ADMINISTRATIVE APPEAL DECISION

PROFFERED PERMIT

THOMAS AND JUDY ROTHDEUTSCH

FILE NUMBER 2005-2902 (LP-INS)

JACKSONVILLE DISTRICT

DATE: JANUARY 1, 2008

Review Officer: Michael F. Bell (RO), US Army Corps of Engineers, South Atlantic Division, Atlanta, Georgia.

Appellant: Thomas Carl and Judy Rothdeutsch

Receipt of Request for Appeal (RFA): August 15, 2006; and November 30, 2007

Appeal Accepted: August 29, 2006

Appeal Conference/Site Visit: September 26, 2006

Summary of Decision: I find this appeal has merit with regard to Appeal Reasons 2, 3, 4, and 5. The positions taken by the District and contested in Appeal Reasons 2, 3, 4, and 5 are not supported by substantial evidence in the Administrative Record (AR); the bases for jurisdiction documented in the *Approved JD Form* by the District and contested in Appeal Reason 5 are contrary to applicable law. This matter is remanded to the District Commander for further analysis and/or reconsideration as prescribed within this document.

Background Information: The Jacksonville District received a permit application from the Appellants on March 18, 2005, and received revised permit drawings on September 2, 2005. The proposed project is located on Mariposa Road along a manmade canal. The landlocked canal is not connected to the Gulf of Mexico. The District conducted a desktop preliminary jurisdictional determination (JD) on March 25, 2005. The jurisdictional waters identified by the preliminary JD identified "[w]aters defined under 33 CFR part 329 as 'navigable waters of the United States'" and "[w]aters defined under 33 CFR part 328.3(a)[(1)] as "waters of the United States." Both of these categories refer to waters jurisdictional as "navigable waters" under Section 10 of the Rivers and Harbors Act of 1899 (RHA), as well as under the Clean Water Act (CWA). On February 21, 2006, the District performed a site visit, resulting in an approved JD of the same date. The approved JD identified the "presence of wetlands adjacent to other waters of the U.S., except for those wetlands adjacent to other wetlands." The JD form required

an explanation of "the rationale used to make [the] adjacency determination" – no rationale was included.

According to the District's Statement of Findings (SOF), the project is located on Mariposa Road along a manmade canal adjacent to the Gulf of Mexico. The lot is legally described as lot 19 of the Ramrod Shores 3rd Addition Subdivision in Section 29, Township 66 South, Range 29 East, on Ramrod Key, Monroe County, Florida. The Appellants' property is vegetated with 60% coverage of buttonwoods and 40% coverage of herbaceous groundcover. The shoreline consists of 50% coverage of white mangroves and buttonwoods and 50% coverage of herbaceous groundcover. The submerged aquatic resources include green and brown algae.

The Appellants propose to place approximately 70 cubic yards of fill material over approximately 4,740 square feet of regulated wetlands for the construction of a single-family residence and appurtenances in/over waters of the US.

The Florida Department of Environmental Protection, by letter dated September 26, 2005, determined that the subject property did not contain wetlands or other surface waters as defined for State purposes in Chapter 62-340 F.A.C. Therefore, a permit from a Florida Environmental Resource Permit will not be required for the proposed project.

The National Marine Fisheries Service (NMFS) responded to the public notice for the project by letter dated October 21, 2005, and provided conservation recommendations. The District closed consultation with the NMFS by electronic mail dated August 2, 2006, after the Appellants agreed to recommended conservation recommendations.

According to the AR, the Jacksonville District Project Manager (PM), reviewed the file, consulted with interested resource agencies, determined compliance with laws and regulations, and decided the proposed project can meet the project purpose and be designed to reduce impacts on this high quality aquatic environment. The PM and the Appellants engaged in telephonic and electronic correspondence in efforts to avoid and minimize impacts.

By proffered permit dated August 4, 2006, the PM informed the Appellants that the least environmentally damaging practicable alternative (LEDPA) would be to minimize impacts to aquatic resources by constructing a retaining wall to stop and treat stormwater before it enters the canal and to deed restrict 1,200 square feet of mangrove fringe on the shoreline in perpetuity. To compensate for the project impacts, the Applicants proffered permit required an in-lieu-fee mitigation payment of $36,908.08 to the Florida Keys Environmental Restoration Fund and required measures to protect the endangered manatee during in-water work activities.

The Appellants disagreed with the proffered permit conditions and appealed the permit to the South Atlantic Division Commander on August 15, 2006. The RO accepted the appeal on August 29, 2006.

Site Visit: Michael Bell, Thomas Carl and Judy Rothdeutsch, District Project Manager Ingrid Sotelo, District Representatives George Kenny, Susan Blass and District Team Leader Paul Kruger (TL) attended the site investigation on September 26, 2006. The attendees observed that the Appellants' lot was historically filled and adjacent to a canal. Crushed marl fill material had been excavated from the canal and deposited over limestone and coral. The lot appeared to be dry on the surface and was undeveloped and covered with 60 percent woody vegetation and 40 percent herbaceous vegetation. The Appellants produced rain gage data from the National Weather Service that demonstrated September as the wettest month of the year in the Monroe County. Since the surface of the lot was dry, the Appellants wanted to prove to the RO that the site was not a wetland, even during the month with the most rain. The Appellants also provided the hydrology criteria from the *1987 Wetland Delineation Manual* (Manual) used to confirm evidence of wetland hydrology and stated the lot met none of the criteria. The Appellants then dug a hole around a large wooden marker left in the ground to prove that hydrology did not exist. The District noticed the wooden marker was saturated within twelve inches of the surface. The District explained that the Appellants' lot was included in an Advanced Identification (ADID) of filled lots in canal subdivisions in the Florida Keys (the United States Environmental Protection Agency (EPA) had conducted the advanced identification of wetlands, or ADID, and the PM had confirmed that the ADID was correct). The attendees then walked the length of the canal. The excavation of the canal stopped 75 feet short of the Gulf of Mexico at the north terminus and 130 feet short of the Gulf at the east terminus. The RO concluded the field investigation and the attendees adjourned to Marathon, Florida, for the appeal conference.

Rapanos Guidance: One reason for appeal concerned the scope of the Clean Water Act jurisdiction over wetlands. The RFA stated that due to a June 19, 2006, Supreme Court decision in the Rapanos and Carabell cases (*Rapanos*), the District did not regulate the wetlands on the property because they were not adjacent. The District could not make a final appeal decision on appeal reason 5 until the District received guidance on the Rapanos decision and re-evaluated the on-site wetlands and waters using that guidance. The Conference was held with the Appellants' knowledge that guidance related to the *Rapanos* Supreme court decision would be forthcoming.

By April 27, 2007 letter, the Corps reiterated to the Appellants that a decision on their *Rapanos* reason for appeal was still on hold pending Executive Branch guidance. Appellants were offered the choice of proceeding to a conclusion of their appeal without the resolution of the *Rapanos* jurisdictional issues (in which case they would need to provide written notice that they were withdrawing that ground of appeal and lose the right to later contest jurisdiction), or await the guidance and pursue the re-evaluation of jurisdiction when the guidance was issued. The Appellants elected to await the guidance.

The District received the *Rapanos* Guidance[1] and associated Jurisdictional Determination (JD) Forms from Headquarters on June 5, 2007. Since this appeal occurred during the period between the Supreme Court decision and the guidance issued by Headquarters, the Appellant was given the choice of using either the new June 5, 2007, guidance or the determination methods at the time of the appeal. The Appellants chose to have their property re-delineated using the *Rapanos* guidance for adjacency appeal reasons only. By July 27, 2007 letter, the Corps notified Appellants that the awaited guidance had been received, and that a new JD would be conducted. Appellants were informed that any appeal of the new JD was limited to *Rapanos* issue, only.

The District completed a new jurisdictional determination pursuant to the *Rapanos* guidance on November 13, 2007. The new JD continued to find that there were jurisdictional waters on the project site, including waters "subject to the ebb and flow of the tide," and that there were "wetlands directly abutting an RPW [Relatively Permanent Water] where tributaries typically flow year-round," with the RPW being one "that flows directly or indirectly into TNWs [Traditional Navigable Waters]." The rationale for this finding was stated as follows:

> The subject property and its associated wetlands directly abut the Schade Canal, thereby maintaining a continuum of flow. The lot is hydrologically fueled by tidal pumping based on the changing of the tide and the permeability and porosity of the coral rock substrate.

The new JD concluded that the wetlands on the subject property were still jurisdictional under Section 404 of the CWA as adjacent wetlands because the wetlands directly abutted an RPW. The November 26, 2007 cover letter noted that the new JD addressed the "extent of Federal jurisdiction ... along a manmade canal adjacent to the Gulf of Mexico."

The Appellants submitted a new RFA dated November 30, 2007. This RFA addressed additional reasons for appeal specifically related to the new JD issued under the Rapanos guidance, primarily contesting the flow relationship and connectivity between the RPW and the TNWs.

APPEAL EVALUATION, FINDINGS and INSTRUCTIONS to the Jacksonville District Engineer (DE):

Reason(s) for the Appeal as Presented by the Appellants:

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[1] The Rapanos Guidance included the following documents relevant to this appeal: a Memorandum Re: CWA Jurisdiction Following the U.S. Supreme Court Decision in Rapanos v. United States; an Approved JD Form; and, a Jurisdictional Determination Form Instructional Guidebook. Also released with these documents were Questions and Answers for *Rapanos* and *Carabell* Decisions. These materials are jointly referred to as the "Rapanos Guidance."

Appeal Reason 1: We spoke to an official at the Monroe County Building Department. He stated that this is the highest mitigation fee he has ever seen. This is an average size lot without a proposed dock, but the fee is the highest he has seen.

FINDINGS: This reason for appeal has no merit.

ACTION: No action required by the District relative to this appeal reason.

Discussion: The District's Statement of Findings (SOF) dated August 4, 2006 (page 5, paragraph f.) and the attached *Functional Assessment KEYMIG Worksheet* (Worksheet) discusses how the adverse impacts for the proposed project are calculated. The effects evaluations are undertaken with a view toward being able to assign an identified debit to be offset by a credit. The method for assessing debits should be comparable to the method used for assigning credits. Corps regulatory program project managers are responsible for using consistent, district-approved methods for assessing and assigning credits or debits in terms of amount, type, and location. This is what happened in this case. The District used the KEYMIG Worksheet in the AR to provide the functional assessment of the project site. The outcome is derived by inserting information into equations on the worksheet.

The PM used the worksheet to determine a contribution of $36,908.08 to the Florida Keys Environmental Restoration Trust Fund to offset impacts for the wetland fill. The Appellants believe that the mitigation fees are excessive for a small lot that does not include a moorage facility. The Appellants referenced an employee from the Monroe County Building Department who inferred that the District accessed an abnormally high mitigation fee.

During the appeal conference, the PM explained that the impact assessment involves three geographic areas of measurement. The first impact area includes the building lot, which is the only area the Appellants will impact. The second and third geographic areas include fringe areas at the shoreline and the benthic communities adjacent to the shoreline. If the Appellants impacted the fringe or canal bottom, the mitigation would have been higher as these resource areas are considered more valuable. At the appeal conference, the PM led the group through the *Functional Assessment KEYMIG Worksheet* contained in the AR. The *Functional Assessment within Improved Subdivisions* is commonly used in the Florida Keys to determine the amount of mitigation needed to compensate for lost aquatic resources. The District stated that the figures were accurate and the assessment was consistent with other functional assessments conducted in the past.

The Appellants provided a letter from the US Fish and Wildlife Service, dated April 1, 2004, stating that the subject lot was cleared in the past and exotic species are becoming established on the lot. The Appellants hoped the letter would support their contention that the site is of low value and the mitigation amount ($36,908.08) is excessive. The PM stated that the ranking given to the lot is consistent with other lots she has worked on and that the fees would be higher if she used the fringe category to

calculate impacts. The Team Leader of the Miami Regulatory Field Office provided the Appellants with a chart comparing other mitigation fees that were similar or higher.

The District also counseled the Appellants on different methods to minimize impacts to reduce the mitigation fee at the appeal conference and offered the Appellants a opportunity to provide their own mitigation, instead. The Appellants decided to stay with the proposed in-lieu-fee-program after being instructed on what is involved in providing an adequate mitigation site and corresponding plan.[2]

Appeal Reason 2: We have a letter (Exhibit 1) from the [Florida] Department of Protection stating that there are not any wetlands on this lot. We know that your criterion is different, but they both have to do with wetlands, so there should be some correlation. There is no correlation at all. The DEP states that there is not one square inch of wetlands on the lot and the Department of the Army states that every square inch is wetlands even area next to the paved road.

FINDINGS: This reason for appeal has merit.

ACTION: The District's AR does not adequately address the issue of the scope any jurisdictional wetlands on the site. The *Approved JD Form* has not been completed or sufficiently explained. Therefore, the proffered permit is remanded to the District Engineer for reconsideration to include sufficient documentation to support the jurisdictional determination.

Discussion: During the site investigation, the Appellants produced rain gage data from the National Weather Service that demonstrated September as the wettest month of the year in the Monroe County. The surface of their lot was dry and the Appellants wanted to prove to the RO that the site was not a wetland, even during the month with the most rain. The Appellants also provided the hydrology criteria from the *1987 Corps of Engineers Wetlands Delineation Manual (Waterways Experiment Station Technical Report Y-87-1, January 1987)* (Manual) used to confirm evidence of wetland hydrology and stated the lot met none of the criteria. The Appellants then dug a hole around a large wooden marker left in the ground to prove that hydrology did not exist.

The TL removed the wooden marker during the site inspection and noticed the marker was saturated within twelve inches of the surface. The District then explained that the Appellants' lot was included in an Advanced Identification (ADID) of filled lots in canal subdivisions in the Florida Keys. The United States Environmental Protection Agency (EPA) conducted the advanced identification of wetlands and the PM confirmed the ADID was correct. The PM stated she used elevations to determine if the site met the hydrology indicators contained in the Manual, as discussed in the ADID.

However, there is no discussion in the AR to show how elevations were tied to the primary hydrology criteria or what the elevations demonstrate in determining wetland hydrology. Field notes, memorandums for record or data forms should be in the AR to

[2] This is simply noted for explanatory purposes, and it not reflected in the AR.

confirm the ADID. The PM mentioned the ADID in an electronic mail message to the Appellants early in the permitting history. No mention of the EPA Advanced Identification of Wetlands (ADID) is contained in the *Data Reviewed for Jurisdictional Determination* dated February 21, 2006.

Regarding the DEP determination of no regulated wetlands or other surface waters, the District explained to the Appellants that the Corps is the Federal agency responsible for making wetland determinations pursuant to the CWA. Wetland delineations are conducted by applying the methods set forth in the 1987 Manual. State agencies have their own criteria and methods for determining wetlands, and the results may differ.

Appeal Reason 3: Our instruction for this project states that we have to post a "Manatee Caution" sign during construction. If you look at the map (Exhibit 2), you can see this canal does not connect to the open water. The canal is blocked by 2 lots. These 2 lots (Exhibit 3 and 4) are "Undug Canal Lots." This is not a canal that was later plugged, but a canal that was never connected to the open water. Since manatees do not cross dry land, there are no manatees in the canal. Also, this is a small canal that is 18 lots long (average lot size 60 feet) without an exit to open water, so there are no motor boats in the canal. Some of the lot owners have ropes with buoys across the canal to make swimming areas. This would prevent motor boats. Requiring a "Manatee Idle Speed" sign when there are no manatees or boats shows that the fact this canal does not connect to the open water was never taken into consideration with this application.

FINDINGS: This reason for appeal has merit.

ACTION: The District's AR does not address the reasons for special conditions to protect the endangered Manatee. During the appeal conference, the PM stated that it was a mistake to attach the Manatee special conditions to this permit. The proffered permit is remanded to the District Engineer to remove these restrictions.

Discussion: The September 21, 2005, public notice for this project states:

> The US Army Corps of Engineers (Corps) has determined the project may affect, but is not likely to adversely affect the Key deer, Lower Keys marsh rabbit, and Eastern Indigo snake. The Corps will request Fish and Wildlife Service's concurrence with these determinations pursuant to Section 7 of the Endangered Species Act by separate Letter.

This endangered species determination did not discuss the endangered Manatee. The RO and the District representatives discussed the Manatee special conditions at the appeal conference. The PM did not realize that the canal was landlocked at both ends

and required the restrictions. The Manatee special conditions are not necessary since the Manatee cannot enter the canal.

Appeal Reason 4: A 6-inch retaining wall is required. Again, the fact that the 2 'Undug Canal Lots' block the opening of this canal was not taken into consideration. When you take this into consideration, this canal becomes a closed system. This makes the canal itself a water retention area. Since by definition, if the canal itself is a water retention area, there is no need for a retaining wall.

FINDINGS: This reason for appeal has merit.

ACTION: The District explained the retaining wall requirement at the appeal conference. However, the District's AR does not address the reason for the retaining wall special condition. The proffered permit is remanded to the District Commander to determine and document whether a retaining wall is a practicable and effective permit condition to minimize impacts.

Discussion: During the appeal conference, the District stated that the retaining wall requirement is a typical permit condition designed to protect waters from the secondary effects of the project. The secondary effects are storm water and surface run-off from the Appellants' property. The retaining wall would stop or temporarily hold sheet flow containing fertilizer, soil and other pollutants that could wash from the site into the canal. However, since the canal is not connected to the Gulf, the Appellants believe that the canal itself would treat the pollutants before they would enter the Gulf.

As the Appellants suggest, the canal would serve as a large water treatment system by capturing the pollutants in the landlocked canal. The suspended particles would fall to the bottom of the canal and remain there except during hurricane events. During the site visit, the District stated that even though the canal is landlocked, the canal itself is an ecosystem that deserves protection. Fish, algae, and other aquatic life exist in the canal and would suffer from oxygen depletion if the canal receives pollutants and does not discharge them. According to the District, the canal is a functioning ecosystem subject to the effects of pollution, is adjacent to the Gulf of Mexico, and deserves protection through the special conditions.

The Environmental Protection Agency (EPA) Guidelines for Specification of Disposal Sites for Dredged or Fill Material at 40 CFR 230.11 (h) 1. Determination of secondary effects on the aquatic ecosystem states:

> Secondary effects are effects on the aquatic ecosystem that are associated with a discharge of dredged or fill material, but do not result from the actual placement of the .... material. Information about secondary effects on the aquatic ecosystem shall be considered .....

Corps regulations also recognize the importance of secondary impact losses. After the residence is constructed, the lot will lose some of its unique aquatic characteristics. Regulations at 33 CFR 320.4(a) (1) states:

> The decision whether to issue a permit will be based on an evaluation of the probable impacts, including cumulative impacts, of the proposed activity and its intended use on the public interest. Evaluation of the probable impacts which the proposed activity may have on the public interest requires a careful weighing of all those factors which become relevant in each particular case...All factors which may be relevant to the proposal must be considered including the cumulative impacts thereof: among those are... general environmental concerns, wetlands...fish and wildlife values...land use, navigation, shore erosion and accretion...water quality...safety...considerations of property ownership, and in general the needs and welfare of the people.

33 CFR 320.4(a)(3) continues;

> The specific weight of each factor is determined by its importance and relevance to the particular proposal. Accordingly, how important a factor is and how much consideration it deserves will vary with each proposal. A specific factor may be given great weight on one proposal, while it may not be present or as important on another.

It is clear the District can require a retaining wall to minimize the secondary and cumulative effects of the project. However, the AR does not address the reason for the retaining wall special condition. The proffered permit is remanded to the District Commander to determine and document whether a retaining wall is an appropriate practicable permit condition to minimize impacts.

Appeal Reason 5: In the August 15, 2006, RFA, the Appellants stated that:

> The Rapanos and Carabell case about 'navigable waters' applies here. The 2 undug Canal Lots (one with a house on it) make this 1180 foot canal not navigable waters. Because of this, no permit should be required.

The Appellants further addressed the jurisdictional issue in their RFA dated November 30, 2007. The Appellants keyed their additional comments to the Rapanos Approved JD Form. Regarding Section II.A., Appellants disagreed that the waters in the canal were subject to the ebb and flow of the tide, stating: "The canal was never finished and there is not any ebb and flow of the water in the canal. This can easily be observed as [there] is not a daily change in the water level." Regarding Section II.B., Appellants disagreed that the canal was an RPW flowing directly or indirectly into TNWs, stating that there were no ditches, culverts or other conveyances that contributed flow to the TNWs.

> Since there is no 'flow' this box cannot be checked. * * * This once again is an undug canal and the water does not flow anywhere. * * * The explanation talks about hydrologically fueled by tidal pumping. This is also in error. The water level in this undug canal is constant. For tidal pumping to occur, you must have a daily change in water level. The water level in this canal does not change daily, so no pumping can occur.

FINDINGS: This reason for appeal has merit.

ACTION: The District must reassess jurisdiction and determine whether the Schade Canal, in conjunction with the wetlands that abut it, has a significant nexus to the Gulf of Mexico, based on hydrologic and ecologic factors.

Discussion: During the appeal site visit, it was determined that the canal is not directly connected to the Gulf with overland flow. The excavation of the canal stopped 75 feet short of the Gulf of Mexico at the north terminus of the canal and 130 feet short of the Gulf at the east terminus. Discussions ensued about the Supreme Court decision of June 19, 2006, in the Rapanos and Carabell cases. Those decisions addressed whether wetlands that are adjacent to, and have a surface hydrological connection with, non-navigable tributaries of traditional navigable waters are part of the waters of the United States under the CWA (Questions and Answers #1).

The District's general position is that the canal is adjacent to the Gulf of Mexico. During the site visit the District stated the canal would be adjacent to the Gulf of Mexico by way of water transfer from the almost yearly tropical storm or hurricane events that would wash the Gulf waters into the canal. Adjacency would also be attained through ground water as evidenced by the tidal fluctuation in the landlocked canal. In permit correspondence and the August 4, 2006, the District consistently referred to the Schade Canal as "a manmade canal adjacent to the Gulf of Mexico." The Appellants, on the other hand, believed the *Rapanos* Supreme Court decision would render the canal and any wetlands on their property non-jurisdictional.

The Justices in the *Rapanos* decision issued five opinions with no single opinion commanding as majority of the court. The *Rapanos* 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. Thus, regulatory jurisdiction under the CWA exists over a water body if either the plurality's or Justice Kennedy's standard is satisfied." *Guidance Memorandum re CWA Jurisdiction*, p. 3. The plurality's test (Plurality Test) extends the Corps regulatory authority "only to 'relatively permanent, standing or continuously flowing bodies of water' connected to traditional navigable waters, and to 'wetlands with a continuous surface connection to' [i.e., the wetland directly abuts and is not separated by uplands, a berm, dike, or similar feature] 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. *Guidance Memorandum re CWA*

Jurisdiction, pp. 1 - 3. The Rapanos Guidance further concludes that the Rapanos decision did not affect the scope of jurisdiction over TNWs (including Section 10 waters) and wetlands adjacent to TNWs. Regarding wetlands adjacent to TNWs, "[t]he agencies will assert jurisdiction over wetlands adjacent to [TNWs], including over adjacent wetlands that do not have a continuous surface connection to [TNWs]."

While the District has referred to the canal as adjacent to the Gulf of Mexico, its task was complicated by a lack of documentation, the limitations of the *Rapanos Approved JD Form*, and a recent decision by the 11th Circuit U.S. Court of Appeals. The November 26, 2007, approved JD here on appeal identified 2 bases for jurisdiction over any wetlands on the Appellant's property: jurisdiction under Section 10 of the RHA by virtue of waters subject to the ebb and flow of the tide, and jurisdiction under the CWA because of the presence of RPWs that flow directly or indirectly into TNWs and wetlands directly abutting such RPWs (which, under the *Rapanos* Guidance, does not require a significant nexus determination).

While the Rapanos decision did not impact the Corps' jurisdiction under Section 10 of the RHA, the AR does not support the conclusion that the canal and any abutting wetlands are "subject to the ebb and flow of the tide" within the meaning of Section 10 and the Corps' implementing regulations. There is no disagreement that the Schade Canal is a manmade, landlocked canal without any surface connection to the Gulf of Mexico (though at least some in the District were under the impression, at least up until the time of permit issuance, that the canal did have a surface connection to the Gulf of Mexico). The November 13, 2007, *Approved JD Form* states that "[t]he lot is hydrologically fueled by tidal pumping based on the changing of the tide and the permeability and porosity of the coral rock substrate." The Appellants disagree, stating that the water level is constant and does not change on a daily basis.

There are no field observations or other documentation in the AR that support the conclusion that, or the degree to which, the canal is tidally-influenced. Even if the canal is tidally-influenced to some degree, a landlocked canal such as this is not subject to Corps Section 10 regulatory jurisdiction unless it is navigable-in-fact or is connected to tidal waters in a manner that affects their course, condition, or capacity. *See U.S. v. Sexton Cove Estates, Inc.,* 526 F.2d 1293, 1299 (5th Cir. 1976) (noting that "every hole dug in South Florida would be within the Corps' jurisdiction" if tidal fluctuation, alone, was sufficient to confer jurisdiction). According to Corps regulations, the limit of jurisdiction in tidal waters extends to the "high tide line," which means "the intersection of the land with the water's surface at the maximum height reached by a rising tide," and does not include storm surges. 33 CFR 328.3(d). The Schade Canal is located beyond the high tide line of the Gulf of Mexico.[3]

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[3] In addition, although the Appellants did not raise Special Condition 3 as an issue, there would seem to be no basis for that condition where there are no Section 10 waters, where the waterbody is a landlocked, manmade canal, and where the permit was issued solely under Section 404 of the CWA.

The AR also does not contain substantial evidence that the Schade Canal is an "RPW" within the meaning of the *Rapanos* Guidance and the Plurality's Test. As noted above, the canal is an artificial, landlocked waterbody with no surface connection to a TNW. "RPWs" are "relatively permanent non-navigable tributaries of [TNWs] ... whose waters flow into a [TNW] either directly or by means of other tributaries." *Guidance Memorandum re CWA Jurisdiction*, p. 5. A "[t]ributary is a natural, man-altered, or man-made water body. Examples include rivers, streams, and lakes that flow directly or indirectly into TNWs." *JD Form Instructional Guidebook*, Figure 1.b, note 3. Canals "that transport relatively permanent flow" into TNWs are jurisdictional as RPWs. *JD Form Instructional Guidebook*, p. 16. While there is no dispute whether the Schade Canal is relatively permanent, there is a dispute whether it contributes "flow" to a TNW. The District argues that there is a subsurface exchange through porous coral rock substrate; the Appellants assert that there is no observable flow. The AR, other than the brief conclusion stated in the November 13, 2007, *Approved JD Form*, does not contain any supporting documentation for the conclusion that there is a subsurface flow connection. And, the definition of RPWs suggests that "indirect" flow refers to contributing flow to a TNW "by means of other tributaries," rather than solely by means of a subsurface connection through rock substrate.

Even if the above concerns regarding the canal's RPW status were to be resolved, the Plurality Test may no longer be used to establish jurisdiction in the states of the 11th Circuit. The recent decision of the 11th Circuit in *U.S. v. Robison*, 505 F.3d 1208 (11th Cir. 2007) disagreed with the "two-test approach" where jurisdiction may be found under the CWA if either the Plurality or Kennedy Tests is satisfied. Instead, it 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* 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." As a result, the finding of jurisdiction based on the conclusion that the Appellants' wetlands directly abut an RPW (the Schade Canal) that flows into a TNW (the Gulf of Mexico) and are therefore jurisdictional under the CWA cannot be sustained - a significant nexus determination pursuant to the Kennedy Test is required.[4]

In its August 13, 2004, JD, the District identified the wetlands on the Appellants' property as "wetlands adjacent to other waters of the U.S." The JD form did not indicate

[4] In fairness to the District, it is noted that the decision in *U.S. v. Robison* was issued on October 24, 2007, well after the Rapanos Guidance was developed, and too close to the issuance of the November 13, 2007 JD here at issue for the import of the case to be fully considered. Should there be an appeal of the *Robison* case, the analysis of its import reflected here may need to be modified.

either the rationale or identify the "other waters" to which adjacency was claimed. As noted above, the Rapanos Guidance states that the Corps will assert jurisdiction over wetlands adjacent to TNWs, including where those adjacent wetlands do not have a continuous surface connection to the TNWs. However, it is the canal which the wetlands abut that is identified by the District as being "adjacent" to the TNW (the Gulf of Mexico) in the proffered permit and *Rapanos* JD. The canal is not identified as a "wetland," which means that its adjacency cannot be effectively presumed, as in the case of wetlands which are bordering, contiguous, or neighboring to TNWs (see 33 CFR 328.3(c)). Corps regulations do recognize that there can be "adjacent" non-tidal *waters* other than wetlands (see 33 CFR 328.4(b)(2) and (c)), but in the wake of the *Rapanos* decision and in the case of waters that are neighboring (as opposed to bordering or contiguous, *i.e.*, abutting) to TNWs, a finding of adjacency for such waters must be based on a significant nexus determination. The Rapanos Approved JD Form states: "If a waterbody is not an RPW, or a wetland directly abutting an RPW, a JD will require additional data to determine if the waterbody has a significant nexus with a TNW." *Approved JD Form*, III.B. [5]

In order to assert CWA jurisdiction over the wetlands on the Appellants' property, the District must determine whether the Schade Canal, in conjunction with the wetlands that abut it, has a significant nexus (and is therefore adjacent) to the Gulf of Mexico, considering and documenting hydrologic (to include tidal influence and subsurface flow) and ecologic factors. In order to determine whether a significant nexus exists, Sections III.B and C will be completed regarding the characteristics of the non-wetland water body and its abutting wetlands, and the District will clarify that the Schade Canal is the water body evaluated under Section IIIB.1. If the District concludes that there is no significant nexus, it must proceed to an isolated waters call and necessary coordination.

Appeal Reason 6: The basis of jurisdictional determination selected B-7. This states: Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1)-(6) of this section. When you consider that the canal was never connected to the open water (it has been demonstrated that this fact was overlooked with requirement of a manatee sign and a retaining wall), this canal does not meet any of the 1 thru 6 criteria. This means that B-7 does not apply. Since there is no jurisdiction, no permit should be required.

FINDINGS: This reason for appeal has no merit.

ACTION: No action required by the District relative to this appeal reason.

Discussion: Since the Appellants chose to have their site reevaluated under the *Rapanos* Guidance, the February 21, 2006, JD form on which this reason for appeal is

[5] It is recognized that the *Rapanos* Approved JD Form checklist does not expressly itemize jurisdiction over reasonably permanent non-wetland waters that neighbor, but have no surface connection to, TNWs. However, in *U.S. v. Robison*, 505 F.3d 1208, n. 18, the 11th Circuit did recognize that reasonably permanent non-wetland waters may be adjacent.

based was superceded by the November 13, 2007, *Rapanos Approved JD Form*. To the extent there is any remaining validity to this reason for appeal, it has been addressed under Appeal Reason 5.

CONCLUSION: As my final decision on the merits of the appeal, I conclude that the AR did not contain substantial evidence in support of the contested, proffered permit conditions and jurisdictional findings, and that the basis for jurisdiction is contrary to applicable law. I hereby return this matter to the Jacksonville District for additional analysis and/or reconsideration as prescribed within this document.

Joseph Schroedel
Brigadier General, US Army
Commanding