

ADMINISTRATIVE APPEAL DECISION

HARVEST PRESBYTERIAN CHURCH; FILE NO. 1999-00190

BUFFALO DISTRICT

OCTOBER 24, 2011

Review Officer: Mr. Mike Vissichelli, U.S. Army Corps of Engineers, North Atlantic Division, acting on behalf of the Great Lakes and Ohio River Division

Appellant: Mr. John Van Hoose, Harvest Presbyterian Church

Permit Authority: Clean Water Act (CWA), Section 404 (33 U.S.C. 1344)

Receipt of Request for Appeal: July 28, 2011

Appeal Meeting: Teleconference held on August 31, 2011

Summary of Decision: The Appellant's request for appeal has merit and the approved jurisdictional determination (JD) is remanded to the Buffalo District (District) to clarify the presence of a relatively permanent water (RPW), and if appropriate a significant nexus evaluation on the wetlands, including an analysis of whether the wetlands have more than a speculative or insubstantial effect on the chemical, physical, and/or biological integrity of the nearest traditional navigable water (TNW), the West Branch of the Rocky River.

Background Information:

Mr. John Van Hoose represents the Harvest Presbyterian Church located at 1095 East Reagan Parkway in the City of Medina, Medina County, Ohio. The surrounding area is a combination of residential homes, baseball fields, and forested area.

On February 3, 1999, the Buffalo District verified a Nationwide Permit 26 for the placement of fill in 0.24 acre of a 2.98 acre wetland for the construction of an access road to reach what is now the location of the church.

In October 2010, Mr. Van Hoose submitted a permit application to install a perforated pipe within wetlands with the intention of lowering the water levels to increase drainage on the property. Mr. Van Hoose states in his permit application that since the ball fields were installed in nearby Medina Park the water elevations on the church property are higher due to the increased spillway elevation at a catch basin which backs water up on to the church property. Mr. Van Hoose would like to minimize the amount of water on the church property to make it more attractive and usable for its members and wildlife. Some or all of the on-site wetlands may be drained as a result of this proposed work. Following discussions with the Buffalo District, Mr. Van Hoose decided to withdraw his permit application and pursue other

options for resolving his issues with the increased water levels on his property. The District withdrew the permit application in a letter dated June 22, 2011.

On June 22, 2011, the Buffalo District issued an approved JD stating that Wetlands A (2.33 acres) and B (1.10 acres) are part of a surface water tributary system to a navigable water of the U.S., and are therefore regulated under Section 404 of the Clean Water Act. The JD is the subject of this request for appeal.

The Appellant is appealing the District's June 22, 2011 approved JD because they disagree with the Buffalo District's determination that waters of the U.S., subject to federal jurisdiction and regulation under the Clean Water Act, are present on the subject parcel. Specifically, the Appellant feels that the District was incorrect in asserting jurisdiction based on its application of the current regulatory criteria and associated guidance in identifying and delineating wetlands.

Appeal Evaluation and Findings:

Reason 1: The Appellant believes the District was incorrect in asserting jurisdiction based on its application of the current regulatory criteria and associated guidance in identifying and delineating wetlands.

Finding: This reason for appeal has merit.

Action: Upon remand, the District shall reconsider the JD and clarify the presence of a RPW and include supporting information on the volume, duration, and frequency of water flow. If an RPW is present and it is determined that a significant nexus evaluation is necessary, the District shall perform an analysis of whether the RPW in association with the wetlands have more than a speculative or insubstantial effect on the chemical, physical, and/or biological integrity of the nearest traditional navigable water (TNW), the West Branch of the Rocky River. In doing so, the District shall document the hydrologic, ecologic, and other functions performed by the tributary and all of its adjacent wetlands.

Discussion:

The Appellant disagrees with the District's determination that the two wetlands are subject to federal jurisdiction. The District identified that Wetlands A and B are part of a surface water tributary system to a navigable water of the U.S., and are therefore regulated under Section 404 of the Clean Water Act. The Appellant alleges that the determination is incorrect. The Appellant states that the land is not and has never been a wetland, and that there is a storm water issue on the property resulting from the city's blockage of a drainage path.

Presence of Wetlands

Districts are to use the 1987 Corps of Engineers Wetlands Delineation Manual and supplemental guidance to identify and delineate wetlands that may be regulated under Section

404 of the CWA. The interim Northcentral and Northeast Regional Supplement to the 1987 Wetland Delineation Manual was implemented in October 2009. Accordingly, under normal circumstances¹ and site conditions, the District will document the presence of wetland hydrology, hydrophytic vegetation, and hydric soils in order to substantiate that an area is wetlands.

The District's memorandum for the record (memo) dated May 9, 2011, characterizes 2.33 acres of Wetland A and 1.10 acres of Wetland B as wetlands separated from each other by a man-made berm (the access drive to the church). The District's determination is based on resource maps and field observations including data collected on hydric soils, vegetation, and hydrology while conducting a site visit on April 21, 2011. The District took four data points and completed data forms to support their conclusion. The District's data forms document indicators of hydric soils including depleted matrix, redox dark surface, depleted below dark surface, and also documents the soil matrix with redox features as hydric. The data forms also support their conclusion that hydrology is present. Several primary indicators of wetland hydrology were documented, including presence of a high water table, saturation, surface water, and inundation visible on aerial imagery. Additionally, the data forms support hydric vegetation.

The District properly followed the 1987 Wetland Delineation Manual and the Northcentral and Northeast Regional Supplement when reaching their decision.

Significant Nexus Evaluation and Presence of a RPW

Following the Supreme Court ruling in *Rapanos v. United States*, 547 U.S. 715 (2006) (hereinafter "*Rapanos*"), on June 5, 2007, the U.S. Environmental Protection Agency (EPA) and the Corps jointly issued guidance intended to foster nationally-consistent implementation of the CWA following the *Rapanos* ruling. A revised memorandum was issued on December 2, 2008.

The *Rapanos Guidance* Guidebook, page 58, states that wetlands adjacent to but not directly abutting RPWs that flow directly or indirectly into TNWs are jurisdictional under the CWA where there is a "significant nexus" with a TNW, and lists documentation requirements to support the determination². A significant nexus determination is required as part of the *Rapanos*

¹ The 1987 Manual notes "normal circumstances" to address situations where an area may fail to meet the diagnostic criteria for wetlands due to human alterations (e.g. vegetation removal, draining, deposition of fill, impoundments, etc.) or natural events (e.g. change in river course, beaver dams, fires, mudslides, etc.) that result in one or more parameters being *absent*.

² Documentation requirements to support a determination:

- Wetlands will meet the 3-parameter test contained in the agency's regulatory definition of wetlands. See also the protocol identified in the *Corps of Engineers Wetlands Delineation Manual* (1987) or appropriate Regional Supplement
- Section III.B.1 of the JD form needs to demonstrate that water flows from an RPW directly or indirectly into a TNW
- Section III.B.2 and 3 of the JD form need to identify rationale that wetland is adjacent (not directly abutting) to an RPW that flows directly or indirectly into a TNW
- Section III.C.3 of the JD form needs to identify rationale to support significant nexus determination for a wetland, in combination with all other wetlands adjacent to that tributary

guidance for wetlands adjacent to RPWs and non-RPWs that flow directly or indirectly into TNWs. A significant nexus analysis will assess the flow characteristics and functions performed by the wetlands adjacent to the RPW or non-RPW to determine if they significantly affect the chemical, physical, and biological integrity of downstream TNWs³. Furthermore, the *Rapanos* guidance, page 58, directs the Corps to document the water flow from an RPW directly or indirectly into a TNW⁴.

The District documents their significant nexus evaluation in Section III.C of the JD form as follows:

Wetland B is connected to Wetland A by a culvert that goes under the existing access road to the church parking lot. Water in Wetland A flows into a catch basin along the northeast boundary of the wetland. Water in the catch basin flows east into the West Branch Rocky River, a TNW farther downstream. Wetlands A and B have the capacity to provide floodwater storage. They also have the potential to filter nutrients and pollutants. Wetland A and B are potential habitat for amphibians and macroinvertebrates.

The District also documents the functions of the wetlands in Section III.B.3 of the JD form:

Wetland A and B have the capacity to provide floodwater storage. They also have the potential to filter nutrients and pollutants. Wetlands A and B are potential habitat for amphibians and macroinvertebrates.

³ The *Rapanos* guidance Guidebook, page 7, states “A significant nexus exists if the tributary, in combination with all of its adjacent wetlands, has more than a speculative or an insubstantial effect on the chemical, physical, and/or biological, integrity of a TNW. Principal considerations when evaluating significant nexus include the volume, duration and frequency of the flow of water in the tributary and the proximity of the tributary to a TNW, plus the hydrologic, ecologic and other functions performed by the tributary and all of its adjacent wetlands.” Specifically, page 15 of the *Rapanos* guidance Guidebook directs the consideration of hydrologic factors such as volume, duration, and frequency of flow, including consideration of certain physical characteristics of the tributary; proximity to the traditional navigable water; size of the watershed; average annual rainfall; and, average annual winter snow pack. It also directs the consideration of ecologic factors such as the ability of the tributary and its adjacent wetlands (if any) to carry pollutants and flood waters to traditional navigable waters; the ability of the tributary and its adjacent wetlands (if any) to provide aquatic habitat that supports biota of a traditional navigable water; the ability for adjacent wetlands to trap and filter pollutants or store flood waters; and, the ability to maintain water quality.

⁴ Corps regulations at Title 33 of the Code of Federal Regulations (CFR) Part 328.3 define waters of the U.S. and do not exclude manmade waters that serve as tributaries. In this instance, the onsite wetland is adjacent to a manmade catch basin (part of a storm sewer system). The *Rapanos* guidance Guidebook, pages 16 and 35, addresses pipes by stating that they do not sever jurisdiction with upstream waters. The *Rapanos* guidance Guidebook also recognizes that pipes may contribute to a surface hydrologic connection when they replace or relocate a water of the U.S., connect a water of the U.S. to another water of the U.S., or provide relatively permanent flow to a water of the U.S. For the JD in question, the catch basin is part of a storm sewer system that connects a water of the U.S. (Wetlands A and B) to another water of the U.S. (West Branch of the Rocky River).

As for the documentation of water flow from an RPW to a TNW, it is unclear which waterbody is the RPW. Although the District's JD form states that Wetlands A and B are adjacent to an RPW that flows to a TNW, the RPW is not identified, and its connection between the wetlands and the TNW is not detailed. Section III.B.2.i.c of the District's JD form states "there is a discrete hydrologic connection where water from wetland A flows into a catch basin that empties into the West Branch Rocky River." but does not mention an RPW. Section III.C.3 of the JD form states "water in the catch basin flows east into the West Branch Rocky River, a TNW farther downstream." and again does not mention an RPW or provide details on the path of flow.

If an RPW is present and it is determined that a significant nexus evaluation is necessary, the significant nexus evaluation shall be sufficiently documented. Currently, the District's JD form provides a brief discussion of a significant nexus but it is incomplete. The District's significant nexus analysis does not assess the flow characteristics and functions of the tributary itself; it only discusses the water flow path. Specifically, there is no discussion on the volume, duration and frequency of the flow of water in the tributary to support that a significant nexus exists. Furthermore, there is no discussion on the proximity of the wetlands and the RPW to the TNW and its effect on the significant nexus determination. In addition, there is no discussion on the characteristics or functions of any tributaries and how they, in association with Wetlands A and B have more than an insubstantial or speculative effect on the chemical, physical or biological integrity of the West Branch Rocky River, the nearest TNW.

The administrative record does not contain sufficient documentation to support the District's conclusion that there is a significant nexus between the onsite wetlands and the nearest TNW, the West Branch of the Rocky River. Although the District provided some information on the connection between the wetland and the nearest downstream TNW in the significant nexus section of the JD form, they did not identify the RPW nor evaluate the significant nexus that the wetland had on the nearest downstream TNW. Upon remand, the District shall clarify the presence of a RPW, including supporting information on the volume, duration, and frequency of water flow. If an RPW is present, the District shall also complete an analysis of whether the RPW associated with the wetlands have more than a speculative or insubstantial effect on the chemical, physical, and /or biological integrity of the nearest TNW. In doing so, the District shall document the hydrologic, ecologic, and other functions performed by the tributary and all of its adjacent wetlands.

Conclusion:

The Appellant's request for appeal has merit and the approved JD is remanded to the Buffalo District to clarify the presence of an RPW, including supporting information on the volume, duration, and frequency of water flow. If an RPW is present and it is determined that a significant nexus evaluation is necessary, the District shall complete an analysis of whether the RPW associated with the wetlands have more than a speculative or insubstantial effect on the chemical, physical, and/or biological integrity of the West Branch of the Rocky River, the nearest TNW. In doing so, the District shall document the hydrologic, ecologic, and other functions performed by the tributary and all of its adjacent

Programs Directorate
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wetlands. The District shall complete these tasks within 60 days from the date of this decision (unless delayed by the need for a site visit) and upon completion, provide the Division office and Appellant with its decision document and final JD. The District will contact the Division if a site visit is required and the expected date of the final JD is delayed beyond 60 days from the date of this decision.



Pauline D. Thorndike
Administrative Appeal Review Officer
Great Lakes & Ohio River Division