

**ADMINISTRATIVE APPEAL DECISION**

**HAYEK PROPERTY; FILE NO. 2007-501**

**BUFFALO DISTRICT**

**SEPTEMBER 2, 2008**

**Review Officer:** Thomas J. Cavanaugh, U.S. Army Corps of Engineers, South Pacific Division

**Appellant:** Mr. and Mrs. Jonathan Hayek

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

**Receipt of Request for Appeal:** October 29, 2007

**Summary of Decision:** The appellant's request for appeal has merit and the approved jurisdictional determination is remanded to the District to reconsider and explain its decision as appropriate.

**Background Information:** Mr. and Mrs. Hayek's (the "appellant") property is located at 6042 Shaffer Road, in Lockport, Niagara County, New York. The property is approximately 18 acres and is bound on the north by Dysinger Road and on the east by Shaffer Road. The property is described by the Buffalo District (the "District") as appearing to be an old agricultural field composed of a mosaic of upland and wet meadow habitats that gently slope from south to north.

The District initially conducted a site visit to the appellant's property in response to a complaint alleging wetland fills during the spring of 2007. The site visit was conducted on April 11, 2007. On April 16, 2007, the District issued a letter to the appellant, stating the presence of federal jurisdictional wetlands "within portions of the undisturbed areas of the property and in areas immediately adjacent to the disturbed areas (house footprint)." The District also informed the appellant of its determination that approximately 0.09 acre of federal jurisdictional wetlands was impacted without proper authorization from the District. Therefore, according to the District, the appellant was in violation of Section 404 of the Clean Water Act (CWA). Lastly, the District offered the appellant the option of either applying for an after-the-fact permit, or restoring the disturbed areas to resolve the violation. Per Corps regulations at 33 CFR 331, the District's April 16, 2007, letter is considered an approved jurisdictional determination (JD) because it included a statement indicating the presence of federal wetlands (both in undisturbed areas of the property and in areas immediately adjacent to the undisturbed areas).

According to the District's administrative record, the appellant submitted an application to the District in April 2007, requesting after-the-fact authorization to construct a home on the property. The District evaluated the appellant's request and determined it could authorize the requested impacts to federal wetlands. The District notified the appellant of its determination in a letter dated September 18, 2007. In its letter, the District affirmed the use of Department of the Army Nationwide Permit number 29 for the discharge of fill material into approximately 0.09

acre of federal wetlands in order to construct a single family home. The District limited its authorization to the portion of the property associated with the construction of the home referred to as the “project area”. The project area was depicted on associated drawings as an area approximately 0.5 acre in size. Unlike the District’s previous approved JD in April 2007, which identified the presence of federal wetlands in undisturbed areas of the appellant’s 18-acre property, the District’s September 2007, letter limited its statement of the presence of federal wetlands on site to the project area.

Per Corps regulations at 33 CFR 331, the declarative statement identifying the presence of federal wetlands in the project area in the District’s September 2007 letter is an approved JD, supersedes the approved JD issued on April 16, 2007, and is an appealable action. In its September 2007 letter, the District also stated the presence of *potential* wetland areas within the appellant’s property not encompassing the project area. Per Corps regulations at 33 CFR 331, this tentative statement is considered a preliminary JD and is not an appealable action. Thus, this appeal decision is limited to the District’s approved JD. The appellant disagrees with and has appealed the District’s approved JD.

**Appeal Evaluation, Findings and Instructions to the Buffalo District Engineer:**

**Reason 1: The wetland map on file with the Town of Lockport shows minimal presence of wetland on the Schaffer Road property. The Town of Lockport issued a building permit to the Hayek’s on February 2, 2007, to construct a single family residence on this property due to the lack of wetlands on the Shaffer Road property.**

**Finding: This reason for appeal does not have merit.**

**Action: No action is required.**

**Discussion:** The origin of the wetland map that the Town of Lockport has on file for the Hayek’s property is not clear from the administrative record, but it does not delineate the extent of Corps jurisdiction pursuant to the CWA. While planning level wetland maps may be maintained for various purposes by local jurisdictions, they cannot be relied upon as a substitute for a Corps approved JD. Therefore, this reason for appeal does not have merit.

**Reason 2: The National Wetlands Inventory map, obtained on-line, shows no wetlands present on the Shaffer Road property and there is no navigable water connected to the Shaffer Road property.**

**Finding: This reason for appeal does not have merit.**

**Action: No action is required.**

**Discussion:** The National Wetlands Inventory maps, like those maps maintained by local jurisdictions may be useful for planning purposes. They are reasonably reliable for finding large wetlands and other bodies of water which are easily found on aerial photographs, but are not useful for determining the extent, or even the presence, of all areas subject to Corps jurisdiction

Program Directorate  
Subject: Hayek Appeal Decision

pursuant to the CWA. As with maps maintained by local jurisdictions, they do not substitute for a Corps approved JD. Therefore, this reason for appeal does not have merit.

**Reason 3: Even assuming there are wetlands at 6042 Shaffer Road, the wetlands have no continuous surface connection to bodies which are waters of the United States, which is required by the United States Supreme Court in order for the Army Corps to exercise jurisdiction under the Clean Water Act pursuant to the decision issued in *Rapanos v. United States*, 126S. Ct. 2208 (2006). Therefore, it is the Hayek's position that the Army Corps exceeded its authority under the Clean Water Act, in violation of *Rapanos v. United States*, by issuing a letter of violation of the Clean Water Act and subsequently issuing a jurisdictional determination that 6042 Shaffer Road is subject to Army Corps' regulation pursuant to the Clean Water Act.**

**Finding: While no surface connection to waters of the United States is required to find jurisdiction, the District has not adequately evaluated jurisdiction pursuant to applicable law and guidance. Therefore, the decision is remanded for appropriate action.**

**Action: Upon remand, the District's shall address the jurisdictional status of the wetlands according to the joint agency *Rapanos* Guidance and document its final JD with an approved JD form. The District shall reconsider its JD as necessary and include a basis for the JD.**

**Discussion:** The appellant asserts that the District incorrectly applied the principles articulated in the U.S. Supreme Court's decision in *Rapanos v. United States*, 547 U.S. 715 (2006) ("*Rapanos*") when it determined the presence of federal jurisdictional wetlands on site.

On June 5, 2007, the U.S. Environmental Protection Agency and the Corps jointly issued guidance, intended to foster nationally-consistent implementation of the CWA that takes into account *Rapanos*. The guidance included memos, an approved JD form, an instructional guidebooks and a Regulatory Guidance Letter (RGL). The collective guidance is referred to herein as the "*Rapanos* Guidance".

As previously stated in the background section, statements within the District's September 2007, letter referring to the presence of federal wetlands within the project site constitute an approved JD. Approved JDs identifying the presence of federal wetlands need to be documented according to the Corps 1987 Wetland Delineation Manual ("*1987 Manual*") and the *Rapanos* Guidance.

### 1987 Manual

Corps policy requires the District to use the 1987 Manual to identify and delineate wetlands that may be regulated under Section 404 of the CWA. Accordingly, under normal circumstances<sup>1</sup>

---

<sup>1</sup> 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*.

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. In atypical situations such as unauthorized activities, positive indicators of wetland hydrology, hydrophytic vegetation, and hydric soils may not be found due to the effects of human activities. In these cases, the 1987 Manual directs the District to determine if wetland indicators were covered or removed by using alternative methods. The District documented their wetland determination in site inspection notes dated April 11, 2007. The District documented the presence of all three wetland criteria in the undisturbed areas and used aerial photography to estimate the prior presence of wetlands in disturbed areas. I find that the District adequately documented the presence of wetlands in accordance with the 1987 Manual.

### Rapanos Guidance

The Rapanos Guidance provides direction for the District when evaluating, documenting and making jurisdictional determinations. The Rapanos Guidance (specifically RGL 07-01) requires the District to use an approved JD form when documenting approved JDs, including approved JDs associated with enforcement actions. The Rapanos Guidance does not address documentation requirements for preliminary JDs, but does recognize that preliminary JDs are often necessary when addressing alleged violations and/or resolving enforcement actions.

Specific to wetlands, the Rapanos Guidance addresses making JDs in four distinct scenarios. The guidance directs the District to assert jurisdiction over 1) wetlands adjacent to traditional navigable waters (TNWs) and 2) wetlands that directly abut non-navigable tributaries of TNWs that are relatively permanent. The Rapanos Guidance does not define relatively permanent waters (RPW) but does provide illustrative examples including waters that typically flow year-round or have continuous flow at least seasonally.

In addition, the Rapanos Guidance directs the Districts to use the “significant nexus” test to determine the jurisdictional status of 3) wetlands adjacent to non-navigable tributaries that are not relatively permanent waters (NRPW) and 4) wetlands that are adjacent to but do not directly abut a non-navigable RPW. The significant nexus test must be a fact-specific analysis that determines whether the wetlands have a significant nexus with TNWs.

In its administrative record, the District documented that small rivulets convey surface water from the wetlands onsite to a roadside ditch along route 93. The District further documented that the roadside ditch is a seasonal RPW that ultimately discharges into another seasonal RPW, an unnamed linear drainageway near the intersection of Old Dysinger Road and Route 93. Lastly, the District documents that the unnamed drainageway flows into Mud Creek, a perennial RPW.

While the District’s administrative record documents the flow of water from the wetlands on site to RPWs, it fails to adequately document which of the four scenarios addressed by the Rapanos Guidance apply to the wetlands within the appellant’s project area. Nor does the record reveal whether a “significant nexus” exists with a relevant water.

Corps regulations at 33 CFR 331 require that an approved JD include the basis for JD. The basis is a summary of the indicators that supports the District’s approved JD. The District’s approved

Program Directorate  
Subject: Hayek Appeal Decision

JD lacks an adequate basis for the JD. The District administrative record also lacks the required JD form per the Rapanos Guidance.

Upon remand, the District's shall address the jurisdictional status of the wetlands according to the Rapanos Guidance and document its final JD with an approved JD form. The District shall reconsider its JD as necessary and include a basis for the JD.

**Overall Conclusion: For the reasons stated above, I conclude that this request for appeal has merit. The approved JD is remanded to the District to reconsider and explain its JD as appropriate.**

Michael Montone  
Appeal Review Officer  
Great Lakes and Ohio River Division