ADMINISTRATIVE APPEAL DECISION

COMMONWEALTH EDISON; FILE NO. LRC-2011-839

CHICAGO DISTRICT

MARCH 5, 2013

Review Officer (RO): Ms. Mary J. Hoffman, U.S. Army Corps of Engineers, Northwestern Division, Portland, Oregon

Appellant: Commonwealth Edison

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

Receipt of Request for Appeal: June 14, 2012

Site Visit/Appeal Meeting: September 17, 2012

Summary: The Appellant is challenging an approved jurisdictional determination (AJD) completed by the Chicago District (District) which concluded that the U.S. Army Corps of Engineers (Corps) has Clean Water Act (CWA) jurisdiction over wetlands located on a property known as the Commonwealth TSS 117 Prospect Heights Substation in Wheeling, Cook County, Illinois. The appeal challenged the AJD on the basis that the district incorrectly applied law, regulation or officially promulgated policy when identifying federal CWA jurisdiction over wetlands on the subject property. The Appellant submitted three reasons for appeal: 1) The subject wetland (Wetland #1) is exempt from federal regulation because it was created in dry land incidental to construction of the substation; 2) The purported wetland lacks a significant nexus with a traditional navigable water, and 3) The USEPA is regulating municipal storm sewer systems as tributaries to Traditional Navigable Waters. **For reasons detailed in this document, these reasons for appeal have merit. The approved jurisdictional determination is remanded to the district for reconsideration.**

Background Information: The Appellant, through consultant Christopher B. Burke Engineering, LTD (CBBEL), submitted a December 20, 2011, request for a jurisdictional determination for five (5) wetlands and two (2) detention basins on the subject property. CBBEL included reference materials and maps and stated an opinion that the seven waters were isolated and exempt from federal regulation because they do not appear to have a direct surface water connection to a jurisdictional waterway.

The District conducted a site visit on February 7, 2012, and issued an AJD letter dated April 20, 2012, which stated "Wetland #1 (+/- 0.97 Ac.) in the far NW corner per the 3/30/12 Approximate Wetland Delineation Exhibit 5 is jurisdictional; all other areas are exempt from regulation." The appellant submitted a complete Request for Appeal (RFA), dated June 13, 2012, which was received by the Great Lakes and Ohio River Division office on June 14, 2012. The appellant was informed by letter dated July 6, 2012, that the RFA was accepted.

Information Received and its Disposition During the Appeal:

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, the RO may allow the parties to interpret, clarify, or explain issues and information already contained in the AR. Such interpretation, clarification, or explanation does not become part of the AR, because the District Engineer did not consider it in making the decision on the AJD. However, in accordance with 33 CFR § 331.7(f), the Division Engineer may use such interpretation, clarification, or explanation in determining whether the AR provides an adequate and reasonable basis to support the District Engineer's decision. The information received during this appeal review and its disposition is as follows:

1. The District provided a copy of the AR to the RO and the Appellant on July 11, 2012. The AR is limited to information contained in the record by April 20, 2012.

2. A site visit and informal appeal meeting was held on September 17, 2012. During the site visit, the Appellant provided an overview of site aquatic features using aerial photographs and engineered drawings and attendees discussed the flow path from the subject wetlands to the nearest Traditionally Navigable Water (TNW). Attendees walked along the drainage channel to the storm sewer intake structure and back to the wetland perimeter. Observed within the review area were various wetlands, ditches, and detention ponds constructed in 1974 (according to the Appellant) to manage drainage of the transmission facility. A wetland area located in the northwest corner of the property is labeled as Wetland #1 by the District. Wetland #1 drains to the south into a constructed ditch which flows through detention basins before discharging into a municipal storm sewer system on the east side of the transmission facility.

Appeal Evaluation, Findings and Instructions to the Chicago District Engineer:

Appellant's First Reason for Appeal: "The subject wetland (Wetland #1) is exempt from federal regulation because it was created in dry land incidental to construction of the substation."

Finding: This reason for appeal has merit.

Action: The District's decision is remanded for further evaluation, analysis, and documentation.

Discussion: The RFA states that the Appellant provided information to the Corps documenting that the subject wetland formed in dry land incidental to the construction of the substation in 1974. Information provided was the substation site grading plan, dated 1970, depicting the proposed ditches and wetland areas to be constructed as part of the substation drainage plan. A 1960 aerial photograph was provided to document that the property was used for agricultural production, and that no wetland areas (or ditches) were identified on the property at the time of the photograph. In addition, a 1974 aerial depicts the property following construction of the substation.

Further, the Appellant states that they believe the wetland area is exempt from federal regulation because it was created in dry land for stormwater drainage and detention, referencing the discussion found in the preamble to regulations at 33 CFR Part 328. The Appellant also referenced consistent language found in the EPA/USACE *Draft* CWA Guidance, dated April 2011. This guidance is draft and is not relevant to this decision. The current EPA/Corps CWA guidance can be found at:
http://www.usace.army.mil/Missions/CivilWorks/RegulatoryProgramandPermits/RelatedResources/CWAGuidance.aspx

The Appellant clarified that under the original stormwater drainage and detention plan, the design included a detention pond to be constructed at the site where Wetland #1 currently exists. Prior to construction (1974) the land was in agricultural cropland. The Appellant stated that the entire area within the substation and stormwater drainages and detention ponds footprint was graded in preparation for construction. One of the intended detention ponds was deleted from the plan and instead a tower was erected at that location. The Appellant asserts that Wetland #1 was "created incidental to construction in dry land" and thus should be exempt.

The District stated, at the appeal site visit, that they did not agree that the aerial photos depicted grading within the area of Wetland #1 but instead was likely vegetation. Further, they believe that wetland conditions developed over time on hydric soils since 1974. They stated they view current conditions at the site as "normal circumstances" and determined that Wetland #1 meets federal wetland criteria.

Federal CWA jurisdiction is determined on a case-specific basis according to implementing regulations found at 33 CFR 328, current agency guidance and standard procedures including the *1987 Corps of Engineers Wetlands Delineation Manual* [1], 2008 EPA/Corps *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States* [2], and the *U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook* [3] (Guidebook).

Waters of the United States are defined at 33 CFR 328.3(a)(1)-(7). Section §328.3(a)(8) excludes certain types of waters by stating:

> . . . Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 123.11(m) which also meet the criteria of this definition) are not waters of the United States.

The preamble discussion for this section of the 1986 regulations [4] states:

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[1] Environmental Laboratory. 1987. "Corps of Engineers Wetlands Delineation Manual," Technical Report Y-87-1, US Army Engineer Waterways Experiment Station, Vicksburg, MS.
[2] Combined cases of *Rapanos v. United States* and *Carabell v. United States.* 126 S. Ct. 2208 (2006).
[3] The Guidebook was issued on June 1, 2007, as Regulatory National Standard Operating Procedures for conducting an approved jurisdictional determination and documenting practices to support an approved JD.
[4] Federal Register, Volume 51, Page 41217; *Section 328.3: Definitions.*

> . . . For clarification it should be noted that we generally do not consider the following waters to be 'Waters of the United States.' However, the Corps reserves the right on a case-by-case basis to determine that a particular waterbody within these categories of waters is a water of the United States. EPA also has the right to determine on a case-by-case basis if any of these waters are 'waters of the United States.' . . .
>
> (c) Artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing. . . .
>
> (e) Waterfilled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of waters of the United States (see 33 CFR 328.3(a)).

The AR lacks documentation that the District conducted any fact-based analyses [5] of the seven onsite water bodies that is necessary to determine the presence or absence of wetlands and establish federal jurisdiction under Section 404 of the CWA. The AR does not include data sheets to verify Federal wetlands criteria as required by the Corps' 1987 wetland delineation manual, the Midwest Regional Supplement to the 1987 manual,[6] or any rationale for concluding that other water bodies are "exempt."

A handwritten note to the file, dated February 7, 2012, documented the District's site visit. This note states:

> I walked the entire site and determined that all the ditches drain into Wetland #1, and were flowing at the time of my visit. Wetland #1 has an outlet control box at its SE corner, with a pipe that heads east to the storm pipe by the RR Tracks. Water was flowing strong and continuously out of Wetland #1. Need to check all maps and the historic aerials to make the JD call. The two constructed detention basins are exempt.

However, no basis for this "exempt" conclusion was provided here or elsewhere within the AR. Further, there were no references to the other four water bodies found on the subject property. The Request For Action (REQ4ACT) cover sheet from the Regulatory Program database (OMBIL Regulatory Module or ORM), dated April 20, 2012, contained a conclusion that "Wetland #1 is jurisdictional...all others are exempt."

It is unclear from information contained in the AR how the District determined that only one of the seven water bodies is jurisdictional as identified in the AJD Form. Section II.B.1 of the form indicates the presence of waters of the U.S. in the review area as "Wetland #1: Wetlands adjacent to non-RPWs that flow directly or indirectly into TNWs." Further, Wetland #1 is described as a 1.77 acre shrub & emergent wetland of moderate quality with intermittent,

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[5] Including, but not limited to data sheets or field notes regarding wetland parameters (soil, vegetation, hydrology), functions, values, hydrologic connections, flow patterns, flow frequency, etc., or other supporting references.

[6] Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Midwest Region (Version 2.0) The Corps' Regional Supplement presents wetland indicators, user notes, delineation guidance, and other information that is specific to the Midwest Region.

discrete and confined flow that drains via a ditch excavated in upland (AJD form, Section III.B.2).

Sections of the form which would support a finding of jurisdiction for Wetland #1 were either left blank or marked "not applicable" (e.g., Section III.B.2.(i) has insufficient explanations, §B.2.(ii) *Chemical Characteristics* was marked as "unknown"; and §B.2.(iii) *Biological Characteristics* is incomplete while the explanation of findings for *Habitat and Aquatic/Wildlife Diversity* stated "Some animals utilizing site").

Finally, in reference to the other water bodies on the site, the section of the AJD form which would appropriately record an evaluation of other waters on the site (Section II.B.2.) entitled *Non-regulated waters/wetlands*, was left blank. A superscript indicates supporting documentation would be presented in Section III.F however the section was not completed. The AR did not contain documentation or analyses of the "other waters" which would support this conclusion.

In addition to insufficient documentation, the AR is confusing with regard to which Wetland #1 has been determined to be jurisdictional. The District's AJD letter clearly lists Exhibit 5 (dated March 30, 2012) and describes Wetland #1 as being +/- 0.97 acre and in the northwest corner of the site. However, the District's site visit note and the description of Wetland #1 from the AJD form, as summarized above, describes the Wetland #1 shown on CBBEL Exhibit 4, dated December 19, 2011. On Exhibit 4, the wetland in the northwest corner of the site is labeled as "Wetland #3" and characterized as 1.36 acres in size; Wetland #1 is along the southern boundary of the site and is described as 1.77 acres in size. The December 2011 CBBEL request for a jurisdictional determination clearly identified and included four exhibits. It is not clear in the record when or how CBBEL Exhibit 5 was produced or obtained.

In summary, I have determined that the administrative record does not support the District's conclusion that Wetland #1 is a jurisdictional water or that other waters on the subject property are excluded as jurisdictional waters. Therefore this reason for appeal has merit. The AJD is remanded to the District for further evaluation and documentation. The district should evaluate each of the seven water bodies using current regulations and guidance to support its jurisdictional determination.

Appellant's Second Reason for Appeal: "The purported wetland lacks a significant nexus with a TNW."

Finding: This reason for appeal has partial merit.

Action: The District decision is remanded for further evaluation, analysis, and documentation.

Discussion: The Appellant believes that the wetland lacks a significant nexus with Traditional Navigable Waters (TNW). They believe there is no connection between the subject wetland and waters of the United States. In further support of this, they state the wetland is "less than an acre", lacks functions that could affect the TNW, and the subject wetland is not part of a larger

wetland system. The Appellant believes that the AR does not document a chemical or biological connection to the Des Plains River (a TNW).

When evaluating a significant nexus for adjacent wetlands, field staff should consider the many functions of water such as sediment trapping, nutrient recycling, pollutant trapping and filtering, retention or attenuation of flood waters, runoff storage, and provision of habitat. In general, waters within a watershed, including their adjacent wetlands, function as an integrated hydrologic system. The current 2008 CWA guidance directs field staff to look for indicators of hydrology, effects on water quality, and physical, chemical, and biological (including ecological) connections or functions when assessing whether a water, alone or in combination with similarly situated waters, has a more than speculative or insubstantial effect on the chemical, physical, or biological integrity of downstream traditional navigable waters.

During the analysis of the above indicators, field staff is not expected to develop new information on similarly situated waters (e.g., the identification or delineation of as yet unmapped wetlands or tributaries). Scientific literature (e.g., peer reviewed) on the functions and effects of types or categories of similarly situated waters generally will be sufficient, along with site-specific information for the water for which a significant nexus determination is being conducted. This information should be incorporated into a site-specific explanation of how the waterbody and similarly situated waters in the region significantly affect the physical, chemical, or biological integrity of a TNW.

The *Guidebook* indicates principal considerations when evaluating significant nexus include, but are not limited to, the volume, duration, and frequency of the flow of water in the tributary and the proximity of the tributary to a TNW. It instructs field staff to consider all available hydrologic information (e.g., gauge data, flood predictions, historical records of water flow, statistical data, personal observations/records, etc.) and physical indicators of flow including the presence and characteristics of a reliable Ordinary High Water Mark with a channel defined by bed and banks. The Guidebook recognizes that as the distance from the tributary to the navigable water increases, it will become increasingly important to document whether the tributary and its adjacent wetlands have a significant nexus rather than a speculative or insubstantial nexus with a TNW.

The AJD form (Section III.C.) in the AR states that the unspecified "tributary" flows through several tributaries for more than thirty miles prior to reaching the nearest TNW (the Des Plaines River). This statement should be verified since it conflicts with other entries and the appellant's assertion that the distance between the onsite wetlands and the TNW is approximately two miles, and that there are no other jurisdictional waters between the wetlands and the TNW. The District's findings (from AJD form Section III(C)(2)):

> The wetland drains off-site into a storm sewer, which according to the USEPA Region 5 ultimately drains to the Des Plaines River. This surface water connection demonstrates the ability of the tributary to carry pollutants, flood waters, nutrients and organic carbon to the TNW. This wetland has the ability to reduce the amount of pollutants and floodwaters reaching the TNW. The headwater wetland is receiving a percentage of its water from groundwater and from runoff from the surrounding uplands before it flows

into Des Plaines River. Wetlands such as these provide stormwater storage, habitat, sediment/toxicant retention and nutrient removal/transformation. The decrease of sedimentation, pollutants, flooding, nutrients and habitat provided by the subject wetland provides a positive effect to the downstream relatively permanent waters and traditional navigable waters. The wetland alone, and in combination with other area wetlands, significantly affect the chemical, physical and biological integrity of the Des Plaines River. Stormwater storage provided by the subject wetlands affect the frequency and extent of downstream flooding, decreasing flood peaks in the Des Plaines River, and in turn impacting navigation and downstream bank erosion and sedimentation. The sediment and pollutant/toxicant retention provided by the subject wetland has a direct positive effect on the Des Plaines River in regards to navigation and aquatic food webs that are not adapted to thrive in sediment-choked environments. These factors contribute to the finding of a significant nexus between the on-site wetland and the TNW.

This conclusion of significant nexus is not supported by documentation and analysis in the AJD form or in other parts of the AR. Insufficient documentation was found in the AR to support the District's conclusion of a significant nexus between the subject wetland and the TNW. The AJD form lacks sufficient documentation in Section III.B.2 to support the District's *Significant Nexus Determination* in Section III.C, stating "unknown" or leaving many subsections blank, and provides no references, additional research or analysis which would support its findings.

The AR and specifically the AJD form, was found to contain errors and omissions of documentation and is not sufficient to support a finding of jurisdiction through a significant nexus. As a result, I have determined that this reason for appeal has merit and the AJD is remanded to the District for further evaluation and documentation. The District should revise, clarify, and supplement the AJD form, where appropriate, and reevaluate its decision.

Appellant's Third Reason for Appeal: "The USEPA is regulating municipal storm sewer systems as tributaries to Traditional Navigable Waters."

Finding: This reason for appeal has merit.

Action: The District decision is remanded for further evaluation, analysis, and documentation.

Discussion: The Appellant believes that the wetland is not adjacent to a non-Relatively Permanent Water (non-RPW) and does not flow into a TNW. The Appellant explained that they believe the subject wetland is adjacent to a non-jurisdictional ditch that flows through a series of ditches and detention ponds prior to reaching the municipal storm sewer system. Approximately two miles of storm sewer pipes lay between the storm sewer intake structure on the site and the Des Plaines River outfall.

A determination of adjacency is based on an evaluation of the relationship between a wetland and the nearest jurisdictional water, which includes consideration of both physical and ecological connections between those waterbodies. The term adjacent means bordering, contiguous, or

neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent wetlands."[7]

An email from the District to EPA, dated February 17, 2012, coordinated their draft determination as ". . . an intra-state, isolated, non-navigable water under 33 CFR 328.3(a)(3). . . The water body is not adjacent to another water of the U.S. The water body does not support a link to interstate or foreign commerce. There are 5 isolated waters, and 2 exempt detention basins." Two attachments were provided but it is unclear what was provided to EPA to support this preliminary finding and copies of the attachments were not found in the AR.

EPA's responding email to the District, dated March 7, 2012, provided comments while indicating non-concurrence with the District's draft isolated determination. EPA's message stated:

> The subject wetlands for this JD drains into a surface inlet through a pipe into the municipal storm sewer system that drains into the Des Plaines River. This wetland is hydrologically connected to WUS via the sewer system, therefore adjacent. From a cursory look into the storm sewer drainage for this area, it does appear that the sewer system drains into the Des Plaines River, which is a TNW. The city also appears to have an extensive map of their storm sewer system, which is in electronic format. The Des Plaines River is impaired. These wetlands function to retain storm water, and filter out nutrients and other pollutants, prior to them entering the storm system and the Des Plaines River.

As per the *Guidebook,* the Corps will assert Clean Water Act jurisdiction over wetlands adjacent to TNWs, and wetlands adjacent to another water of the U.S. where such wetlands have a significant nexus with downstream TNWs.[8]

After receipt of comments from EPA, the District concluded that Wetland #1 was adjacent to an unspecified non-RPW (see AJD form Section II.B.1.a). The District clarified, at the appeal site visit, that the referenced non-RPW is a ditch that is draining the wetland and connects with storm water ponds and the municipal storm sewer system. This is supported in Section III B.1 which identifies the route to the TNW as "The wetland drains during storm events via a ditch cut in upland soils, and then enters a constructed stormwater pond which outlets into a pipe to a Storm Sewer." However, as noted previously, Sections III.B.2 and III.D, *Determinations of Jurisdictional Findings*, do not support the District's determination. Finally, Section IV, *Data Sources,* provides no references used in reaching their determination.

During the appeal site visit, the District explained that they based their jurisdictional determination on EPA's comments and the District deferred to EPA. Coordination procedures adopted in June 2007 require consultation with EPA on jurisdictional determinations under Section 404 of the CWA. Also, a January 1989 (and January 1993 amendment) EPA/Corps Memorandum of Agreement concerning the determination of geographic jurisdiction under the Section 404 Program does state that "In making their determinations, the Corps and EPA will

[7] 33 CFR 328.3(c)

[8] The plurality standard in *Rapanos* may provide an alternative basis for asserting jurisdiction. See Section 5.

adhere to the '*Corps of Engineers Wetlands Delineation Manual' (Waterways Experiment Station Technical Report Y-87-1, January 1987)* and EPA guidance on isolated waters, and other guidance, interpretations, and regulations issued by EPA to clarify EPA positions on geographic jurisdiction and exemptions." However, in the absence of EPA electing to make the final jurisdictional determination as a "Special Case," the Corps has the ultimate responsibility to adequately document its determination. Information presented by EPA should be evaluated and, if the Corps concurs, should be adequately incorporated into the Corps' documentation to support its determination.

This reason for appeal has merit due to a lack of adequate documentation to support the jurisdictional determination. The AJD is remanded to the District for further evaluation and documentation. The District should reevaluate its determination of adjacency using the current CWA guidance, and document the analysis to support the District's jurisdictional determination.

Conclusion: For the reasons stated above, I have determined this Request for Appeal has merit. The approved jurisdictional determination is remanded to the Chicago District for reconsideration consistent with the discussions above. The final Corps decision on jurisdiction in this case will be the Chicago District Engineer's decision made pursuant to my remand.

Suzanne Chubb

Suzanne Chubb
Regulatory Program Manager
Great Lakes and Ohio River Division