

ADMINISTRATIVE APPEAL DECISION

CITY OF BROOK PARK – AEROSPACE PARKWAYS PARCELS

BUFFALO DISTRICT FILE NO. LRB-2014-543

July 14, 2015

Review Officer (RO): Mr. Tom Cavanaugh, South Pacific Division, US Army Corps of Engineers

Appellant: City of Brook Park

Permit Authority: Section 404 of the Clean Water Act (33 USC § 1344 et seq.)

Receipt of Request for Appeal: November 17, 2014

Site Visit/Informal Meeting: April 29, 2015

Summary: The Appellant is challenging the Buffalo District's (LRB) approved jurisdictional determination (JD) which concluded that waters of the United States are present on-site subject to federal regulation under the Clean Water Act (CWA). The Appellant believes the Buffalo District incorrectly applied law, regulation, or official promulgated policy. More specifically, the Appellant believes the district has not met either Rapanos test, plurality or Kennedy, with respect to Wetland B. The Appellant stated that the Buffalo District did not demonstrate a continuous surface water connection between Wetland B and a relatively permanent water (RPW) to satisfy the plurality opinion, and the approved JD did not demonstrate a significant nexus to a traditional navigable water (TNW) to meet Justice Kennedy's concurrence. For reasons detailed in this document, the reason for appeal has merit. The JD is remanded to the District for reconsideration, additional evaluation, and documentation sufficient to support the decision. The final Corps jurisdictional decision in this case will be made by the Buffalo District Engineer or his designated representative.

Background Information: HzW Environmental Consultants, LLC (HzW) submitted a JD report to the Buffalo District on behalf of the City of Brook Park. The report titled *Affirmation and Jurisdictional Determination Request for the Block Q and Additional Parcel Study Area Located Adjacent to Aerospace Parkway in the City of Brook Park, Cuyahoga County, Ohio (H14091)* was dated June 13, 2014, and identified two wetlands (Wetland A and Wetland B) within the boundaries of the 22-acre study area. The study area contains two separate parcels. The northern parcel contains Wetland A, and the southern parcel contains Wetland B. The study area is located north of the intersection of Aerospace Parkway and Ruple Parkway, west of Aerospace Parkway, east of Ruple Parkway, and south of Cedar Point Drive. See the attached map titled Figure 3¹ for a depiction of the study area and location of identified aquatic resources. The study area is located within the Lower Rocky River watershed (Hydrologic Unit Code

¹ AR at 014

(HUC) 12: 041100010203) of the Rocky River watershed of Lake Erie. The Rocky River is a TNW.

Representatives of HzW and the Buffalo District completed a site visit on June 24, 2014. Based on the JD report and the site visit, Wetland A is a 0.69-acre wetland² and Wetland B is a 9.82-acre wetland,³ and both wetlands are comprised of forested, shrub, and emergent vegetation.

In a letter dated September 19, 2014,⁴ the District notified the Appellant that Wetland B was determined to be part of a surface water tributary system of a navigable water of the United States and is subject to jurisdiction under Section 404 of the CWA. The letter stated Wetland A, in the northern parcel, was determined not to have a clear surface water connection or ecological continuum to the tributary system of a navigable water of the United States and is considered an isolated, non-navigable, intrastate water, not regulated under Section 404 of the CWA. The District's findings were recorded on one JD form⁵ dated August 11, 2014, titled *LRB, City of Brook Park – Aerospace Parkways Parcels, DA No. 2014-00543, Wetland A, Wetland B; Form 1 of 1*.⁶

On November 17, 2014, the Great Lakes and Ohio River Division received a Request for Appeal (RFA) from the Appellant dated November 14, 2014, which explained their reason for the appeal. The Appellant was informed by letter dated December 12, 2014, that the RFA met the criteria for appeal and was accepted.

Information Received and its Disposition During the Appeal Review:

The Administrative Record (AR) is limited to information contained in the record as of the date of the Notification of Administrative Appeal Options and Process form. Pursuant to 33 CFR § 331.2, no new information may be submitted on appeal. To assist the Division Engineer in making a decision on the appeal and in accordance with 33 CFR § 331.7(f), the Review Officer (RO) may allow the parties to interpret, clarify, or explain issues and information already contained in the AR. The information received during this appeal review includes:

1. The Appellant's RFA dated November 14, 2014, with a document containing its comments and analysis of the District's approved JD.
2. The District's AR, which was provided to the RO and the Appellant on December 30, 2014.
3. A site visit and informal meeting held on April 29, 2015. Details of the site visit and meeting are contained within the Appeal Meeting and Site Visit Memorandum for Record dated May 20, 2015.

² *Id.* at 014

³ *Id.* at 021-022 and 034

⁴ *Id.* at 002-003

⁵ *Jurisdictional Determination Form Instructional Guidebook*. U.S. Army Corps of Engineers and Environmental Protection Agency. 30 May 2007. This *JD Guidebook* is intended to be used as the U.S. Army Corps of Engineers Regulatory National Standard Operating Procedures for conducting and documenting an approved JD.

⁶ AR at 006-012

The submittals were accepted as clarifying information in accordance with 33 CFR § 331.7(d). No new or additional information was received or used during the appeal review.

APPEAL EVALUATION, FINDINGS, AND INSTRUCTIONS TO THE BUFFALO DISTRICT ENGINEER

Appellant's Reason for Appeal: The Appellant believes the Buffalo District incorrectly applied law, regulation, or official promulgated policy. More specifically, the Appellant believes the District has not met either Rapanos test, plurality or Kennedy, with respect to Wetland B. The Appellant stated the Buffalo District did not demonstrate a continuous surface water connection between Wetland B and an RPW to satisfy the plurality opinion, and the approved JD did not demonstrate a significant nexus to a TNW to meet Justice Kennedy's concurrence. Therefore, Wetland B is not a water of the United States subject to the federal requirements of the CWA.

Finding: This reason for appeal has merit.

Action: The approved JD is remanded to the District Engineer. Upon remand, the Buffalo District shall reconsider whether a significant nexus exists between Wetland B and the nearest TNW. The District shall include sufficient documentation, as appropriate, to support its decision as to whether a significant nexus exists between Wetland B and the nearest TNW.

Discussion: The Appellant believes Wetland B lacks a continuous surface water connection between Wetland B and an RPW, and Wetland B lacks a significant nexus with a TNW. For these reasons, the Appellant believes the Corps has not met its legal burden under *Rapanos* to assert jurisdiction over Wetland B.

As a result of the *Rapanos*⁷ Supreme Court decision, the U.S. Environmental Protection Agency and the Corps developed the memorandum *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States*, dated June 5, 2007, and amended December 2, 2008 (Rapanos Guidance). The Rapanos Guidance requires the application of new standards, as well as a greater level of documentation to support an agency JD for a particular waterbody. The Rapanos Guidance also provides a methodology to ensure CWA jurisdictional determinations are consistent with the *Rapanos* decision.

There was no majority opinion in the *Rapanos* Supreme Court case and controlling legal principles may be derived from the principles espoused by five or more justices.⁸ In *Rapanos*, there was one plurality opinion (four justices), two concurring opinions, and two dissenting opinions. As the Rapanos Guidance states on page three, "...regulatory jurisdiction under the CWA exist over a water body if either the plurality's or Justice Kennedy's standard is satisfied... Therefore, the agencies have evaluated the Rapanos opinions to identify those waters that are subject to CWA jurisdiction under the reasoning of a majority of the justices."

⁷ 126 S. Ct. 2208 (2006)

⁸ Rapanos Guidance, page 3

The Appellant stated in their RFA on page 2 of the November 14, 2014 letter, "...the Corps has not met either test [plurality or Kennedy] with respect to Wetland B; it should therefore be deemed an isolated wetland." The District did not contend that Wetland B is considered jurisdictional under the plurality standard. This standard or test requires that jurisdictional adjacent wetlands have a continuous surface connection with an RPW where the wetland directly abuts the tributary.⁹ The District determined Wetland B was a wetland adjacent to, but not directly abutting, an RPW that flows directly or indirectly into a TNW.¹⁰ The District asserted jurisdiction over Wetland B based on the wetland's significant nexus with a TNW, which is the standard applied by Justice Kennedy.

The District summarized its significant nexus evaluation on the AJD form,¹¹ concluding that Wetland B is hydrologically connected to Abram Creek through an off-site non-jurisdictional drainageway located on the north side of Wetland B that flows east into a storm sewer that discharges to Abram Creek. Abram Creek flows north into the Rocky River, a TNW. Additionally, Wetland B is hydrologically connected to the East Branch Rocky River through a non-jurisdictional swale located on the west side of Wetland B that flows west into a catch basin and through a storm sewer system that discharges to the East Branch Rocky River. The East Branch Rocky River connects with the West Branch Rocky River to form the Rocky River, which becomes a TNW further downstream. The Rocky River watershed is impaired due to land development, urbanization, suburbanization, urban runoff, and storm sewers. The District stated the wetland stores runoff, filters pollutants, and settles sediment thereby supplying the downstream TNW with a cleaner source of water that will aid in reducing the watershed's impairments.¹²

The Appellant does not disagree with the District's conclusion of a hydrological connection between Wetland B and Abram Creek.¹³ Non-jurisdictional drainageways and storm sewers may contribute to a surface hydrological connection between an adjacent wetland and a TNW.¹⁴ The JD Guidebook, pages 16 and 35, addresses pipes by stating that they do not sever jurisdiction with upstream waters and recognize that pipes may contribute to a surface hydrological connection when they replace or relocate a water of the United States, connect a water of the United States to another water of the United States, or provide relatively permanent flow to a water of the United States.

The District described a second hydrologic connection to the TNW through a non-jurisdictional swale located on the west side of Wetland B. However, there is nothing in the administrative

⁹ *Id.* at 7

¹⁰ AR at 006 on Section B.1.a. of the approved JD Form

¹¹ *Id.* at 006-014

¹² *Id.* at 014

¹³ November 14, 2014, RFA stating on page 2 the third overall bullet on the page, "HzW does not contest these features exist [the Wetland B to non-jurisdictional drainageway to storm sewer to Abram Creek flow path described in Section III:B.2.(i)(c) of the approved JD form]" and page 3 the third bullet on the page that states, "While connections can be traced using the information below [referring to Section IV: Data Sources of the approved JD form], physical examinations of such connections show signs of very infrequent flow and volume..."; and statements made during the appeal meeting as described in 4.e. of the appeal meeting and site visit MFR.

¹⁴ Rapanos Guidance, page 12

record that confirms the non-jurisdictional swale is hydrologically connected to Wetland B, and neither the Appellant nor the Buffalo District field verified if a hydrologic connection could be observed from the wetland to the non-jurisdictional swale.¹⁵

The Appellant believes the wetlands considered in the cumulative analysis section on the approved JD form¹⁶ are not reasonable to include due to their position abutting Abram Creek in an entirely different landscape position.¹⁷ The District stated adjacent and abutting wetlands of Abram Creek, the RPW used for the significant nexus evaluation, were used to describe the suite of functions performed collectively to determine the significant nexus of Wetland B.¹⁸ The Rapanos Guidance instructs the District to "...assess the flow characteristics and functions of the tributary itself, together with the functions performed by any wetlands adjacent to that tributary, to determine whether collectively they have a significant nexus with traditional navigable waters."¹⁹ It was appropriate for the District to include the adjacent wetlands identified in Section III.B.3. in making the significant nexus determination.

The District's summary conclusion for Wetland B provides general characteristics of wetland functions and services, and generally infers that there is a chemical, biological, and physical connection to the TNW, but the District did not explain the specific connections between documented wetland characteristics found at the site, and if, or how these wetland functions and services would affect the Rocky River (TNW) located approximately 5-10 river miles from Wetland B. For example, the District stated the wetland is located in close proximity to development and the wetland receives a majority of its hydrology from precipitation and runoff associated with the adjacent development and roadways; the wetland's proximity to the development provides an important function of reducing the effects of runoff and storm sewer impacts on the downstream TNW.²⁰ However, it is unclear if any runoff from nearby commercial developments or the roadway could flow into the wetland since the roadway and development appear to drain directly to a storm sewer.²¹

Additionally, in making a significant nexus determination the District should assess the flow characteristics and functions of the tributary itself, together with the functions performed by any wetlands adjacent to that tributary, to determine whether collectively they have a significant nexus with a TNW.²² The JD form under Section III.B. states, "This significant nexus evaluation that combines, for analytical purposes, the tributary and all of its adjacent wetlands is used whether the review area identified in the JD request is the tributary, or its adjacent wetlands, or both." The District did not adequately assess the characteristics and function of Abram Creek on the JD form and did not provide relevant information in Section III.B.1.

¹⁵ Appeal Meeting and Site Visit MFR in Section 6.c.

¹⁶ AR 009-010

¹⁷ RFA Letter, page 2 first bullet and Appeal Meeting and Site Visit MFR in Section 4.d.

¹⁸ Appeal Meeting and Site Visit MFR in Section 5.c.

¹⁹ Rapanos Guidance, page 8

²⁰ AR at 010

²¹ *Id.* at 046-052 and 055-057

²² Rapanos Guidance, page 8

As a result, I find that this reason for appeal has merit. The AR does not support the District's determination that Wetland B has a more than speculative and not insubstantial significant nexus to the nearest TNW, and thus the JD is remanded on this point.

Upon remand, the District shall reconsider the JD and assess the tributary itself, together with the functions performed by Wetland B and any wetlands adjacent to that tributary, to determine whether collectively they have a significant nexus with a TNW to determine if they significantly affect the chemical, physical, and biological integrity of the nearest TNW, the Rocky River. Specifically, an evaluation should include a consideration of the frequency, volume, and duration of flow (of the RPW) and the proximity of the RPW to the TNW. The evaluation should also consider the functions performed cumulatively by Wetland B and all wetlands that are adjacent to the tributary, such as storage of flood water and runoff; pollutant trapping and filtration; improvement of water quality; support of habitat for aquatic species; and other functions that contribute to the maintenance of water quality, aquatic life, commerce, navigation, recreation, and public health in the TNW.²³

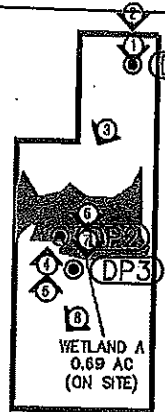
CONCLUSION: Upon review and evaluation of the Request for Appeal and the District's Administrative Record, I have determined the appeal has merit. The District has failed to support its determination regarding adjacency through a significant nexus as required under the guidance and promulgated policies of the Corps Regulatory Program. As a result, the JD is remanded to the District for reconsideration, additional evaluation and documentation sufficient to support the decision. The final Corps jurisdictional decision will be made by the Buffalo District Engineer, or his designated representative, pursuant to my remand.



Suzanne Chubb
Chief of Regulatory
Great Lakes & Ohio River Division

²³ Section IV. Detailed JD Form Instructions (Section III.C.3)

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Brook Park, City of - Aerospace Parkway
D/A Processing No. 2014-00543
Cuyahoga County, Ohio
Quad: Cleveland South
Sheet 2 of 2



LEGEND





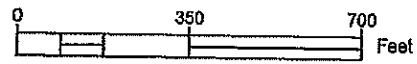
-  STUDY AREA (22.03 AC)
-  WETLAND
-  DATA POINT
-  PHOTO LOCATIONS

FIGURE 3

AQUATIC RESOURCE MAP
BLOCK Q AND ADDITIONAL PARCEL
BROOK PARK, CUYAHOGA COUNTY, OHIO



HZW ENVIRONMENTAL
CONSULTANTS, LLC