

ADMINISTRATIVE APPEAL DECISION

UNITED STATES SUGAR CORPORATION – LAKE HARBOR QUARRY

FILE NO. SAJ-2007-6239

JACKSONVILLE DISTRICT

1 March 2013

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

Receipt of Request for Appeal: 9 January 2012

Acceptance of Request for Appeal: 7 February 2012

Appeal Conference: 19 June 2012

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

SUMMARY OF DECISION

The request for appeal (RFA) submitted by the United States Sugar Corporation (Appellant) has merit. The administrative record (AR) does not support the determination made by the US Army Corps of Engineers, Jacksonville District (hereinafter the “District”) that the property contains non-navigable tributaries of traditionally navigable waters (TNW) where the tributaries are relatively permanent waters (RPWs) with continuous flow, at least seasonally. In addition, the AR does not support the District’s determination that the onsite waters have a significant nexus to the nearest downstream TNW.

BACKGROUND

The United States Sugar Corporation is the landowner for the property in question which consists of approximately 7,629.19 acres¹ of farmland and is located within the Everglades Agricultural Area (EAA), which is part of the Everglades Watershed. Specifically, the property is located north of Bolles Canal Road, south of G-2 Canal Road, east of Miami Canal Road, and west of U.S. 27 in Palm Beach County, Florida.

The District describes the property as farmland that is divided into smaller farm sections and farm areas by a grid of onsite canals and ditches that convey water. In decreasing order of relative size, these conveyances include the following: perimeter canals;

¹ Of this amount, 7,366 acres are farmland and 264 acres are non-wetland waters (See Sections II.B.1.b and IV.B. of the Approved Jurisdictional Determination Form).

perimeter ditches; and farm ditches (also known as lateral ditches according to the District and referred to as “farm ditches/laterals” or “lateral/farm ditches”). The perimeter canals are approximately 30-35 feet wide and are located every mile in the east/west direction and every one-half mile in the north/south direction. The District notes that the smaller perimeter ditches may only be 15-20 feet wide but doesn’t appear to specify the orientation of these conveyances. The perimeter canals break the property into farm areas, and farm ditches typically divided these farm areas into eight (8) sections (farm fields). Farm ditches/laterals are approximately four (4) feet wide and are oriented in a north/south direction every 650 feet. According to the AR, the farm ditches/laterals connect to the perimeter ditches.

At times, the AR appears to contain different terms for the same conveyance. In addition, Appellant refers to the farm ditches/laterals as “field ditches” and perimeter ditches as “lateral ditches.” For purposes of this review, the appeal decision document will reflect the terminology used in the Approved Jurisdictional Determination Form (hereinafter “AJD Form”) when referring to onsite waters. Specifically, the AJD Form refers to the “perimeter ditches” and “perimeter canals” as RPWs and “farm ditches/laterals” as nonRPWs.

The flow of water offsite is through one of three pump stations.. Pump station 1 discharges directly into the Miami Canal, a TNW located to the west of the property. Pump stations 2 and 3 discharge into the Bolles Canal, (also referred to by the Districts as a RPW), which is located to the south of the property and directly discharges into the Miami Canal or the North New River Canal (located to the east of the property), depending on the water differential between these two canals. The District references the North New River as a TNW.

On 10 November 2011, the District issued an AJD to Appellant for the property. The District concluded that the property contains 665,100 linear feet (264 acres) of waters of the United States in the form of tributaries that are subject to regulation by the Corps. Appellant disagrees with the District’s determination and submitted a RFA on 9 January 2012, citing the reasons for appeal described and addressed below.

The administrative appeal was evaluated based on the District’s AR and Appellant’s 9 January 2012 RFA. Appellant also submitted the following: a document titled “Supplement to Administrative Appeal” and dated 8 February 2012; an undated document received on 28 June 2012 documenting Appellant’s opening statement and responses to questions posed by the Appeals Review Officer during the 19 June 2012 appeal meeting; and a 6 September 2012 e-mail message.² Appellant’s 28 June 2012 document also included enclosures. The appeal of an AJD is limited to information contained within the District’s AR up to the date of the District’s determination,

² According to Appellant’s 6 September 2012 e-mail message, there are 176 field ditches and 7 lateral ditches. Appellant stated that the G2 and Bolles Canals are not within the boundaries of the Lake Harbor farm.

acceptable reasons for appeal contained within the Appellant's RFA and received within sixty (60) days of the date of the notice of appeals, and information presented by the District or Appellant that further interprets or clarifies the AR or RFA.³ Therefore, only clarifying information contained with Appellant's documents dated 8 February 2012 and 28 June 2012 and its e-mail message dated 6 September 2012 was considered during the evaluation of this RFA.

APPELLANT'S REASONS FOR APPEAL

The five appeal reasons specified in this section were included in Appellant's RFA dated 9 January 2012, as further clarified in its 8 February 2012 Supplement. However, in its 28 June 2012 document, Appellant provided a list of the reasons for appeal, and the list includes an appeal reason that was not included in the RFA. Specifically, the RFA does not challenge the Corps' conclusions that the North New River and Miami Canals are TNWs, but the 28 June 2012 document states the fifth appeal reason to be that "[t]he Corps has not established that the North New River and Miami Canals are TNWs."

The challenge to the District's TNW conclusions is a new appeal basis that was not timely submitted. Although the TNW conclusions were not timely challenged, the question of whether the District established that the North New River Canal is a TNW is one of several issues which had been identified during the appeal process as needing to be addressed by the District on remand.

Lastly, one of the appeal reasons that was identified to be in the RFA (Appeal Reason 5 - the lack of a nexus to endangered species) was not in the list of appeal reasons that was included in the 28 June 2012 document. Consequently, the five appeal reasons that were timely presented in the RFA, as clarified in Appellant's subsequent documents, are listed below and followed by a list of the other issues that were identified during the appeal process and need to be addressed by the District on remand.

Appeal Reason 1: The Corps lacks jurisdiction because the entire property is prior converted cropland, which is excluded from the definition of "waters of the United States." [Clarification in Appellant's 28 June 2012 document: "The entire Lake Harbor Farm, including the farm fields and the interior field and lateral ditches and canals, qualifies as PCC and is excluded from CWA jurisdiction."]

Appeal Reason 2: The entire site is isolated from TNWs, and non-navigable isolated waters fall outside the Corps' jurisdiction. The only way the internal ditches and canals connect to the Miami Canal or Bolles Canal is via pump stations. [Clarification in Appellant's 28 June 2012 document: "The entire site is isolated from TNWs and therefore non-jurisdictional because the pump stations sever any connection from the Lake Harbor farm to offsite waters."]

³ 33 C.F.R. § 331.7(f).

Appeal Reason 3: The JD erroneously relies on Justice Scalia's jurisdictional test in *Rapanos* to conclude that the perimeter ditches are RPWs. The Corps may only apply Justice Kennedy's significant nexus test to determine the scope of its jurisdiction. Assuming that Justice Scalia's test may be applied, the perimeter ditches fail to meet the standard set forth in Justice Scalia's test because they do not have relatively permanent flow and do not connect to TNWs. The pump stations represent distinct boundaries between the perimeter canals and the Miami and Bolles Canals and thus sever any flow and/or connection to TNWs. [Clarification in Appellant's 28 June 2012 document: "The AJD erroneously relies on Justice Scalia's jurisdictional test in *Rapanos* to conclude that the perimeter ditches are RPWs. *Robison v. United States*, 505 F.3d 1208, 1219-20 (2007). The District erred by applying the plurality's jurisdictional test, and, in any event, none of the features on the farm site qualify as RPWs because they do not have relatively permanent flow and do not connect to TNWs."]

Appeal Reason 4: The Corps has not demonstrated a significant nexus between the "isolated lateral and perimeter ditches [farm ditches/laterals and perimeter ditches] and navigable waters." [Clarification in Appellant's 28 June 2012 document: "The Corps has not demonstrated a significant nexus between the on-site drainage features and TNWs. The significant nexus determination relies on an improper reach, does not provide evidence of the volume, duration, and frequency of flow or of the functions and services of the field and lateral ditches and canals that are purportedly significant to the TNW."]

Appeal Reason 5: The JD incorrectly asserts that the "field (lateral) ditches and the perimeter canals are foraging areas for wood storks and other wading birds". Accordingly, there is no nexus to endangered species such that the on-site features are jurisdictional.

Other Issues Identified: The following issues were identified during the appeal process that were not specific bases for appeal but need to be addressed by the District: (1) insufficient information supporting that the North New River is a TNW; (2) insufficient information to establish whether the Bolles Canal and G-2 Canal are RPWs; (3) the accuracy of the factual statements regarding the G-2 Canal; and (4) confusing tributary terminology in the AR and inconsistent facts in the AR versus Appellant's submissions.

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

Appeal Reason 1: The Corps lacks jurisdiction because the entire property is prior converted cropland, which is excluded from the definition of "waters of the United States." [Clarification in Appellant's 28 June 2012 document: "The entire Lake Harbor Farm, including the farm fields and the interior field and lateral ditches and canals, qualifies as PCC and is excluded from CWA jurisdiction."]

Finding: This reason for appeal does not have merit.

Discussion: Appellant asserted in the RFA that, prior to 23 December 1985, the entire site was converted from wetlands to non-wetlands for the purpose of producing an agricultural commodity and it has been farmed continuously since that time. Appellant concluded that the site meets the requirements for PCC and, consequently, should be excluded from CWA jurisdiction. Furthermore, Appellant stated that the Corps and EPA categorically excluded PCC from the definition of “waters of the United States” when the agencies amended their regulations in 1993. Appellant also asserted that the Corps cannot assert jurisdiction simply because there may be a future project that involves non-agricultural activities.

In summary, Appellant’s property has not been determined to be “prior converted cropland” (hereinafter “PC cropland”) by any Federal agency. Notwithstanding a PC cropland determination, the Corps and Environmental Protection Agency (EPA) have authority to determine CWA jurisdiction. Each of these conclusions is explained below.

In 1993, the Corps and EPA issued final regulations which, among other changes, revised the definition of “waters of the United States” to exclude PC cropland.⁴ The purpose of this change was to codify existing policy, as reflected in Regulatory Guidance Letter (RGL) 90-07,⁵ and help to achieve consistency among various Federal programs affecting wetlands.⁶ Regarding the definition of “waters of the United States,” the Corps regulation states the following:

Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area’s status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA⁷.

The term “prior converted cropland,” however, is not defined in the Corps or EPA regulations. Prior to 1996, PC cropland was defined in the National Food Security Act Manual which the Soil Conservation Service (SCS) published.⁸ Following the 1996 amendments to the Food Security Act of 1985 (FSA), a definition for PC cropland was added to the regulations of the Natural Resources Conservation Service (NRCS),⁹ which

⁴ Clean Water Act Regulatory Programs, 58 Fed. Reg. 45008-01 (August 25, 1993) (final rule).

⁵ Clarification of the Phrase “Normal Circumstances” as it Pertains to Cropped Wetlands, RGL 90-07 (September 26, 1990).

⁶ 58 Fed. Reg. at 45031.

⁷ 33 C.F.R. § 328.3(a)(8).

⁸ 58 Fed. Reg. at 45031.

⁹ See Highly Erodible Land and Wetland Conservation, 61 Fed. Reg. 47019-01 (September 6, 1996) (interim final rule with request for comments).

is an agency in the U.S. Department of Agriculture (USDA).¹⁰ NRCS defines “prior-converted cropland” to mean

a converted wetland where the conversion occurred prior to December 23, 1985, an agricultural commodity had been produced at least once before December 23, 1985, and as of December 23, 1985, the converted wetland did not support woody vegetation and met the following hydrologic criteria:

- (i) Inundation was less than 15 consecutive days during the growing season or 10 percent of the growing season, whichever is less, in most years (50 percent chance or more); and
- (ii) If a pothole, playa or pocosin, ponding was less than 7 consecutive days during the growing season in most years (50 percent chance or more) and saturation was less than 14 consecutive days during the growing season most years (50 percent chance or more).¹¹

The NRCS’ PC cropland definition is relevant for determining a person’s eligibility for USDA programs, and it is a Federal agency that applies the definition and makes a determination.¹² There is no indication, however, that any Federal agency has applied the definition and made a determination that Appellant’s property is PC cropland. In fact, U.S. Sugar is not a USDA program participant, and it has not requested nor received a PC cropland determination from the NRCS.¹³

Even if NRCS had determined Appellant’s property to be PC cropland, such a determination does not preclude or diminish the authority of the Corps and EPA to determine CWA jurisdiction. To the contrary, the mutual efforts of the EPA, Corps, and NRCS has promoted consistency but has not diminished the authority of any Federal agency.

¹⁰ The NRCS was originally established by Congress in 1935 as the Soil Conservation Service. In 1994, the agency’s name was changed to its current name to reflect the broadened scope of the agency’s activities.

¹¹ 7 C.F.R. § 12.2(a). The term “converted wetland” is defined to mean “a wetland that has been drained, dredged, filled, leveled, or otherwise manipulated ... for the purpose of or to have the effect of making possible the production of an agricultural commodity without further application of the manipulations described herein if: (i) Such production would not have been possible but for such action, and (ii) Before such action such land was wetland, farmed wetland, or farmed-wetland pasture and was neither highly erodible land nor highly erodible cropland. *Id.*

¹² See, e.g., 7 C.F.R. § 12.1 (stating the scope of Part 12 to be setting forth terms and conditions under which a person shall be determined to be ineligible for certain USDA benefits); 33 C.F.R. § 328.3(a)(8) (“Notwithstanding the determination of an area’s status as prior converted cropland by any other Federal agency ...”); Clean Water Act Regulatory Programs, 58 Fed. Reg. at 45031-45033 (August 25, 1993) (discussing SCS determinations and jurisdictional determinations made by EPA and the Corps); and RGL 90-07, para 5.f. (discussing the Corps’ reliance upon “prior converted cropland” designations by the SCS).

¹³ See page 2 of Appellant’s June 28, 2012 document containing responses to questions and additional information.

The fact that the EPA's and Corps' authority are unaffected by a NRCS determination of PC cropland is consistently stated in applicable federal regulations, agency agreements, and other documents. For example, in 1993 the Corps and EPA addressed this issue in response to comments on the proposed definition of "waters of the United States" and stated,

... [T]oday's rule does not 'delegate' EPA's ultimate authority for determining the scope of geographic jurisdiction under the CWA. At the same time, we believe it is critical that duplication between the SCS's wetlands program and the CWA Section 404 program be reduced. In that regard, we believe that farmers should generally be able to rely on SCS wetlands determinations for purposes of complying with both the Swampbuster program and the Section 404 program. In order to make this reliance possible, we are working with SCS to develop appropriate procedures, including monitoring, for coordinating wetland determinations by the agencies However, in order to clarify the relationship between determinations made by SCS and the Corps or EPA, we have added language to the rule itself stating that the final authority regarding CWA jurisdiction remains with EPA.¹⁴

Consistent with this response to comments, the Corps' regulation states, "Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, . . . the final authority regarding Clean Water Act jurisdiction remains with EPA."¹⁵ Furthermore, the applicable Local Operating Agreement between NRCS and the Corps concerning compliance with the FSA and CWA highlights that NRCS and the Corps will inform persons that a determination it performs may not be valid for CWA or FSA (as applicable) jurisdiction.¹⁶ Consistent with this Local Operating Agreement, SAJ included this information in its cover letter conveying the AJD to the Appellant.¹⁷

Even if NRCS certifies a wetland determination, the Florida NRCS Field Office Technical Guide instructs that "Other Waters" are not regulated under the FSA, which includes, among other waters, "ditches."¹⁸ The Technical Guide also instructs persons to request wetland determinations from the Corps for "[a]gricultural lands where non-agricultural uses have been established or will be established to the extent that agricultural production will no longer occur or is no longer feasible."¹⁹

¹⁴ Clean Water Act Regulatory Programs, 58 Fed. Reg. at 45032-45033.

¹⁵ 33 C.F.R. § 328.3(a)(8).

¹⁶ Local Operating Agreement Between the Natural Resources Conservation Service, Florida and the Army Corps of Engineers, Jacksonville District Concerning Compliance with the Food Security Act and the Clean Water Act, Article III.A.1.(c), 2.(c) (September 2, 2005).

¹⁷ Jacksonville District Letter, p. 2 (November 10, 2011) (stating, "This determination may not be valid for the wetland conservation provisions of the [FSA].").

¹⁸ Florida Wetland Mapping Conventions and Procedures, pp. 5-6 (March 2004).

¹⁹ *Id.* at 6 (emphasis added).

Appellant's property was not determined to be PC cropland and, even if it had been, such a determination would not negate or diminish the Corps' authority to determine CWA jurisdiction. Also, there is nothing in the AR to support Appellant's assertion that the Corps asserted jurisdiction over the tributaries "simply because there may be a future project that involves non-agricultural activities." Consequently, the District appropriately determined the geographic scope of jurisdiction on the subject property for CWA purposes.

Action: None required.

Appeal Reason 2: The entire site is isolated from TNWs, and non-navigable isolated waters fall outside the Corps' jurisdiction. The only way the internal ditches and canals connect to the Miami Canal or Bolles Canal is via pump stations. [Clarification in Appellant's 28 June 2012 document: "The entire site is isolated from TNWs and therefore non-jurisdictional because the pump stations sever any connection from the Lake Harbor farm to offsite waters."]

Finding: This reason for appeal has merit.

Discussion: Appellant asserts that the entire site is isolated from TNWs because the only connection to a TNW is through the pump stations. Appellant also states that the pump stations sever any connection from the Lake Harbor farm to offsite waters.

In Section III.B of the AJD Form, the District described the onsite waters and states that their connection to TNWs (the Miami Canal and/or the North New River) is through one of three pump stations. More specifically, the AJD Form in Section III.B.1.ii.a. explains that water flows off the farm fields either through sheet flow or subsurface flow to the farm ditches/laterals, which then discharge to the perimeter ditches through culverts. The water is discharged from the perimeter ditches offsite through the pump stations to the Bolles Canal or to the Miami Canal. Accordingly, water accumulates on either side of the berm and the pumps are operated to discharge water in either direction, as may be required by agricultural practices.

The term "waters of the United States" is defined to include "[a]ll impoundments of waters otherwise defined as waters of the United States under the definition."²⁰

Generally, impoundment of a water of the United States does not affect the water's jurisdictional status.²¹ Based on the District's description of the role of the pump stations in discharging water to the Bolles Canal or Miami Canal (see Section III.B), one reasonable conclusion is that the site contains impounded waters, and the pumping stations do not sever the hydrologic connection of the onsite waters with TNWs.

²⁰ 33 C.F.R. § 328.3(a)(4).

²¹ Jurisdictional Determination Form Instructional Guidebook, p. 51, Section II.B.1 [hereinafter "JD Guidebook"].

However, documentation is required to support a determination that a water body otherwise defined as a water of the United States is being impounded and that the particular impoundment does, in fact, retain its jurisdictional status.²²

In this case, neither the District's AJD Form nor the AR as a whole contain sufficient information addressing whether the pumping stations impound waters otherwise defined by Corps regulations as waters of the United States. If the pumping stations do impound waters of the United States, the AR should address the pumping stations in full to include additional factors (e.g., seepage, spillways, and operational impacts to flow) that would clearly demonstrate whether the pumping stations affect the jurisdictional status of the impounded waters (or "impoundment").

Action: The District must adequately address whether the pumping stations are impounding the onsite waters and, if yes, whether the impoundments retain their jurisdictional status as waters of the United States, which is relevant to the issue of the site's hydrologic connection with TNWs. If the pumping stations are impounding the onsite waters, the District should complete Section II.B.1.a. and Section III.D.7 of the AJD Form.

Appeal Reason 3: The JD erroneously relies on Justice Scalia's jurisdictional test in *Rapanos* to conclude that the perimeter ditches are RPWs. The Corps may only apply Justice Kennedy's significant nexus test to determine the scope of its jurisdiction. Assuming that Justice Scalia's test may be applied, the perimeter ditches fail to meet the standard set forth in Justice Scalia's test because they do not have relatively permanent flow and do not connect to TNWs. The pump stations represent distinct boundaries between the perimeter canals and the Miami and Bolles Canals and thus sever any flow and/or connection to TNWs. [Clarification in Appellant's 28 June 2012 document: "The AJD erroneously relies on Justice Scalia's jurisdictional test in *Rapanos* to conclude that the perimeter ditches are RPWs. *Robison v. United States*, 505 F.3d 1208, 1219-20 (2007). The District erred by applying the plurality's jurisdictional test, and, in any event, none of the features on the farm site qualify as RPWs because they do not have relatively permanent flow and do not connect to TNWs."]

Finding: This reason for appeal has merit.

Appellant's Appeal Reason 3 is understood to focus on the perimeter canals and perimeter ditches, which the District determined to be RPWs.²³ This discussion section focuses only on whether the AR supports the conclusion that the perimeter canals and perimeter ditches are RPWs. The issue of whether the pump stations sever any flow and/or connection to a TNW was addressed in the section for Appeal Reason 2. The

²² JD Guidebook, p. 58, Section III.D.7.

²³ In Section III.B.1.(ii)(c) of the AJD Form, the flow of the RPWs is specified to be "seasonal" with twenty (20) or more flow events per year. Regarding the farm ditches/laterals, the District concluded they are non-RPWs (see Section III.B.1.(ii)(b) of the AJD Form); consequently, the farm ditches/laterals are not the focus of Appellant's Appeal Reason 3.

issues regarding significant nexus and Justice Scalia's versus Justice Kennedy's tests are addressed in the section for Appeal Reason 4.

The Memorandum, Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States* (December 2, 2008) (hereinafter "Rapanos Memorandum") (pp. 6-7) provides guidance to the agencies to generally assert jurisdiction over a non-navigable, relatively permanent water body whose waters flow into a TNW either directly or indirectly. RPWs are described in the Rapanos Memorandum (pp. 6-7), as "waters that typically (e.g., except due to drought) flow year-round or waters that have a continuous flow at least seasonally (e.g., typically three months). The Rapanos Memorandum (p.6, footnote 24) definition of a tributary includes "natural, man-altered, or man-made water bodies that carry flow directly or indirectly into a traditional navigable water."

Therefore, CWA jurisdiction over an RPW would be upheld when two conclusions are true. The RPW must carry flow directly or indirectly into a TNW, and it must have flow that is year-round or continuous at least seasonally (typically 3 months). Accordingly, in order to satisfy documentation requirements for determining the presence of a RPW, the District must first substantiate whether the water body typically has flow either year-round (perennial) or continuous, at least seasonally. Once the flow regime of the presumed RPW is established, the District must then document the manner in which it determined the pathway and characteristics of the discharges between the water body and a TNW or between the water body and two or more waters of the U.S. (i.e., document that the RPW flows either directly or indirectly into a TNW or flows between two or more waters of the U.S. and document that the discharge is continuous, at least seasonally.

The JD Guidebook (pp. 56) describes factors that are useful in determining flow and whether or not the flow is continuous at least seasonally: 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, shelving, wracking, water staining, sediment sorting, and scour. Relevant contextual factors that directly influence the hydrology of tributaries include the size of the tributary's watershed, average annual rainfall, average annual winter snow pack, slope, and channel dimensions. Other principal considerations of flow include the volume, duration, and frequency of the flow of water in the tributary.

The JD Guidebook, p.56 states, "If flow is continuous at least 'seasonally' provide data supporting this conclusion in Section III.B of the AJD Form. The District provided relevant data in this section. The District provided additional flow data within Section III.D.2 of the AJD Form. Specifically, the District's AJD Form provides the following information as it relates to flow characteristics of the onsite tributaries:

Section III.B.1.(ii).(a) – "Based on the constant inundation of water within these canals as well as the quantity and frequency of flow offsite from these canals to the Bolles and G-2 canal through nine pumps at the three pump stations, the perimeter canals are relatively

permanent waters. The lateral/farm ditches discharge to the perimeter ditches through culverts and hold water throughout the year.”

Section III.B.1.(ii).(b) – The tributary/s were checked as Artificial (man-made) and Manipulated (man-altered) with the following explanation: “The farm ditches/laterals (non RPWs) discharge to/recharge by gravity via culverts from the farm’s perimeter ditches/canals (RPWs), which discharge to/recharge from the Bolles Canal or the G-2 Canal, which are in turn hydrologically connected to the North New River and Miami Canals (TNWs).”

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/year (i.e. frequency). The tributary was described as having: bed and banks, OHWM, clear/natural line impressed on the bank, shelving, water staining, destruction of terrestrial vegetation, and multiple observed or predicted flow events (i.e. volume and duration).

Section D.2. – The District’s data and rationale indicating that the tributary/s flow seasonally (onsite RPWs) is as follows: “The perimeter/farm ditches (RPWs) can be found throughout the site and discharge to the Bolles Canal or the Miami Canal which are then in turn connected to the North New River Canal. The perimeter ditches are interconnected throughout the site. While relatively shallow, these canals typically have water in them throughout most of the year as they are used as either irrigation (filled from the Bolles or G-2 canals to maintain water levels on the farm during periods of low rainfall) or drainage (water is discharged off the farm to the Bolles or G-2 canals to maintain low water levels onsite during periods of high rainfall). While a period where there was no water within these canals is a possibility, it would occur only in an extreme drought event. The nature of the flow between the perimeter canals and the Bolles or Miami Canals are artificial in nature occurring through nine pumps in three pump stations. The farm has also self-identified one-inch stormwater retentions as a best management practice for stormwater management. Therefore, it is difficult to characterize the artificially maintained flow between the perimeter canal and the Bolles/Miami Canals as year-round. However, after reviewing the known offsite discharges from the three pump stations, the Corps has determined that the flow can be characterized as seasonal as an average of approximately 70% of the discharges within the past seven years have occurred during June 1 and October 31 correlating to the South Florida rainy season.”

On the AJD Form, the District substantially documented duration and volume of flow within the onsite tributaries and provided numerous physical indicators (e.g., bed and banks, OHWM, clear/natural line impressed on the bank, shelving, water staining, destruction of terrestrial vegetation, and multiple observed or predicted flow events).

However, without further analysis of the frequency of flow it is unclear whether the onsite tributaries are perennial, intermittent and/or ephemeral waters. Information in the AR (e.g., estimated average of 20 or greater flow events in the review area/year, and an

average of approximately 70% of the discharges within the past seven years have occurred during June 1 and October 31 correlating to the South Florida rainy season) is useful in such determinations, but does not provide a sufficient rationale to support the conclusion that the flow from the onsite tributaries to the TNW is year-round or continuous, at least seasonally.

Action: Reevaluate and/or substantially document the frequency of flow from the perimeter canals and/or perimeter ditches to a downstream TNW and make a determination as to whether or not the tributary is an RPW (perennial), an RPW (seasonal), intermittent, or ephemeral.

Appeal Reason 4: The Corps has not demonstrated a significant nexus between the “isolated lateral and perimeter ditches [farm ditches/laterals and perimeter ditches] and navigable waters.” [Clarification in Appellant’s 28 June 2012 document: “The Corps has not demonstrated a significant nexus between the on-site drainage features and TNWs. The significant nexus determination relies on an improper reach, does not provide evidence of the volume, duration, and frequency of flow or of the functions and services of the field and lateral ditches and canals that are purportedly significant to the TNW.”]

Finding: This reason for appeal has merit.

Discussion: This section focuses solely on whether the AR establishes a significant nexus to a TNW for the onsite waters. The issue regarding whether the onsite waters are “isolated” was addressed in the section for Appeal Reason 2. For purposes of this section, the discussion presumes that the perimeter ditches and perimeter canals are RPWs with seasonal flow, though Appellant’s challenge to this determination is addressed in the section for Appeal Reason 3.

The District concluded that the onsite tributaries are a combination of “Relatively permanent waters (RPWs) that flow directly or indirectly into TNWs” and “Non-RPWs that flow directly or indirectly into TNWs.”²⁴ More specifically, the perimeter ditches were determined to be RPWs with seasonal flow, and the farm ditches/laterals were determined to be non-RPWs.²⁵

In the Eleventh Circuit, the Kennedy test for significant nexus is the sole method of determining CWA jurisdiction, and the test must be applied to tributaries as well as wetlands.²⁶ Consequently, a significant nexus analysis must be conducted for all waters

²⁴ Section II.B.1.a. of the AJD Form.

²⁵ Section III.B. 1(a), (b), and (c) of the AJD Form.

²⁶ In *United States v. McWane, Inc.*, 505 F.3d 1208 (11th Cir. 2007), petition for rehearing en banc denied, 521 F.3d 1319 (Mar. 27, 2008), petition for certiorari denied, Dec. 1, 2008, the Eleventh Circuit concluded that the Justice Kennedy’s significant nexus test is the sole method for determining CWA jurisdiction in the 11th Circuit pursuant to *United States v. Rapanos*, 547 U.S. 715 (2006). Accordingly, all USACE

on site (RPWs and nonRPWs), with sufficient documentation placed in the AR regarding the existence of the significant nexus. In conducting a significant nexus analysis, the District should consider flow characteristics and functions of the tributary; hydrologic factors, such as volume, duration, and frequency of flow and proximity to the TNW; and ecologic factors, such as provision of aquatic habitat.²⁷

Documentation requirements specified for non-RPWs²⁸ are as follows, which are similar to those for RPWs in this case:

- Section III.B.1 (and III.B.2 and III.B.3, if applicable) of the AJD form needs to demonstrate that water flow characteristics of a non-RPW, in combination with the functions provided by those non-RPWs and any adjacent wetlands (if any), has more than an insubstantial or speculative effect on the chemical, physical, and/or biological integrity of the TNW.
- Section III.C.1 or Section III.C.2 needs to identify rationale to support the significant nexus determination for the non-RPW.²⁹

The District's AJD Form provides the following information:

Section III.C.1. – Significant nexus findings for non-RPW that has no adjacent wetlands and flows directly or indirectly into TNWs³⁰:

“...These canals are typical of the sort of ditches/canals throughout the relevant reach. The farm ditches have the capacity to carry pollutants and flood waters to the TNW from the farm field. Additionally, the discharge can move sediment from the farm area to the TNW. The 264 acres of onsite farm ditches, perimeter ditches, and canals and the approximately 6,700 miles of interconnected ditches and canals throughout the relevant reach serve to carry residential and agricultural pollutants and flood water to the North New River Canal and the Miami Canal (both TNWs). Given the drainage area (approximately 408,735 acres) of the relevant reach, a significant volume of stormwater attenuation and filtration is provided to the TNWs. Based on observed fish, the foraging of wood storks along these canal systems, and the existence of alligators, support that the tributaries, non-RPWs included, provide sufficient biomass support for fish and other species including feeding and nesting area, which are also associated with the Everglades and the TNWs. These waters have the capacity to support foodwebs in the Everglades, the TNWs, and the associated watersheds through the transfer of nutrients and organic carbon.

approved jurisdictional determinations under Section 404 of the CWA within the Eleventh Circuit must employ the significant nexus standard.

²⁷ See Rapanos Memorandum, pp. 8-12; JD Guidebook, pp. 54-56.

²⁸ JD Guidebook, pp. 57.

²⁹ JD Guidebook, pp. 57.

³⁰ The AJD Form does not have a section solely to perform a significant nexus analysis on RPWs that flow directly or indirectly into TNWs. Therefore, the District used this section for this information.

The functions provided by the lateral/farm ditches, perimeter canals, and other canals have a significant combined effect on the physical, chemical, and biological integrity of the Everglades and the North New River and Miami Canals.”

The District’s rationale that the onsite RPWs and non-RPWs have a significant “Physical” nexus with the downstream TNW is as follows:

Section III.B.1.(i). – The watershed size and drainage area were both estimated to be 408,735 acres. The average annual rainfall was estimated to be 40-65 inches.

Section III.B.1.(ii)(a) – The RPWs (tributary) were described as flowing directly into the TNW. The non-RPWs (tributary) were described as flowing through 2 tributaries before entering the TNW. The proximity of the onsite tributaries were described as being 1 (or less) miles from the TNW. (Note that the pick list for miles does not have an option less than 1). The flow route, to the TNW, was described as follows:

The project falls within the Everglades Agricultural Area, a 700,000-acre agricultural area developed through drainage of the northern Everglades. The EAA covers approximately 27% of the historic Everglades and includes 500,000 acres of farmland, mainly producing sugar cane. The EAA is part of the Everglades Watershed based on the USGS Hydrologic Unit Codes (03090202). There are 16 basins (12-digit HUC codes) within the Everglades Basin. The project falls within two of them (the West Bolles Canal – 030902020300 and the East Bolles Canal – 030902020200) that total 408,735 acres and make up the relevant reach of the project. The two sub-basins, which consist of similar quality habitat and land uses, are actually interconnected as there is no hydrologic barrier between them along the Bolles Canal. They consist of offsite and canals/ditches, that are similar to the onsite canals/ditches. Within the West Bolles Canal basin, the Miami Canal is a Traditionally Navigable Water as evidenced by the presence of historic navigation locks 6.5 miles to the north and documented navigation through historic photographs. The North New River canal is also a TNW within the East Bolles Canal basin. The Bolles Canal has an east-west alignment connecting and flowing directly into both the Miami and North New River primary canals. Because of the Bolles Canal’s shallow depth, it has historically served local farms by flowing either east or west depending on stages in the primary canals (the Miami or North New River Canals). The G-2 and the Bolles Canal (or L-21) border the site to the north and south respectively. Although the

Bolles Canal runs along the full southern border of the site, the southeast corner of the site is 1 mile to the Miami Canal. The G-2 canal forms the northern border of the site and there is 0.5 miles from the intersection of the G-2 canal and the Miami Canal and the site's northwestern border.

The proposed project area is 7,629.19 acres within a larger farm. The site is divided into smaller farm sections by canals and ditches. All of the ditches and canals onsite are hydrologically interconnected and consist of 30 to 35 foot wide perimeter canals every mile in the east/west direction and every ½ mile in the north/south direction. Smaller perimeter ditches may be only 15-20 feet wide, although, like the larger perimeter canals they are all interconnected. The perimeter canals break the farm into farm areas which are then typically divided into 8 sections (farm fields) by farm ditches (also known as lateral ditches). Farm ditches/laterals are oriented in a north/south direction every 650 feet (8 laterals per mile). Depending on the crop planted, the farm fields may include field ditches or furrows that may or may not maintain wetland vegetation based on either the water levels maintained on the site or on frequent maintenance. When planted in sugar cane, which grows on roughly a four year cycle, the farm ditches are not maintained. When the fields are prepared for replanting of the next cycle of sugar, the farm ditches are cleared out completely and realigned. Water flows off the farm fields either through sheet flow or subsurface flow to the lateral ditches, which then discharge to the perimeter ditches through culverts. The perimeter ditches discharge offsite through pump stations to the Bolles Canal or to the Miami Canal, which are named and permitted through the South Florida Water Management District. Based on the constant inundation of water within these canals as well as the quantity and frequency of flow offsite from these canals to the Bolles and G-2 canal through nine pumps at the three pump stations, the perimeter canals are relatively permanent waters. The lateral/farm ditches discharge to the perimeter ditches through culverts and hold water throughout the year.

Section III.B.1.(ii).(b) – The tributary/s were checked as Artificial (man-made) and Manipulated (man-altered) with the following explanation: “The farm ditches/laterals (non RPWs) discharge to/recharge by gravity via culverts from the farm's perimeter ditches/canals (RPWs), which discharge to/recharge from the Bolles Canal or the G-2 Canal, which are in turn hydrologically connected to the North New River and Miami Canals (TNWs).”

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/year. The tributary was described as having: bed and banks, OHWM, clear/natural line impressed on the bank, shelving, water staining, destruction of terrestrial vegetation, and multiple observed or predicted flow events.

The District’s rationale that the onsite RPWs and non-RPWs have a significant “Chemical” nexus with the downstream TNW is as follows:

Section III.B.1.(iii) – The tributaries were characterized as: tannin stained, clear, agricultural ditch water, water quality determined by the surrounding agricultural areas. Specific pollutants, within the tributaries, were described as: sediment, nutrients, fertilizers, pesticides.

The District’s rationale that the onsite RPWs and non-RPWs have a significant “Biological” nexus with the downstream TNW is as follows:

Section III.B.1.(iv) – The tributaries were described as supporting habitat for:

Federally Listed species: Field ditches and the perimeter canals are foraging areas for wood storks and other wading birds. Wood storks were observed on the edges of similar canals within the area.

Fish/spawn areas: Fish are located throughout the canal systems in South Florida including these farm or perimeter canals.

Other environmentally-sensitive species: Alligators live within the canal and ditch system. In addition to the presence of fish and alligators, canals in South Florida also support foraging habitat for wood storks, and based on a project specific wildlife survey, a number of other birds, small mammals and reptiles.

Aquatic/wildlife diversity: While diversity in the tributaries may be affected compared to a non-manipulated system, reptiles, amphibians, birds, and fish are present; additionally, the presence of large reptiles including alligators throughout the canal system shows that the system supports significant aquatic fauna.

The Rapanos Memorandum states (pp. 10): “Where a tributary has no adjacent wetlands, the agencies will consider the flow characteristics and functions of only the tributary itself in determining whether such tributary has a significant effect on the chemical, physical and biological integrity of downstream traditional navigable waters. A tributary...is the entire reach of the stream that is of the same order (i.e., from the point of

confluence, where two lower order streams meet to form the tributary, downstream to the point such tributary enters a higher order stream).”

The District applied the Kennedy test (that is, it performed a significant nexus analysis, as documented on the AJD Form) and did not rely on the Scalia test. However, without further rationale, it appears the District either inappropriately aggregated the effects of the onsite tributaries (both RPWs and non-RPWs) on the TNW³¹ or failed to adequately document and support its basis for determining that the entire reach of the stream is of the same order.

The District also did not establish whether the onsite tributaries affect the chemical, physical, and biological integrity of a downstream TNW in a manner that is more than speculative or insubstantial. As it relates to the significant nexus evaluation, the AJD Form states that the onsite waters have the potential to carry pollutants and flood waters from the farm area to the TNW; transport sediments from the farm area to the TNW; attenuate and filter a significant volume of flood waters for the TNW; and support foodwebs in the Everglades, the TNWs, and the associated watersheds through the transfer of nutrients and organic carbon.³² The AR does not substantially address how the onsite tributaries actually affect the TNW (e.g., beneficial and/or detrimental impacts associated with attenuating or transporting pollutants to either pristine or impaired waters). Therefore, although the District provided information in the AR stating the potential for onsite waters to have an effect on a TNW, they did not provide an adequate analysis to establish that the onsite tributaries have a significant nexus to the nearest downstream TNW.

Action: The District must re-evaluate the onsite waters and provide a tributary specific rationale to support whether the tributary has a significant nexus to a TNW. This analysis should document how the District determined that the entire reach of the tributary is of the same order and establish whether the onsite tributaries are likely to have an effect that is more than speculative or insubstantial on the chemical, physical, and biological integrity of the downstream TNW/s.

Appeal Reason 5: The JD incorrectly asserts that the “field (lateral) ditches and the perimeter canals are foraging areas for wood storks and other wading birds”. Accordingly, there is no nexus to endangered species such that the on-site features are jurisdictional.

Finding: This reason for appeal does not have merit.

³¹ The Rapanos Memorandum, p. 9, states, “Justice Kennedy applied the significant nexus standard to the wetlands at issue in Rapanos and Carabell: “[W]etlands possess the requisite nexus, and thus come within the statutory phrase ‘navigable waters’, 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.’” See also Rapanos v. United States, 547 U.S. 715, 780 (2006) (Kennedy, J., concurring in the judgment).

³² Section III.C.1. of the AJD Form.

Discussion: The appellant essentially argues that the District is precluded from asserting its jurisdiction over onsite waters based on the lack of a nexus to endangered species. In doing so, the appellant states on page 7 of its RFA that "...the District asserted that a potential nexus could be made to isolated waters through federally endangered species."

The District is not required to establish a nexus to endangered species in order to determine its jurisdiction over an aquatic resource. There is no evidence within the District's AR to suggest that the District relied upon a nexus to endangered species to establish their jurisdiction. To the contrary, there is ample evidence that the District attempted to establish the presence of permanent and non-permanent waters with a significant nexus to a downstream TNW in establishing its jurisdiction, and the adequacy of the District's evaluation is discussed throughout this decision. Accordingly, this reason for appeal has no merit.

Action: None required.

Other Issues Identified: Three issues were identified during the appeal process that are not included in the five specific bases for appeal which were timely submitted in the RFA. However, the District needs to address these issues, which are the following: (1) insufficient information supporting that the North New River is a TNW; (2) the accuracy of the factual statements regarding the G-2 canal;³³ and (3) confusing tributary terminology and inconsistent facts in the AR versus Appellant's submissions.

Other Issue 1: Insufficient information supporting that the North New River is a TNW - The District concludes that the Miami Canal is a TNW "as evidenced by the presence of historic navigation locks 6.5 miles to the north and documented navigation through historic photographs."³⁴ The District documented a reasonable basis for its conclusion. However, for the North New River, the District provides only the conclusion that the North New River "is also a TNW within the East Bolles Canal basin."³⁵ The District must provide a sufficient basis for its conclusion regarding the North New River; a mere conclusory statement is not sufficient.

Other Issue 2: Accuracy of the facts regarding the G-2 Canal³⁶ - The AR states, "The G-2 and the Bolles Canal (or L-21) border the site to the north and south respectively."³⁷ It also states, "The G-2 canal forms the northern border of the site...." Appellant presented a different factual conclusion regarding the G-2 Canal, disagreeing that it is on the property. Furthermore, based on review of the AR, it is not clear that any of the tributaries flow into the G-2 Canal. Consequently, the facts within the AR, regarding the position of the G-2 Canal in relation to the site and whether the G-2 Canal provides a hydrological connection between an onsite tributary and a TNW are unclear.

³³ For example, the information regarding the tributaries that connect to the G-2 is unclear.

³⁴ AJD Form, Section III.B.1.(ii)(a).

³⁵ *Id.*

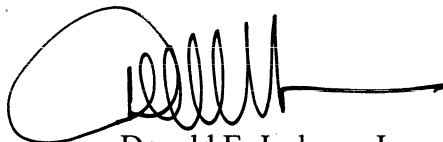
³⁶ For example, the information regarding the tributaries that connect to the G-2 is unclear.

³⁷ AJD Form, Section III.B.1.(ii)(a).

Other Issue 3: Confusing tributary terminology and inconsistent facts in the AR versus Appellant's submissions - It is difficult to follow the analysis of the tributaries because the terminology is not consistent. For example, the Physical Characteristics section of the AJD Form (Section III.B.1.(ii)(a)) distinguishes between "farm ditches/laterals," "smaller perimeter ditches" (15-20 feet wide) and "larger perimeter canals" (30 to 35 feet wide). The next section provides the average width for perimeter canals (but not perimeter ditches)³⁸ and the average flow is discussed for perimeter ditches (but not perimeter canals).³⁹ In addition, Appellant uses different terminology and, for what seems to be the same tributaries (albeit with a different name), Appellant's facts differ from the District's facts regarding the number of field ditches/laterals and perimeter ditches and canals. The AR does not contain a diagram that includes all of the relevant information in one place (that is, onsite tributaries, location of the pump stations, and canals that are RPWs and TNWs). The District should review the factual information provided by Appellant, determine the correct and relevant facts, and make the AR clear with respect to the relevant information.

CONCLUSION

For the reasons stated above, I have determined the appeal has merit. The District's AR does not contain sufficient documentation to support the decision that the subject site contains waters of the United States that have a significant nexus to a TNW. In addition to the bases of appeal that have merit, other issues were identified and are discussed above that the District must address. The administrative appeals process for this action is hereby concluded.



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

³⁸ See AJD Form, Section III.B.1.(ii)(b).
³⁹ See AJD Form, Section III.B.1.(ii)(c).