ADMINISTRATIVE APPEAL DECISION

JAMES CROWDER

FILE NO. SAC-2009-1149

CHARLESTON DISTRICT

2 OCTOBER 2012

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

Receipt of Request for Appeal: 23 May 2012

Acceptance of Request for Appeal: 8 June 2012

Appeal Conference: 19 July 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) supports the District's determination that the subject site contains waters of the United States (WOUS) and is within CWA jurisdiction, consistent with 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"). In addition, the AR establishes that the relatively permanent water (seasonal) has a significant nexus to the nearest downstream Traditional Navigable Water (TNW).

BACKGROUND

The property for which an Approved Jurisdiction Determination (AJD) was completed is a 19.5 acre portion of the appellant's property. Specifically, the property is located at 475 Little Cedar Creek Road, Winnsboro[1], Fairfield County, South Carolina.

The District concluded, via letter dated April 11, 2012, that the 19.5 acre portion of the property includes two tributaries that are subject to CWA jurisdiction. One tributary was defined as a Relatively Permanent Water (RPW) with perennial flow and the other was defined as a RPW

[1] The Approved JD Form specifies the City as Jennings, but it is actually Winnsboro. This discrepancy does not affect the District's determination that the Corps has jurisdiction over these RPWs. However, it is recommended that the District resolve this discrepancy for the record to be more precise.

with seasonal flow. The RPW with seasonal flow is approximately 250 linear feet (1-3 feet wide) and discharges into the RPW with perennial flow[2]. The RPW with perennial flow is approximately 1,725 linear feet (3-5 feet wide)[3] and discharges, offsite, into Little Cedar Creek (RPW) that discharges into Big Cedar Creek (also referenced as Cedar Creek) (TNW) that discharges into the Broad River (TNW), which at its confluence with the Saluda River becomes the Congaree River, a "navigable water of the U.S." within Rivers and Harbors Act (RHA) jurisdiction.

On May 23, 2012, the Appellant's Request for Appeal (RFA) was received, disagreeing with the District's determination and citing the reasons for appeal addressed below.

INFORMATION RECEIVED DURING THE APPEAL AND ITS DISPOSITION

The administrative appeal was evaluated based on the District's administrative record, the Appellant's Request for Appeal, and discussions at the appeal meeting.

APPELLANT'S STATED REASONS FOR APPEAL

Appeal Reason 1: "My site [proposed pond site] is a gulley with a low volume stream (probably less than .1 or .2 cfs) and an intermittent stream, which I believe is not part of the waters of the United States. (The flow varies with rain, and the SAC personnel did visit the site a few days after a rain, but should know the effect the recent rain would have had)."

Appellant also refers to a June 5, 2007, Memorandum titled "Clean Water Act Jurisdiction" which was issued following the U.S. Supreme Court's decision in Rapanos v. United States and Carabell v. United States, stating that the Memorandum on page 7 "specifically refers to 'geographic features generally are not jurisdictional waters.' The first line references 'e.g. gullies, small washes characterized by low volume, infrequent, or short duration flow' – which is exactly the description of my site."

In support of Appellant's position that the site is not a water of the U.S., he stated an engineer prepared a dam plan, and the South Carolina Department of Health and Environmental Control (SC DHEC) approved a dam permit based on the plan.

Appeal Reason 2: "The reasons I do not believe the site of my proposed pond site is on waters of the U.S. are that if it is, it has been acquired unconstitutionally by the U.S., since there was no compensation for the taking of the "rights claimed.' "

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[2] The connectivity of the seasonal RPW to the perennial RPW was observed during the July 19, 2012 appeal meeting.

[3] The Approved JD Form specifies the 1,725 linear-foot RPW to be 3-5 feet wide on page 1 but 2-5 feet wide on page 6. This discrepancy in the width does not affect the District's determination that the Corps has jurisdiction over this RPW with perennial flow. However, it is recommended that the District resolve this discrepancy for the record to be more precise.

Appeal Reason 3: The Appellant attached an e-mail message dated April 22, 2012, which seeks the Corps' positions on eight listed items.

Appeal Reason 4: The Appellant expressed interest in knowing what other Districts decide regarding JDs and requested information in how to access this information.

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

Appeal Reason 1: "My site [proposed pond site] is a gulley with a low volume stream (probably less than .1 or .2 cfs) and an intermittent stream, which I believe is not part of the waters of the United States. (The flow varies with rain, and the SAC personnel did visit the site a few days after a rain, but should know the effect the recent rain would have had)."

Appellant also refers to a June 5, 2007, Memorandum titled "Clean Water Act Jurisdiction" which was issued following the U.S. Supreme Court's decision in Rapanos v. United States and Carabell v. United States,[4] stating that the Memorandum on page 7 "specifically refers to 'geographic features generally are not jurisdictional waters.' The first line references 'e.g. gullies, small washes characterized by low volume, infrequent, or short duration flow' – which is exactly the description of my site."

In support of Appellant's position that the site is not a water of the U.S., he stated an engineer prepared a dam plan, and the South Carolina Department of Health and Environmental Control (SC DHEC) approved a dam permit[5] based on the plan.

Finding: This reason for appeal does not have merit.

Discussion: The District completed two Approved Jurisdictional Determination Forms (AJD Forms), dated April 2, 2012 – one for each tributary (1,725 linear feet and 250 linear feet). Both AJD Forms indicated that the onsite tributaries are "Relatively permanent waters (RPWs) that flow directly or indirectly into TNWs" (Section II.B.1.a.). The 1,725 linear-foot RPW was found to have perennial flow (typically year round) and the 250 linear-foot RPW was found to have seasonal flow.

The Rapanos Memorandum (p. 6-7), defines RPWs as tributaries that typically (e.g., except due to drought) flow year-round or have continuous flow at least seasonally (e.g., typically three months).

The JD Guidebook (pp.56-57) states the following documentation requirements to support a

[4] Appellant stated in his appeal that a copy was attached, but the document was not provided. The guidance in the June 2007 EPA/Army Memorandum is incorporated into the Rapanos Memorandum; therefore, the fact that the 2007 Memorandum was not provided does not affect the evaluation of the RFA..

[5] Appellant stated in his appeal that a copy of the SC DHEC letter was attached, but the letter was not provided. The District provided a copy of the January 30, 2012 letter, which was reviewed, added to the AR, and considered in this decision document.

RPW determination, including applicable policy:

> • If flow is typically year round; flow determinations should be supported by characteristics in Section III.B.1 of the form such as flow/gage data, rainfall data, anecdotal information, or
>
> • If flow is continuous at least "seasonally" provide data supporting this conclusion in Section III.B.
>
> As a matter of policy, field staff will include in the record any available information that documents the existence of a significant nexus between a RPW that is not perennial and a TNW.

The Rapanos Memorandum (pp. 10-11) states the following regarding flow indicators:

> Physical indicators of flow may include the presence and characteristics of a reliable ordinary high water mark (OHWM) with a channel defined by bed and banks. Other physical indicators of flow may include shelving, wracking, water staining, sediment sorting, and scour. Consideration will also be given to certain relevant contextual factors that directly influence the hydrology of tributaries including the size of the tributary's watershed, average annual rainfall, average annual winter snow pack, slope, and channel dimensions. [footnotes omitted]

The Rapanos Memorandum (p. 10) also lists other principal considerations of flow to include the volume, duration, and frequency of the flow of water in the tributary and the proximity of the tributary to a traditional navigable water.

Section II. of the JD Guidebook (p. 15) states:

> The agencies will assert jurisdiction over the following waters:
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> ...
>
> • Non-navigable tributaries of TNWs that are relatively permanent (i.e., the tributaries typically flow year-round or have continuous flow at least seasonally) and wetlands that directly abut such tributaries.
>
> ...
>
> The significant nexus evaluation will include:
>
> • An assessment of the flow characteristics and functions of the tributary, itself, in combination with the functions performed by any wetlands adjacent to the tributary to determine if they have more than an insubstantial or speculative effect on the chemical, physical and/or biological integrity of TNWs[6].

[6] Meeting any one of these will establish a Significant Nexus (i.e., "and/or") if more than insubstantial or speculative.

• A consideration of hydrologic factors such as:
- volume, duration, and frequency of flow, including consideration of certain physical characteristics of the tributary
- proximity to the traditional navigable water
- size of the watershed
- average annual rainfall
- average annual winter snow pack

• A consideration of ecologic factors such as:
- the ability of the tributary and its adjacent wetlands (if any) to carry pollutants and flood waters to traditional navigable waters
- the ability of the tributary and its adjacent wetlands (if any) to provide aquatic habitat that supports biota of a traditional navigable water
- the ability for adjacent wetlands to trap and filter pollutants or store flood waters
- the ability to maintain water quality.

The District's AJD Form, relating to the RPW with perennial flow (i.e., 1,725 linear-foot section), provides the following information:

Section III.D.2. (Provide data and rationale indicating that tributary is perennial) –

Stream 1 is an unnamed tributary to Little Cedar Creek. The tributary is shown on the USGS topographical map as a 2nd order solid blue (perennial) line and on the USDA-NRCS Fairfield Co soils map as a 2nd and 3rd (from its confluence with Stream 2 documented on JD Basis Form sheet 2 of 2) order intermittent stream. The drainage area for the reach is approximately 275 acres, which would provide sufficient water for perennial flow, particularly as this drainage area is downstream of other drainage areas which contribute to the flow regime. During a site visit, a strong, continuous OHWM was observed as indicated by clear, natural line impressed on the bank; shelving, vegetation matted down, bent, or absent; leaf litter disturbed or washed away; sediment deposition; presence of litter and debris; destruction of terrestrial vegetation; sediment sorting; abrupt change in plant community. Further, the tributary has differentiated bed and bank features with well defined benches. However, it is significantly downcut, entrenched and unstable as evident in the mid-channel bars. It does appear to be re-establishing a floodplain within the valley as evident in the benches. Strong riffle-run-pool complex was observed in the channel. Also observed were strong sediment sorting, the absence of vegetation in the thalweg, shelving, disturbed leaf litter, scour, wrack lines, oily scum and floculent [sic] from iron oxidizing bacteria in off-line pools, as well as filamentous algae. Taken together, these indicators establish that the tributary, Stream 1, flows perennially.

Section IV.B. (Additional Comments to Support JD) –

The tributary, Stream 1, is an unnamed tributary to Little Cedar Creek, which

> flows to Cedar Creek (also referenced as Big Cedar Creek), a TNW that flows to the Broad River, which at its confluence with the Saluda River becomes the Congaree River, a "navigable waters of the U.S." within Rivers and Harbors Act (RHA) jurisdiction..... In regards to its biological and chemical connectivity to the downstream TNW, the tributary has the capacity to transfer nutrients and organic carbon that supports downstream foodwebs. Further, it enhances a variety of wildlife species by providing source water and habitat diversity as a 2nd and 3rd order headwater stream. The tributary transports water, sediment, and other pollutants from adjacent uplands to the downstream TNW, Cedar Creek. The Cedar Creek Watershed, to which this tributary contributes, as identified by SCDHEC water quality monitoring stations, has high fecal coliform counts and high concentrations of cadmium in sediments, however the increasing trend in dissolved oxygen indicates improving water quality. This high coliform count is consistent with the site inspection which shows intense agricultural use as pasture land within drainage area.

The District's AJD Form, relating to the RPW with seasonal flow (i.e., 250 linear-foot section), provides the following information:

The District's significant nexus findings in Section II.C.4. are as follows:

> This tributary, Stream 2, provides important biological, chemical, and physical functions that support the integrity of the downstream TNW. Biological: The tributary provides shelter, breeding grounds and habitat diversity for aquatic life as a headwater stream. The tributary also provides benefits for local terrestrial wildlife such as a source of drinking water, shelter, and habitat diversity. Chemical: The tributary receives stormwater runoff from the adjacent upland silvaculture and agriculture activities. Bacteria and aquatic insect larvae in the hyporheic zone consume organic materials and convert nutrients from the adjacent agricultural/pasture land. Through the tributary's shallow subsurface flow/hyporheic flow which filters and retains pollutants in the substrate and sediments that settle out in the channel from rehic flow, the amount of pollutants that are carried to the downstream TNW are affected. Physical: The tributary provides physical functions that through its curvature and sinuosity include retaining and reducing the velocity of flood waters from the drainage area. Further, the tributary helps to maintain normal downstream flows to the TNW. This tributary, Stream 2, has a significant nexus with the TNW.

A more detailed analysis of the physical, chemical, and biological nexus is found below.

The District's rational that the seasonal RPW has a significant "Physical" nexus with the downstream TNW is as follows:

Section III.B.1.(i). – The watershed size was estimated to be 64,518 acres and the drainage area

was estimated to be 122 acres. The average annual rainfall was estimated to be 46.92 inches and the average annual snowfall was estimated to be 4.7 inches.

Section III.B.1.(ii).(a) – The seasonal RPW was described as flowing through 2 tributaries before entering the TNW. The proximity of the seasonal RPW was described as being 2-5 river miles from the TNW. The flow route, to the TNW, was described as follows:

> This unnamed tributary, a SRPW [seasonal-RPW], flows to another unnamed tributary, a PRPW [perennial-RPW], which flows to Little Cedar Creek, which flows to Cedar Creek (also referenced as Big Cedar Creek), a TNW that flows directly to the Broad River, which at its confluence with the Saluda River becomes the Congaree River, a "navigable waters of the U.S." within Rivers and Harbors Act (RHA) jurisdiction.

Section III.B.1.(ii).(b) – The seasonal RPW was checked as "Natural" with an average width of 2 feet and substrate composition of silts, sands, and gravel. The tributary's condition/stability was described as "highly eroding and fairly unstable. Further, Stream 2 is deeply incised, highly entrenched, showing low sinuosity. Channel is degrading and down cutting with sediment migrating from the adjacent uplands which are in and have historically been in silvaculture and agricultural use."

Section III.B.1.(ii).(c) – The tributary was defined as having "seasonal flow", with an estimated average of 20 (or greater) flow events in the review area per year. The tributary was described as having bed and banks, and OHWM, with indicators of OHWM being clear, natural line impressed on the bank; changes in the character of soil; shelving; vegetation matted down, bent, or absent; destruction of terrestrial vegetation; sediment sorting; scour; sediment deposition; water staining; and abrupt change in plant community.

The flow regime was described in Section III.B.1.(ii)(c) as follows:

> The tributary, Stream 2, is depicted as a 1st order intermittent stream on the USGS topographic map and as a 2nd order intermittent stream on the USDA-NRCS Fairfield County soils map. It exhibits characteristics of a stream with seasonal flow. The sediment sorting and rounding of substrate materials indicates regular flow. The continuous OHWM, absence of vegetation, evidence of shallow subsurface flow, and sediment sorting in the channel further supports the determination that this tributary's flow regime is seasonal. The drainage area of approximately 122 acres is large enough to provide significant volumes of water to the tributary through runoff and lateral subsurface movement of water and further supports the seasonal determination. ...The approximately 122 acre drainage area as well as the significant downgrading of the channel indicate that large volumes of water do move through this tributary. The features such as gleyed and low chroma soils and sediment sorting indicate that the flow remains constant, rather than being flashy.

The subsurface flow was described as: "Gleyed and low chroma (2 or less) and free water from

substrate surface to a depth of no greater than 6 inches indicates that this tributary has ground water recharge/shallow subsurface flow. Further, iron-oxidizing bacteria associated with ferric hydroxide precipitates (Fe-plaque) as evidence of groundwater recharge, are present in pools immediately upstream of the confluence with Stream 1."

The District's rational that the seasonal RPW has a significant "Chemical" nexus with the downstream TNW is as follows:

Section III.B.1.(iii) – The tributaries were characterized as follows:

> Within the reach described on this form, the shallow subsurface water present on the day of the site visit was all that has been viewed by this office. The downstream reach that it flows into has clear water with oily film from iron-oxidizing bacteria in places. The Cedar Creek Watershed, to which this tributary contributes, as identified by SCDHEC water quality monitoring stations, has high fecal coliform counts and high concentrations of cadmium in sediments, however the increasing trend in dissolved oxygen indicates improving water quality. This high fecal coliform count is consistent with site inspection which shows intense agricultural use as pasture land within the 122 acre drainage area.

The District's rational that the seasonal RPW has a significant "Biological" nexus with the downstream TNW is as follows:

Section III.B.1.(iv) – "The riparian corridor is variable in width with some areas more than 100 feet wide, with species such as sweetgum, sycamore, white and red oak. However, due to ongoing silvaculture (harvesting of the upland planted pines) and agriculture (pasture land) activities the corridor has been reduced in multiple locations to the standard SC Foresty Commission 40 foot Streamside Management Zone."

Also in Section III.B.1.(iv), the tributary was described as supporting habitat for aquatic/wildlife diversity, as follows:

> This tributary enhances a variety of wildlife species by providing source water and habitat diversity as a first order headwater stream. Further, it has the capacity to transfer nutrients and organic carbon that supports downstream foodwebs. The tributary transports water, sediment, and other pollutants from adjacent uplands to the TNW. Further, the tributary transfer[sic] nutrients and organic carbon that support downstream foodwebs.

Based on the District's AJD forms, JD Guidebook, and Rapanos Memorandum, I have concluded the District provided documentation and support for its flow determinations for each RPW. In addition, the District sufficiently documented and supported that the RPW with seasonal flow has a significant nexus to the nearest downstream TNW.

Furthermore, the Appellant's assertion that the proposed pond site does not contain WOUS,

based on receiving a SC DHEC dam permit, dated January 30, 2012, is irrelevant. The fact that a State agency issued a permit for a dam has no bearing on whether or not the Corps has CWA jurisdiction of the two tributaries in question (jurisdiction vs. State permit are two separate issues). In addition, the SC DHEC dam permit states as a general condition (#6), "That this permit does not obviate the requirement to obtain other Federal, State, or local assent required by law for the activity authorized herein."...

Action: None required.

Appeal Reason 2: If the tributaries are considered waters of the U.S., they have been acquired unconstitutionally by the U.S., since there was no compensation for the taking of the "rights claimed".

Finding: This reason for appeal is outside the purview of the regulatory appeal process.

Discussion: The District is required to follow the CWA, its implementing regulations, relevant judicial decisions, and applicable policy in reaching a determination of whether a property is within the regulatory jurisdiction of the CWA. The Federal Courts, not the Corps, are the appropriate authorities for determining whether a Federal government action has resulted in a "taking" of private property and, if yes, the appropriate remedy. Mere assertion of regulatory jurisdiction under the Clean Water Act by the Corps does not constitute a regulatory taking. The requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself "take" the property.

Action: None required.

Appeal Reasons 3-4: The Appellant requested the Corps' position on specified items and asked how to access information on other district offices' JDs.

Finding: These two requests are not appealable bases; they do not meet the criteria for appeal that is specified in 33 C.F.R. Part 331 – Administrative Appeals Process. The regulation at 33 C.F.R. 331.2 defines appealable actions to be "an approved JD, a permit denial, or a declined permit, as these terms are defined in this section." Also, the appeals process is not the appropriate forum for providing the information requested.

CONCLUSION

For the reasons stated above, I have determined the appeal does not have merit. The District's AR contains substantial evidence to support its decision that the subject site contains WOUS. In addition, the AR establishes that the seasonal RPW has a significant nexus to the nearest downstream TNW. The District's determination was not 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.

Jason W. Steele
Administrative Appeals Review Officer
South Atlantic Division