diversion upstream, flow to the downstream TNW from the drainageway is interrupted. In addition, the small reach of the drainageway downstream of the diversion does not receive enough precipitation to support more than ephemeral flow, if any.”



But for an analysis of the flow conditions in the unnamed channel, the District has identified a potential source of pollutants (nutrients from historical agricultural use) as well as topographic and geographic features that contribute to a significant nexus with a TNW.

However, per the Rapanos Guidance, principal considerations when evaluating significant nexus include the volume, duration, and frequency of flow in a tributary and the proximity of the tributary to a TNW.<sup>10</sup> The Rapanos Guidance recognizes the importance of documenting whether the tributary and its adjacent wetlands have a significant nexus rather than a speculative or insubstantial nexus with a TNW.<sup>11</sup> Likewise, it is increasingly important to document a significant nexus when the hydrologic connection is minimal or in question. The District's analysis of the hydrologic connection has not met the standard that the nexus not be speculative or insubstantial.

This reason for appeal has merit and is remanded for further evaluation and consideration.

**Reason for Appeal 3:** "There is no significant nexus because implementation of the Drainage Master Plan controls sediment transport to the ocean."

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

**Action:** No further action is required.

**Discussion:** The action under appeal at this point is the District's JD regarding the subject channel, and is limited to determining whether the channel is subject to CWA regulation. The presence of the sediment retention structure (as a component of the Drainage Master Plan) does not have a direct bearing on the JD. Further, the presence of an impoundment structure or any man-made barrier does not affect CWA jurisdiction over WOUS.<sup>12</sup>

This reason for appeal does not have merit.

**Reason for Appeal 4:** Combines the reasons cited by the Appellant in the RFA pertaining to coordination of the draft JD between the District and the EPA, as follows:

- The Corps changed its independent findings to support the EPA's unfounded request for a significant nexus determination,

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<sup>10</sup> U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook, p.16.

<sup>11</sup> *Id.* p.16-17.

<sup>12</sup> U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook.

- The District reversed its position on jurisdiction based solely on EPA's unsubstantiated conclusions; the EPA's considerations are based on erroneous factual assumptions.

**Finding:** This reason for appeal has merit.

**Action:** The decision is remanded to the District for additional analysis and reconsideration.

**Discussion:** Coordination procedures adopted in June 2007 require consultation with EPA on jurisdictional determinations under Section 404 of the CWA. Also, a January 1989 (and 1993 amendment) EPA/Corps Memorandum of Agreement concerning the determination of geographic jurisdiction under the Section 404 Program states that "in making their determinations, the Corps and EPA will adhere to the '*Corps of Engineers Wetlands Delineation Manual*' (Waterways Experiment Station Technical Report Y-87-1, January 1987) and EPA guidance on isolated waters, and other guidance, interpretations, and regulations issued by EPA to clarify EPA positions on geographic jurisdiction and exemptions.

The District followed the coordination procedures according to current guidance but during the appeal site visit the District confirmed that they based their final jurisdictional determination on EPA's comments and that the District deferred to EPA without conducting additional analyses or otherwise confirming the EPA's assertions. In the absence of EPA electing to make the final jurisdictional determination as a "Special Case," the Corps has the ultimate responsibility to adequately document its determination. Upon remand, the comments received from the EPA should be evaluated and, if the Corps concurs, should be adequately incorporated into the Corps' documentation to support the Corps' final JD.

As a result, this reason for appeal has merit and is remanded for further evaluation and consideration.

**Reason for Appeal 5:** "The Corps acted arbitrarily and capriciously in reaching a conclusion counter to the evidence."

**Finding:** This reason for appeal has merit.

**Action:** The decision is remanded to the District for additional analysis and reconsideration.

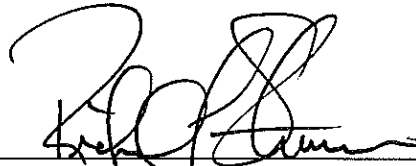
**Discussion:** As stated above under Reason for Appeal 1, the District Engineer does not provide adequate support in the AR for his conclusion that the unnamed channel is a waterbody. Furthermore, per the findings under Reason for Appeal 2 above, the AR does not support CWA jurisdiction through significant nexus.

The District's analysis of a hydrologic connection (including volume, duration, and frequency of the flow of water) has not met the standard that the nexus not be speculative or insubstantial. As a result, I find that this reason for appeal has merit and the decision must be remanded to the District Engineer for further evaluation and consideration.

**OVERALL CONCLUSION:** After reviewing and evaluating the RFA, the District's AR, and the site visit, I have determined that the third reason does not have merit while the reasons for appeal one, two, four and five have merit. I find that the AR does not sufficiently support the District's JD and the appeal has overall merit. I am remanding the JD to the District for further clarification and evaluation. The final Corps decision in this case will be the Honolulu District Engineer's decision made pursuant to my remand.

*25 November 2013*

Date



RICHARD L. STEVENS  
Brigadier General, USA  
Commanding