ADMINISTRATIVE APPEAL DECISION

DAVID SULLIVAN

FILE NO. SAM-2011-1242-LET

MOBILE DISTRICT

2 AUGUST 2012

Review Officer: Jason Steele, U.S. Army Corps of Engineers, South Atlantic Division (SAD)

Appellant: David Sullivan

Date of Receipt of Request for Appeal: 4 January 2012

Acceptance of Request for Appeal: 7 February 2012

Appeal Meeting: 28 February 2012

Authority: Section 404 of the Clean Water Act (CWA) (33 U.S.C. § 1344)

SUMMARY OF DECISION

Appellant's request for appeal (RFA) does not have merit. The administrative record (AR) substantiates the District's determination that the subject wetlands have a significant nexus to the nearest downstream Traditional Navigable Water (TNW), as required by the *U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook* (6/1/2007) ("JD Guidebook"), and the EPA/Army Memorandum, *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States* (2 December 2008) ("Rapanos Memorandum").

BACKGROUND

David Sullivan (Appellant) is appealing the Mobile District's (District) 4 November 2011 decision to assert jurisdiction over 15.6 acres of wetlands on his property, located east of U.S. Highway 43 in the northeast corner of the intersection of Highway 43 and Bates Lake Road, Latitude 31.19315° North / -88.00961° West, Malcolm, Washington County, Alabama.

The District contends that the onsite wetlands (15.6 acres) are adjacent (directly abutting) to a relatively permanent water (RPW) that flows directly into a TNW.

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

The appellant does not dispute the wetlands determination on his property. However, he does dispute the connectivity of the onsite wetlands to the northern, west to east flowing, offsite tributary. In addition, the appellant disputes the significant nexus of the west to east flowing, offsite tributary that the wetlands on his property flow into. In particular, the appellant believes the evidence establishing a significant nexus is speculative and insubstantial.

INFORMATION RECEIVED DURING THE APPEAL AND ITS DISPOSITION

1. The District provided a copy of the administrative record, which was reviewed and considered in the evaluation of this request for appeal.

2. The appellant supplied supporting documentation at the time of submittal of the RFA.

APPELLANT'S REASON FOR APPEAL

The appellant disputes the connectivity of the onsite wetlands to the northern, west to east flowing, offsite tributary. In addition, the appellant disputes the significant nexus of the west to east flowing, offsite tributary that the wetlands on his property flow into. In particular, the appellant believes the evidence establishing a significant nexus is speculative and insubstantial.

EVALUATION OF THE REASON FOR APPEAL, FINDING, DISCUSSION, AND ACTION FOR THE MOBILE DISTRICT COMMANDER

Appeal Reason: The appellant disputes the connectivity of the onsite wetlands to the northern, west to east flowing, offsite tributary. In addition, the appellant disputes the significant nexus of the west to east flowing, offsite tributary that the wetlands on his property flow into. In particular, the appellant believes the evidence establishing a significant nexus is speculative and insubstantial.

Finding: This reason for appeal does not have merit.

Discussion: In *Rapanos v. United States*, 547 U.S. 715 (2006), the United States Supreme Court addressed the question of the circumstances under which a wetland or tributary is a "water of the United States" within the meaning of the CWA. The *Rapanos* decision included five opinions, with no single opinion commanding as majority of the court. The U.S. Army Corps of Engineers and Environmental Protection Agency issued guidance in response to the *Rapanos* decision. The December 2, 2008, "Clean Water Act Jurisdiction Following the Supreme Court Decision in Rapanos v. United States and Carabell v. United States" ("Revised Guidance") provides that "[w]here there is no majority opinion ..., controlling legal principles may be derived from those principles espoused by five or more justices." As a result, "regulatory jurisdiction under the CWA exists over a water body if either the plurality's or Justice Kennedy's standard is satisfied." Revised Guidance, p. 3. This is sometimes referred to as the "two test" approach. The plurality's test (Plurality Test) extends the Corps regulatory authority "only to 'relatively permanent, standing or continuously flowing bodies of water' [referred to as "RPWs"] connected

to traditional navigable waters [TNWs], and to 'wetlands with a continuous surface connection to' such relatively permanent waters." Justice Kennedy's test (Kennedy Test) 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 traditional navigable waters [TNWs]." Revised Guidance, pp. 1 – 3.

However, the Plurality Test may no longer be used to establish jurisdiction in the states of the 11th Circuit. The 2007 decision of the 11th Circuit Court of Appeals in *United States v. Robison*, 505 F.3d 1208 (11th Cir. 2007), cert. denied sub nom, *United States v. McWane, Inc.*, 129 S.Ct. 627 (Dec. 1, 2008) disagreed with this "two-test approach" where jurisdiction may be found under the CWA if either the Plurality or Kennedy Tests is satisfied. Instead, the 11th Circuit held that it was Justice Kennedy's 'significant nexus' test which provides the "governing rule of *Rapanos*" and "governing definition of 'navigable waters' under *Rapanos*." The *Robison/McWane* Court further noted Justice Kennedy's determination that "a 'mere hydrologic connection' between a wetland and a navigable-in-fact body of water would not necessarily be sufficiently substantial to meet his "significant nexus" test." Under the rule of the *Robison/McWane* decision, the Plurality Test may no longer be used to establish jurisdiction in the states of the 11th Circuit. The Revised Guidance, p. 3, n. 16, recognizes that "the Kennedy standard is the sole method of determining CWA jurisdiction in [the Eleventh] Circuit."

The Rapanos Memorandum, page 1, states: "A significant nexus analysis will assess the flow characteristics and functions of the tributary itself and the functions performed by all wetlands adjacent to the tributary to determine if they significantly affect the chemical, physical and biological integrity of downstream traditional navigable waters." And, "[s]ignificant nexus includes consideration of hydrologic and ecologic factors."

The JD Guidebook, page 7, states: "A significant nexus exists if the tributary, in combination with all of its adjacent wetlands, has more than a speculative or an insubstantial effect on the chemical, physical, and/or biological integrity of a TNW."

The District identifies, under Section III.B.1.(ii)(a) of the "Approved Jurisdictional Determination Form" (JD Form), dated 3 November 2011, the flow route to the TNW as follows: "Sheetflow runoff and groundwater seepage from the wetlands on the jurisdictional (JD) site flow in a northerly direction into a west-east flowing wetland drain and unnamed tributary running along north side of property off JD site. This wetland drain and tributary flow into a south-north flowing drainage ditch running roughly parallel to railroad tracks east of the property on west side of the tracks. The ditch along west side of railroad tracks flow directly into perennial Bates Creek which flows in a northeasterly direction converging with perennial Bilbo Creek which flows easterly into the Section 10 TNW Tombigbee River."

Section II.B.1 of the JD Form indicates the presence of waters of the U.S. in the review area as, "Wetlands directly abutting RPWs that flow directly or indirectly into TNWs."

Characteristics of the west-east flowing tributary is described under Section III.B.1., of the JD Form, as follows:

Physical Characteristics - Flow regime was described as: "Tributary has a perennial flow (20 or greater events/year) regime driven by both rainfall runoff and natural elevation of the groundwater table within the soil. This tributary is not documented on available mapping sources such as road maps, USGS topographic quadrangle maps, or FEMA maps and is not a waterway routinely monitored with gauge equipment. Therefore, flow regime was based on a single 26 September 2011 observation of the tributary in which flow was observed to exist despite abnormally dry conditions during the spring and early summer (through June) and since rainfall received during Tropical Storm Lee (September 2-5, 2011). On 26 September the tributary contained flowing water. No routinely tracked flow data, such as USGS gauge station data, is available for the tributary to Bates Creek."

Surface flow is described as, "discrete and confined" with the following characteristics: "The unnamed tributary originates on the west side of U.S. Hwy. 43 as a discrete wetland drain that flows throught the northwest corner of the JD site. The wetland drain has water drainage patterns through the wetland as well as drift deposits and water stained leaves. Further down the drainage to the east an observable confined bed and bank channel has formed within the wetland. The riparian corridor along the channel consists of both upland and wetland land areas that contribute overland sheet flow to the tributary, evidenced by scour channels in the tributary banks where water flows from the ground surface at top of bank down into the channel."

An ordinary high water mark (OHWM) was identified within this tributary.

Chemical Characteristics – "The water flowing in the tributary under tree canopy on the date of field evaluation was clear with no oily film and no turbidity or discoloration other than some slight orangish-brown coloration resulting from presence of tannins that occur due to natural leaching from decompostion of detritus in the slightly acidic water and soils that occur in south Alabama. The water flowing in the portions of the ditched tributary that were not under tree canopy was also clear with the orangish-brown tannin coloration but also has areas of very red-orange coloration along banks and around shallow, partially exposed bars in the channel as a result of iron leaching naturally from the soils as well as the probable microbial activity of naturally occurring iron-fixing bacteria. There are no known pollutants to the tributary other than potential for sediment, petroleum products, or fertilizer/herbicide/pesticide from adjacent residential and commercial properties and roadways to be present in stormwater runoff that makes its way into the tributary."

Biological Characteristics – "Mixed hardwood forest and pine wetland and upland riparian corridor along the tributary to Bates Creek located just above the north property line of the JD site. Riparian corridor along the west-east flowing portion of tributary consists of a mix of natural hardwood and pine forest vegetative cover as well as cut-over pine plantation approximately 3+/- years into unmanaged succession and regeneration. The west-east portion of the tributary has an approximately 265+ foot wide natural, undeveloped forest vegetated riparian buffer (approximately 130 feet on each side of channel). The south-north ditched portion of the tributary has no riparian buffer along its east bank due to the presence of the railroad track and right-of-way maintained with a cover of gravel and very small riprap. Along the west bank the riparian buffer ranges from an approximately 65 foot wide natural mixed hardwood and pine upland forest strip between the railroad and residential property to an approximately 2,000 foot wide corridor between Hwy 43 and the railroad composed of hardwood dominated wetlands with scattered upland hummocks which is also the floodplain of Bates Creek. The tributary as a whole conveys the organic carbon and nutrients from bacterial breakdown of wetland and upland plant material downstream to the resident amphibians and aquatic invertebrates, and aquatic and terrestrial vertebrates spawning, foraging, seeking shelter from predators, and/or residing permanently in the stream and adjacent riparian lands. Additionally, having an undeveloped forested area along both banks, the west-east portion of the tributary provides a water source as well as vegetative cover and food sources for resident amphibians, aquatic invertebrates, and aquatic and terrestrial vertebrates to spawn/reproduce, nest, forage, and seek shelter from predators. The northern portion of the south-north ditched tributary, along the wetlands in the floodplain of Bates Creek, has greater water volume and flow than the southerly portion, and being more proximal to Bates Creek, has greater ability to function as a nursery and refuge area for fish as well as providing transport of organic carbon and a source for water, food and cover for resident amphibians, aquatic invertebrates, and aquatic and terrestrial vertebrates to spawn/reproduce, nest, forage, and seek shelter from predators."

Characteristics of the onsite wetlands (15.6 acres) are described under Section III.B.2., of the JD Form, as follows:

Physical Characteristics – "Wetland area is a mosaic of bedded pine plantation that is experiencing some pine regeneration and bay-gum-poplar hardwood regeneration. Wetland area was likely a hardwood dominated wetland prior to the planting of pine trees to establish a silviculture activity. Medium to low quality wetlands that have been adversely affected by past bedding practices used on the property to be able to get the roots of pine seedlings above excessively wet soils and establish pine plantation. The bedding has created unevenly distributed hydrology through the wetland by creating the elevated beds which are becoming less wet and furrows between the beds which are more wet and even hold standing water in some areas on the property. The JD site wetlands contribute

flow of surface water to the tributary to Bates Creek in direct response to water received in precipitation events and/or when depth to the seasonal high water table is sufficiently high for the wetlands to be inundated and flow out to the tributary. During precipitation events, direct precipitation to the wetland and water running off from surrounding lands and roadways flows into the wetland where it is absorbed into the ground and utilized by plants, evaporates to the atmosphere, and sheetflows into the off-site tributary and downstream to Bates Creek. No subsurface flow evaluation was performed. The wetlands are directly abutting a non-TNW. The wetlands are 2-5 river miles from the TNW. The wetlands are located within the 500-year, or greater, floodplain."

Chemical Characteristics – "A few areas within the delineated wetland did exhibit inundation on the date of field evaluation. The standing water in these locations was clear and had orangish-brown coloration resulting from presence of tannins that occur due to natural leaching from decompostion of detritus in the slightly acidic water and soils that occur in south Alabama. There are no known pollutants to the wetlands other than potential for sediment, petroleum products, or fertilizer/herbicide/pesticide from adjacent commercial properties and roadways to be present in stormwater runoff that makes its way into the tributary."

Biological Characteristics – "JD site wetlands are a componed of the riparian buffer of the tributary to Bates Creek just above the north property line of the site. Wetland area supports hardwood trees and saplings, pine trees, and shrub, vine and fern species such as Magnolia virginiana (FacW), Quercus nigra (Fac), Nyssa biflora (Obl), Liquidambar styraciflua (Fac), Acer rubrum (Fac), Liriodendron tulipifera (Fac), Pinus elliottii (FacW), Cyrilla racemiflora (FacW), Cliftonia monophylla (Obl), Ilex coriacea (FacW), Ilex glabra (FacW), Rubus betulifolius (Fac), Gelsemium sempervirens (Fac), Chasmanthium laxum (FacW), Woodwardia areolata (Obl), Osmunda regalis (Obl), and Osumnda cinnamomea (FacW). The JD site has approximately 85% total vegetative cover. The JD site wetlands provide support for wildlife diversity. Vegetation within the wetland includes vines and trees that produce berries and nuts which can be used as a food source by numerous wildlife species including deer, raccoons, rabbits and other rodents, and birds. Small animals were heard moving in the groundcover on the site during field review and rabbit scat was observed on several tree stumps throughout the site. The wetland area provides vegetative cover and food sources, as well as a source of water for resident amphibians and reptiles, aquatic invertebrates, and terrestrial vertebrates allowing them to use the area for spawning/reproduction, nesting, foraging, and/or seeking shelter from predators."

The physical, chemical, and biological characteristics of the similarly situated wetlands (3 wetlands equaling 79.6 acres total) are described under Section III.B.3., of the JD Form, as follows:

"The three similarly situated wetland areas adjacent to the unnamed tributary being considered in this cumulative analysis include: approximately 1 acre of herbaceous wetlands (forested prior to past land clearing) on the west side of U.S. Hwy. 43 adjacent to a restaurant facility located at the head/origin of the wetland drain which extends through the northwest corner of the JD site, approximately 18.6 acres of forested wetlands on JD site and adjacent residential lots to the north in which the tributary flow originates, and 60 acres of forested wetlands in floodplain of Bates Creek which also abut and contribute water flow to the ditched portion of the tributary on the west side of the railroad track. This wetland and tributary system provides a source of water recharge Bates Creek and downstream tributaries, it provides capacity to receive, retain and treat, and convey stormwater and precipitation to downstream wetlands and tributaries, and provides treatment of pollutants including removal of sediment and and sequestration of chemical and petroleum contaminants through natural fixing processes of bacteria in the soil. Decomposition of detritus and other organic matter from plants and wildlife also provides nutrients and organic carbon for use by wildlife and fish in the downstream food web of Bates and Bilbo Creek and the Tombigbee River. Wetlands abutting the tributary also provide natural lands with vegetative cover, food sources, and access to a water source where wildlife may rest, forage, nest, reproduce and seek refuge from predators."

The rationale that the onsite (15.6 acre) wetlands are directly abutting the west-east flowing offsite tributary is described under Section III.D.4., of the JD Form, as follows:

"The wetlands on the JD site contain discrete wetland drainages that flow directly into the tributary to Bates Creek which is located just above the north property line of the site. The wetlands within the review area and are not physically separated from the tributary by upland berms, roadways or other physical barriers that would interfere with or prevent hydrology from the wetland from flowing to the off-site tributary. See Section III D 2 above regarding perennial RPW Further Nexus discussion addressing 11th Circuit Court decision from United States v. McWane case concluding that Justice Kennedy's "significant nexus" test provides the governing rule of Rapanos: The wetlands and perennial RPW, including the ditched portion of the RPW along the railroad tracks, receive direct precipitation and runoff water from adjacent undeveloped natural buffer lands, residentially developed lands, commercially developed lands west of U.S. Hwy. 43, silviculture lands, roadways and railroad right-of-way. The perennial-RPW in combination with its directly abutting palustrine forested wetlands have a significant nexus to the downstream RPWs and TNW by providing 1)- shading of the perennial-RPW helping prevent/reduce increase of water temperature in waters feeding into downstream RPWs and TNWs helping to keep these waters more habitable to aquatic wildlife and reducing the potential for in-stream algal blooms or growth spikes that often result from increased light exposure and water temperature 2)- a groundwater discharge source/contributing source of water

recharge to Bates Creek and other downstream waterbodies 3)- provide capacity to receive, retain and treat rainfall run-off by providing a buffering wetland area where the roughness created by vegetative cover allows sediment and trash picked up in runoff to settle out of the water column prior to entering the downstream tributary system and TNW. Bacteria in the wetland soils also provide natural removal of chemical contaminants such as petroleum based products from roadways and fertilizers, pesticides, and herbicides that is picked up in stormwater run-off after application in surrounding residential yards, small residential garden plots, commercial landscaping, and road rights-of-way. Once oxygen in the soil is exhausted, bacteria in the soil use water in the soil pore spaces containing these contaminants to generate the energy they need to survive and in this process chemically breakdown these contaminants and fix the by-products in the soil reducing their concentration in downstream waterways and making these contaminants less accessible to fish and other animals in the food web. 4)- Bacterial and fungal decomposition of detritus and other organic matter (e.g. dead animals, fecal material, etc.) are conveyed from the wetlands by the perennial-RPW flow supplying nutrients and organic carbon to the downstream waters for use by wildlife and fish in the downstream aquatic system and food web 5)- the perennial-RPW drainage and its abutting wetlands and undeveloped uplands provide a wildlife habitat corridor between the JD site and Bates Creek that provides access to a source of water and forested habitat for resting, nesting, refuge, and foraging for amphibians, reptiles, birds, and small to large mammals that reside permanently in and/or periodically utilize the system of streams, wetlands, and uplands surrounding Bates Creek."

Based on the JD Guidebook and Rapanos Memorandum concerning how to document wetlands directly abutting RPWs that flow directly or indirectly into TNWs (and the 11th Circuit Court Decision "McWane"), it is found that the District adequately and appropriately documented the jurisdiction in this case.

Action: None required.

CONCLUSION

For the reasons stated above, I find that the appeal does not have merit. The District's administrative record contains substantial evidence to support the District's determination that the subject wetlands have a significant nexus to the nearest downstream TNW. The District's determination was not otherwise arbitrary, capricious or an abuse of discretion, and was not plainly contrary to applicable law, regulation, Executive Order, or policy. The administrative appeals process for this action is hereby concluded.

Donald E. Jackson, Jr.
Colonel, US Army
Commanding