

ADMINISTRATIVE APPEAL DECISION

GEORGE NEWELL

FILE NO. SAC-2007-1277

CHARLESTON DISTRICT

9 December 2013

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

Appellant: George Newell

Date of Receipt of Request for Appeal: 5 August 2013

Acceptance of Request for Appeal: 30 August 2013

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

SUMMARY OF DECISION

Mr. George Newell's (Appellant) request for appeal (RFA) does not have merit. The administrative record (AR) substantiates the determination made by the U.S. Army Corps of Engineers (Corps), Charleston District (District) that there are wetlands present and they are adjacent to, but not directly abutting, a relative permanent water that flows directly into a traditional navigable water (TNW). In addition, while not required by law but required by policy, the District documented that the subject wetlands have a significant nexus to the nearest downstream TNW, as required by the *U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook* (30 May 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

By letter dated 1 August 2012, the Appellant requested a wetland determination for an approximate 4-acre property. On 3 December 2012, the District issued an approved jurisdictional determination (AJD) to Appellant for his property located on the south side of U.S. Highway 17A, just west of the Town of Moncks Corner in Berkeley County, South Carolina. Appellant disagreed with this determination and on 24 January 2013, the South Atlantic Division received his RFA of the District's December 2012 AJD. Appellant's RFA was accepted on 15 April 2013, and an appeal meeting/site visit was conducted on 14 May 2013.

Representatives of the South Carolina Department of Transportation (SCDOT) were asked to participate in the May 2013 appeal meeting to address Appellant's concern that road construction on U.S. Highway 17A has altered water flow from his property. During the site visit, SCDOT representatives pointed out physical changes to the area that resulted from the road widening project, to include the removal of a culvert that previously conveyed water from Appellant's property into a roadside ditch. SCDOT representatives discussed how these changes altered the drainage pattern along the highway while the group inspected the potential pathway of water along U.S. Highway 17A and locations downstream. Based on this new information, the District determined it needed to re-evaluate the December 2012 AJD and, on 20 June 2013, the District issued a new AJD for the Appellant's property.

The 20 June 2013 AJD is an appealable action and supersedes the 3 December 2012 AJD. In accordance with Corps regulations at 33 C.F.R. § 331.5(b)(7), a previously approved JD that has been superseded by another approved JD based on new information is no longer an appealable action. Accordingly, Appellant's January 2013 RFA and the associated appeal proceedings are moot.

The District's June 2013 AJD states that the current flow pathway differs from the pathway described in its previous AJD (see p. 9). The District acknowledges the current flow pathway is a result of ditch and drainage system alterations associated with the SCDOT project along U.S. Highway 17A, including portions of that project to which Appellant's property is contiguous. Based on its June 2013 AJD, the District asserts that there are wetlands on Appellant's property and they are adjacent to, but not directly abutting, a relatively permanent water that flows directly into a TNW and are therefore subject to jurisdiction under the CWA.

Appellant disagrees with the District's June 2013 AJD and submitted a new RFA dated 22 July 2013, that was received by this office on 5 August 2013. Appellant's new RFA listed four reasons for appeal, with the first basis being all of the reasons originally submitted in his 24 January 2013 RFA, as clarified by Appellant on 21 March 2013. Appeal reasons 2-4 concern the appeal meeting procedures and allege a disregard of the Corps' rules during the initial appeal and disregard of the law as set forth in the Supreme Court's *Rapanos* decision. The Appellant's reasons for appeal are stated below.

INFORMATION RECEIVED DURING THE APPEAL AND ITS DISPOSITION

1. The District provided a copy of the AR, which was reviewed and considered in the evaluation of this RFA.
2. The Appellant provided supporting documentation with his submittal of the RFA.

APPELLANT'S CLARIFIED REASONS FOR APPEAL 1-4

Reason 1: Appellant's first reason for appeal specifically incorporates the nine reasons for appeal that he originally submitted in his 24 January 2013 RFA, as clarified by Appellant on 21 March 2013. For clarity of discussion and without any substantive changes, these nine reasons for appeal have been re-designated as appeal reasons 1.a through 1.e.

Reason 1.a: The tributary (ditch), on the property, is a ditch that was excavated wholly in and draining only uplands and does not carry a relatively permanent flow of water. As per the Supreme Court decision in *Rapanos v. United States*, these features are not jurisdictional. In addition, the ditch, across the property, is a "man-made ditch" (draining through uplands) and not a "man-altered tributary" (dug/realigned of a natural tributary).

Reason 1.b: The tributary (ditch), on the property, does not connect to the downstream pond. Even if there was a connection, what would be going into the pond (from the property) is no worse than what is already coming out of the pond and going downstream.

Reasons 1.c: The property has been altered by a rare, unnatural situation (illegally dug ditch). As per the 5 June 2007 Questions and Answers for the *Rapanos* and *Carabell* Decision (page 3 (7. A., point 2)), "Unless an area has been altered or is a rare natural situation, wetland indicators of all three characteristics must be present during some portion of the growing season for an area to be a wetland."

Reasons 1.d: There is selective enforcement of CWA violations in the Charleston District.

Reason 1.e: Based on the Supreme Court decision in *Rapanos v. United States*, the approximate 4-acre property does not have a significant nexus with the downstream traditional navigable water (TNW).

Reason 2: Objection to appeal meeting procedures.

Reason 3: Obvious disregard of Corps rules applied in processing the original appeal (that is, the 24 January 2013 RFA).

Reason 4: Obvious disregard for law as stated in the majority opinion of the Supreme Court decision in *Rapanos v. United States* and *Carabell v. United States*.

EVALUATION OF THE REASONS FOR APPEAL, FINDINGS, DISCUSSION, AND ACTIONS FOR THE CHARLESTON DISTRICT COMMANDER

Appeal Reason 1.a: The tributary (ditch), on the property, is a ditch that was excavated wholly in and draining only uplands and does not carry a relatively permanent flow of water. As per the Supreme Court decision in *Rapanos v. United States*, these features are not jurisdictional. In addition, the ditch, across the property, is a "man-made ditch" (draining through uplands) and not a "man-altered tributary" (dug/realign of a natural tributary).

Finding: This reason for appeal does not have merit.

Discussion: With the exception of the facts regarding the ditches draining uplands only versus uplands and wetlands, the District and Appellant reached similar conclusions regarding the jurisdictional status and geographic position of the subject ditches within the landscape. The District's AR (20 June 2013, AJD Form; Section II.B.2.) supports the District's conclusions that there are two ditches which were largely, but not entirely, excavated in uplands; the wetlands and uplands drain through both of the ditches; the ditches do not carry relatively permanent water flow; and the portions of the ditches excavated outside of the wetlands are not jurisdictional. As explained below, the fact that the ditches are not RPWs does not undermine the District's conclusion that the wetlands are jurisdictional.

More specifically, the District concluded in its AJD that Appellant's property includes two linear conveyance features (ditches) which were excavated in uplands, with a portion of one of the ditches having been excavated within the wetland. Consequently, one of the ditches was not excavated wholly in uplands, and the District determined that the portion of the one ditch that was excavated within the wetland is part of the wetland and shares the same jurisdictional status.

The non-jurisdictional determination regarding the ditches that were excavated in uplands does not by itself negate the District's conclusion that there are jurisdictional wetlands on Appellant's property. To the contrary, the District's determination that the ditches are non-jurisdictional (except for the portion that was excavated through wetlands) was a consideration in the District's analysis. The District classified the onsite waters as being in the category of "[w]etlands adjacent to but not directly abutting RPWs that flow directly or indirectly into TNWs" (Section II.B.1.a.). The District documented that the wetlands drain via the mostly non-jurisdictional ditches to a RPW (unnamed tributary) which flows into a TNW (specifically, the Cooper River). Accordingly, the District substantiated that the ditches, both on Appellant's property and along Highway 17A, contribute to a surface hydrologic connection between the wetland on Appellant's property and a TNW, via the RPW.

As the JD Guidebook (Section III.C., p. 54) explains,

... 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 U.S. because they are not tributaries or they do not have a significant nexus to a TNW. Even when not themselves, waters of the U.S., these geographic features (e.g., swales, ditches) may still contribute to a surface hydrologic connection between an adjacent wetland and a TNW.

As explained above, the District documented that the ditches contribute to a continuous, surface hydrologic connection between the wetland and the downstream TNW.

Action: None required.

Appeal Reason 1.b: The tributary (ditch), on the property, does not connect to the downstream pond. Even if there was a connection, what would be going into the pond (from the property) is no worse than what is already coming out of the pond and going downstream.

Finding: This reason for appeal does not have merit.

Discussion: The District concluded that the two ditches connect to an unnamed RPW which flows directly into the Cooper River, a TNW. The District documented the presence of an impoundment, evaluated the effect of the impoundment on the hydrologic connection between the RPW and TNW, and concluded that the impoundment does not sever the connection between the RPW and the TNW. Furthermore, the AR documents the District's assessment of the water quality under the significant nexus portion (Section III.C.3.) of the AJD. Even if Appellant's statement was factually accurate and the water quality of the RPW as it flows into the impoundment is the same as the water quality flowing out of the impoundment, this fact would not negate or sever the documented hydrologic connection nor would it conflict with the District's conclusions regarding the cumulative positive effects of the wetlands on the water quality of the RPW and TNW (that is, they act as filters, etc.).

In its AJD, Section III.B.1(ii)(a), the District described the flow route (from the onsite wetlands to the downstream TNW) as follows:

Based on site visit and reconnaissance of the flow route as well as photo and map interpretation: water flow leaves the subject wetland via two non-jurisdictional conveyances that drain to the US Highway 17A roadside, flowing via roadside drainage piping to the relevant reach tributary approximately 0.84 mile southwest of the Newell property. The relevant reach tributary flows south and then east for approximately 3.7 river miles to the TNW Cooper River.

Furthermore, in its AJD, the District documented the existence of an impoundment, which the Appellant refers to as a pond. Specifically, this impoundment is shown in the "2006 Infrared Photography" that is included in the AR, and the tributary characteristics are identified in Section III.B.1(ii)(b) of the AJD as "[m]anipulated (man-altered)" with the following explanation provided:

Based on inspection at publicly accessible locations and on photo interpretation, portions of the tributary have been altered by channelization, including culverts, cross drain installations, and an impounded portion of the tributary.

The District evaluated whether the impoundment affected the flow of water from the RPW to the TNW. Based on aerial photos and multiple field observations of the tributary (that is, on 26 September 2012, 6 May 2013, and 14 May 2013) at publically accessible locations – including crossings of US 17A, US 52, and old Highway 52 southwest of Moncks Corner, the District concluded there is continuous (perennial) flow of the RPW as it enters the impoundment and continuous (perennial) flow as it exits the impoundment. The District also concluded that the entire reach of the tributary exhibits bed and banks features consistent with discrete and confined flow.

In the AR, the District sufficiently documented a flow connection from the onsite waters (that is, the 1.6 acres of wetlands) through the non-jurisdictional ditches to the RPW, and through the RPW (including through the impoundment within the RPW) to the downstream TNW.

The quality of the water in the RPW at points on either side of the impoundment does not negate or diminish the adequacy of the documented flow connection or the District's significant nexus analysis because the quality of water is not a factor in establishing a hydrologic connection from the subject wetlands to the downstream TNW. However, water quality, in the downstream TNW is a factor when establishing a significant nexus (if required).

The Guidebook 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.' When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term 'navigable waters' (p. 3).

As explained above, water quality is not relevant when establishing a hydrologic connection from the subject wetlands to the downstream TNW. However, it does become relevant in establishing a significant nexus (if required). In this case, as a matter of policy, a significant nexus is required to establish jurisdiction. Since the

Appellant raised the issue of significant nexus as a reason for appeal (1.e.), the water quality aspect of the District's significant nexus evaluation is addressed below under reason 1.e. and is addressed in the District's AJD in Section III.C.3.

Action: None required.

Appeal Reasons 1.c: The property has been altered by a rare, unnatural situation (illegally dug ditch). As per the June 5, 2007 Questions and Answers for *Rapanos* and *Carabell* Decision (page 3 (7. A., point 2)), "Unless an area has been altered or is a rare natural situation, wetland indicators of all three characteristics must be present during some portion of the growing season for an area to be a wetland."

Finding: This reason for appeal does not have merit.

Discussion: The District documented the presence of all three wetland characteristics, thus providing the required support for its conclusion that wetlands are present. The Appellant's reason for appeal references a sentence from a Corps guidance document titled "Questions and Answers for *Rapanos* and *Carabell* Decision" (dated 5 June 2007). The meaning of this sentence is the opposite of what Appellant indicates it to be. The complete response to question 7, which is, "What is the Agencies' definition of a wetland?", is the following:

- Those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.
- We use three diagnostic environmental characteristics when making wetland determinations: vegetation, soil, and hydrology. Greater than 50% of the vegetation present must be considered hydrophytic. Hydric soil must be present. The hydrology requirement is satisfied when an area is saturated within 12 inches of the surface at some time during the growing season of the prevalent vegetation. Unless an area has been altered or is a rare natural situation, wetland indicators of all three characteristics must be present during some portion of the growing season for an area to be a wetland.

Based on the above guidance, the District must establish that all three (3) wetland characteristics are present in order to claim jurisdiction over a wetlands area. If an area has been altered or is a rare, natural situation, however, the District is not required to establish that all three wetland characteristics are present.

The District completed one Wetland Determination Data Form (dated 26 September 2012) for the property based on the 1987 Corps of Engineers Wetlands Delineation Manual (the 1987 Manual) and the Atlantic and Gulf Coastal Plain Regional Supplement. For the area that the District designated as wetlands, the District documented on the Wetland Determination Data Form positive indicators of all three parameters (hydrophytic vegetation, hydric soils, and wetland hydrology) which are required for wetlands to be present. This is sufficient even if the property is concluded to have been altered.

Furthermore, Appellant's statement that one of the two ditches was illegally dug (which Appellant alleges was by the SCDOT) does not somehow sever the surface hydrologic connection between the wetlands and the TNW. Accordingly, the District sufficiently documented the presence of wetlands, and the existing ditches contribute to a connection from the wetlands to the TNW.

Action: None required.

Appeal Reasons 1.d: There is selective enforcement of CWA violations in the Charleston District.

Finding: This reason for appeal does not meet the criteria for a regulatory appeal in the Corps' regulations.

Discussion: The Corps' regulations at 33 CFR § 331.5 set forth the acceptable bases for a regulatory appeal. Specifically, a person may appeal an approved JD, a permit denial, or a declined permit, and the reasons must be specifically stated in the RFA and be more than a simple request for appeal because the affected party did not like the approved JD, permit decision, or the permit conditions. Examples of acceptable reasons for appeals include, but are not limited to, the following: a procedural error; an incorrect application of law, regulation or officially promulgated policy; omission of material fact; incorrect application of the current regulatory criteria and associated guidance for identifying and delineating wetlands; incorrect application of the Section 404(b)(1) Guidelines; and use of incorrect data.

Action: None required.

Appeal Reason 1.e: Based on the Supreme Court decision in *Rapanos v. United States*, the approximate 4-acre property does not have a significant nexus with the downstream traditional navigable waterway (TNW).

Finding: This reason for appeal does not have merit.

Discussion: The District sufficiently documented its rationale to support its determination that a significant nexus exists between the wetland, in combination with

all other wetlands adjacent to that tributary and the nearest downstream TNW (20 June 2013, AJD Form; Section III.C.3).

The JD Guidebook (p. 58) states that wetlands adjacent to but not directly abutting RPWs that flow directly or indirectly into TNWs are jurisdictional under the CWA where there is a "significant nexus" with a TNW. The JD Guidebook further directs the District to document its significant nexus determination for the wetland, in combination with all other wetlands adjacent to that tributary, in Section III.C.3 of the AJD form.

In Section III.B.3 of the AJD Form, the District identified the presence of wetlands associated with the tributary (all other wetlands adjacent to the tributary). It documented there were 10 wetlands, equaling 120 acres, being considered in the cumulative analysis. This section also specifies that there are +/- 1,120 acres of directly abutting wetlands along the tributary, with the following explanation provided:

Wetlands listed in the cumulative analysis are considered one wetland system which includes an expansive swamp system of over wetland [sic] 1,100 acres.

The District sufficiently documented in the AR that its significant nexus analysis included the cumulative effects of more than 1,100 acres of wetlands that are adjacent to or abutting the tributary as required by the JD Guidebook (all other wetlands adjacent to the tributary). Based on the totality of the information in Section III.B.3 of the AJD Form, the figure of 120 acres is a typographical error and should be 1,120 acres. This typographical error does not affect the analysis or adversely affect the conclusion.

In conducting its significant nexus analysis, the AR shows that the District evaluated the cumulative effects of the adjacent wetlands on water quality as well as their other functions.

In Section III.C.3 of the AJD Form, the District provided the following information:

The wetland and tributary within the review area are located just south of the [T]own of Moncks Corner which is a developed area and is slowly continuing to expand. The wetlands perform important functions to filter pollutants and sediments caused by traffic and development, preventing them from entering the Cooper River. These wetlands also provide for flood storage in heavy rain events along with habitat for a diversity of aquatic and upland species. The Cooper River has been shown to exhibit high turbidity due to elevated suspended sediments and other particulates, have lowered dissolved oxygen levels and heightened biological oxygen

demand (BOD). The influx of relatively better water quality with respect to these measures demonstrates the important contribution of lower turbidity and higher oxygen level waters that are made by the relevant reach and its collectively adjacent wetlands to the integrity of the downstream TNW.

Accordingly, the District provided sufficient documentation in the AR to establish a significant nexus between the wetlands on Appellant's property, in combination with all other wetlands adjacent to the tributary, and the Cooper River (TNW). In addition, the District provided sufficient documentation that the tributary, in combination with all of its adjacent wetlands, provide a water quality benefit to the downstream TNW by filtering pollutants/sediments thus preventing them from entering the TNW.

Action: None required.

Reason 2: Objection to appeal meeting procedures.

Finding: This reason for appeal does not meet the criteria for a regulatory appeal in the Corps' regulations.

Discussion: The Corps' regulations at 33 CFR § 331.5 set forth the acceptable bases for a regulatory appeal. Specifically, a person may appeal an approved JD, a permit denial, or a declined permit, and the reasons must be specifically stated in the RFA and be more than a simple request for appeal because the affected party did not like the approved JD, permit decision, or the permit conditions. Examples of acceptable reasons for appeals include, but are not limited to, the following: a procedural error; an incorrect application of law, regulation or officially promulgated policy; omission of material fact; incorrect application of the current regulatory criteria and associated guidance for identifying and delineating wetlands; incorrect application of the Section 404(b)(1) Guidelines; and use of incorrect data.

Without something more, an objection to the procedures that were followed for the appeal meeting is not an acceptable basis for appeal. A person may appeal an AJD, a permit denial, or a declined permit. Appellant does not allege that the procedures affected the AJD, which had been finalized before the appeal meeting. Appellant also does not allege or show that the procedures resulted in his inability to provide information that is relevant to his appeal. Accordingly, this appeal basis does not fall within the bases set forth in the Corps regulations and does not meet the criteria for appeal.

Action: None required.

Reason 3: Obvious disregard of Corps rules applied in processing the original appeal (that is, the 24 January 2013 RFA).

Finding: This reason for appeal does not meet the criteria for appeal because it is not associated with a current AJD, proffered permit, or permit denial.

Discussion: As stated in the Background section above, the appealed AJD is dated 20 June 2013 AJD and it supersedes the 3 December 2012 AJD. In accordance with Corps regulations at 33 C.F.R. § 331.5(b)(7), a previously approved JD that has been superseded by another approved JD based on new information is no longer an appealable action. Accordingly, Appellant's January 2013 RFA and the associated appeal proceedings are moot, and there is no allegation or information to support that the Corps' processing of the previous appeal has adversely impacted Appellant's current appeal.

Action: None required.

Reason 4: Obvious disregard for law as stated in the majority opinion of the Supreme Court decision in *Rapanos v. United States* and *Carabell v. United States*.

Finding: This reason for appeal does not have merit.

Discussion: The AR supports that the District did not disregard applicable law, policy, and/or guidance in its generation of the AJD. The District explained the basis for its determination that wetlands are present; identified the waters that provide a continuous surface hydrologic connection between the wetlands and the nearest TNW; and in accordance with policy and guidance, conducted a significant nexus analysis.

The District is required to follow the JD Guidebook, in which the Corps evaluated the *Rapanos* decision and issued guidance that was consistent with the opinions. The District also is required to follow the *Rapanos* Memorandum, in which the Corps and EPA implemented the *Rapanos* decision and addressed the jurisdiction over waters of the United States under the Clean Water Act. The AR supports the conclusion that the District followed applicable law, policy, and guidance in determining there are jurisdictional wetlands on Appellant's property.

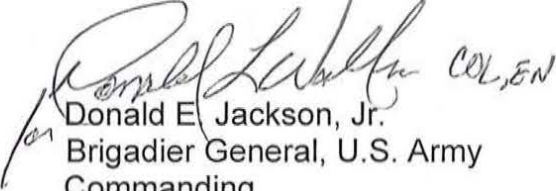
Action: None required.

CONCLUSION

For the reasons stated above, I find that the appeal does not have merit. The District's AR contains sufficient evidence to support the District's determination that there are wetlands present which are adjacent to, but not directly abutting, an RPW that flows directly into a TNW and are subject to jurisdiction under the CWA. In addition, while not required by law, the District documented that the subject wetlands have a significant nexus to the nearest downstream TNW to comply with current Corps policy. The District's determination was not otherwise arbitrary, capricious or an abuse of

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discretion, and was not plainly contrary to applicable law, regulation, Executive Order, or policy. The administrative appeals process for this action is hereby concluded.

 COL, EN
Donald E. Jackson, Jr.
Brigadier General, U.S. Army
Commanding