

ADMINISTRATIVE APPEAL DECISION

**HC CONTRACTORS
FILE NO. POA-2010-190**

ALASKA DISTRICT

15 January 2013

Review Officer: Mike Vissichelli, U.S. Army Corps of Engineers, North Atlantic Division

Appellant: HC Contractors

Date of Receipt of Request for Appeal: 6 November 2011

Date of Acceptance of Request for Appeal: 30 November 2011

Appeal Meeting Date: 5 June 2012

ACCEPTED REASON FOR APPEAL:

The Pacific Ocean Division accepted the Request for Appeal (RFA) by HC Contractors (HCC) dated 6 November 2011.

HCC contends that the U.S. Army Corps of Engineers, Alaska District (the District), omitted material facts and did not correctly apply the current regulatory criteria and guidance in determining that there are “waters of the United States” on HCC’s property.

BACKGROUND INFORMATION:

HCC appeals the District’s 9 September 2011 approved jurisdictional determination (AJD) which determined that HCC’s site contains two wetlands subject to District regulatory jurisdiction under Section 404 of 33 U.S.C. 1344, the Clean Water Act.

INFORMATION CONSIDERED DURING THE APPEAL:

1. The District’s administrative record (AR).
2. HCC provided comments, analysis, and documents that were accepted as clarifying information in accordance with 33 CFR 331.7. HCC offered additional flow measurements along various reaches of Channel C, recorded by HCC’s consultants on 26 September 2012. The flow measurements were not considered in this appeal because they are new information generated after the District issued the AJD.

SUMMARY OF DECISION:

HCC’s RFA has merit. The AJD is remanded to the District to reevaluate whether the onsite wetlands are adjacent to Channel C via an unbroken, shallow subsurface connection taking into consideration the similar and/or controlling *Great Northwest* court

decision. The District should also reevaluate its determination that the Chena Slough is a Traditionally Navigable Water (TNW).

EVALUATION OF THE REASONS FOR APPEAL:

HCC contends that the AJD omitted material facts and that the District did not correctly apply the current regulatory criteria and guidance in determining that there are “waters of the United States” on HCC’s site. Specifically, HCC’s appeal reasons are:

Appeal Reason 1: The District’s determination that the onsite wetlands are adjacent to Channel C is incorrect.

Finding: Appeal Reason 1 has merit.

Action: The District should reevaluate its determination that the onsite wetlands are jurisdictionally adjacent to Channel C, documenting its consideration of the *Great Northwest* court decision.

Discussion: HCC argues that the District’s AJD is inconsistent with *Great Northwest, Inc. v. United States Army Corps of Engineers*, D. Alaska, 4:09-cv-0029-RRB, Order of Summary Judgment, June 8, 2010 (Beistline, J.). According to HCC, the District’s determination that the onsite wetlands are adjacent to Channel C via an unbroken shallow subsurface connection is legally incorrect because the large wetland west of Peridot Street is jurisdictionally adjacent to Channel C but is separated from HCC’s onsite, non-jurisdictional, wetland on the east side of Peridot Street, which is a man-made barrier.¹

The *Great Northwest* Court found that:

“Where a jurisdictional wetland is separated from another wetland by a man-made barrier, jurisdiction will only extend beyond the man-made barrier if the wetlands are “continuous” such that they should be considered to be the same wetland...the Corps’ regulations themselves place wetlands adjacent to jurisdictional wetlands outside the reach of the Clean Water Act, as defined by 33 C.F.R. 328.3(a)(7). Thus, even if the Corps were to determine that there exists an “ecological interconnection” or “significant nexus” between the wetlands and the [TNW], the wetlands would still not be “waters of the United States” as defined by the Corps itself.”

Great Northwest at 17.

Although *Great Northwest* involved a railroad berm and not a public street, there appears no legal difference between the railroad berm in *Great Northwest* and Peridot Street here. Because there is geographic, factual, and legal/procedural similarity between *Great Northwest* and HCC, the District’s AJD should have included a detailed factual and legal discussion of *Great Northwest* that, if appropriate, distinguished the District’s AJD in HCC from the holding in *Great Northwest*. Instead, the HCC AJD did not discuss *Great Northwest* at all, providing no basis to conclude that the District adequately considered the

¹ See map at AR Page 85

case and properly distinguished it. On its face, *Great Northwest* appears potentially controlling, or at least factually and legally persuasive in several respects. Without credibly distinguishing *Great Northwest*, the AR does not support the District's determination that the onsite wetlands on the east side of Peridot Street are jurisdictionally adjacent to Channel C. Instead, as in *Great Northwest*, the onsite wetlands appear non-jurisdictional because they are separated from jurisdictional wetlands by a man-made barrier.

Appeal Reason 2: The District's determination that the onsite wetlands have a shallow groundwater connection to Channel C is incorrect.

Finding: Appeal Reason 2 has merit.

Action: The District should reevaluate its determination that the onsite wetlands have an unbroken, shallow subsurface connection with Channel C and should address the inconsistencies in the AR related to shallow subsurface flow and the USGS data provided by HCC.

Discussion: HCC contends that a groundwater connection from the site to Channel C is speculative because the District misinterpreted USGS information, depth to groundwater, and the presence of discontinuous permafrost.

HCC provided the District with USGS groundwater gauge information from 1975 to 1990 that indicates groundwater depths ranging from 1.5 to 9 feet below the ground surface. The District conducted its own analysis that indicates groundwater depths of 0 to 8 inches below the surface, a significantly different conclusion. The District's analysis did not address the contradictory USGS groundwater data and is therefore incomplete, at best, or contradicted and invalid at worst.

Further, although the District's groundwater analysis is based upon detailed information, scientific literature and expert opinions, the analysis applies only to the general geographic region and does not focus upon the onsite wetlands – which is the specific area that is relevant to the question of jurisdiction.

Finally, the AR is internally inconsistent regarding the subsurface connection between the onsite wetlands and Channel C as follows:

1. "The primary means by which wetlands at the subject property sustain a hydrologic connection to Channel C and Chena Slough is via subsurface flow" (AR, Page 68).
2. "Although the onsite wetlands are separated by Peridot Street from a large wetland area (located on the west side of Peridot Street) that is contiguous with Channel C, (RPW), Peridot Street does not sever the significant nexus that the onsite wetlands (and similarly situated lands associated with Channel C) have with Chena Slough (TNW)" (AR, Page 64).

3. “Peridot Street is a dirt/gravel road that appears to impede surface flow and near surface seepage from leaving the site and is impassable due to shallow inundation during wet periods” (AR, Page 63).
4. “The surface barriers separating the subject wetland from nearby jurisdictional waters are man-made and obstruct very little of the sub-surface seepage that provides most of the hydrologic connection between the subject wetlands and Channel C” (AR, Page 73).
5. “If not for the presence of the artificially created surface barriers, the northerly on-site wetlands would likely be part of the large wetland area that directly abuts Channel C, a RPW. In contrast, the southerly on-site wetland may have been always separated from the larger wetland area by naturally occurring uplands, though it might have had an occasional to intermittent surface water connection with the large wetland via swales” (AR, Page 73).
6. “The ecological interconnection with Channel C is supported by continuous lateral groundwater flow from the subject wetlands to Channel C” (AR, Page 74).
7. “Seasonal frost inhibits infiltration to the shallow aquifer until late summer when pore ice thaws, permitting and contributing to downward percolation” (AR, Page 74).

Based upon the weaknesses described above, the administrative record as a whole does not support the District’s conclusion that the onsite wetlands are “Waters of the United States.”

Appeal Reason 3: Chena Slough is not a Traditionally Navigable Water (TNW).

Finding: Appeal reason 3 has merit.

Action: The District should reevaluate its determination that Chena Slough is a TNW by clearly documenting whether Chena Slough provides commercial water-borne recreation, or other means of interstate or foreign commerce, in accordance with the 2008 Rapanos guidance.

Discussion: HCC contends that no commercial navigation exists in Chena Slough, so it is not a TNW under the 2008 Rapanos guidance.

The 2008 Rapanos interagency guidance defines TNWs as “waters currently being used for commercial navigation including commercial water-borne recreation (e.g. boat rentals, guided fishing trips, water ski tournaments, etc). . . [A]ll waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide.”²

² 2 December 2008 Joint Memorandum between the Environmental Protection Agency (EPA) and Department of the Army entitled “Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in Rapanos v United States & Carabell v United States”

Footnote 20 of the Rapanos Guidance provides:

33 C.F.R. § 328.3(a)(1) ; 40 C.F.R. § 230.3(s)(1) . The "(a)(1)" waters include all of the "navigable waters of the United States," defined in 33 C.F.R. Part 329 and by numerous decisions of the federal courts, plus all other waters that are navigable-in-fact (e.g., the Great Salt Lake, UT and Lake Minnetonka, MN). For purposes of CWA jurisdiction and this guidance, waters will be considered traditional navigable waters if:

- They are subject to Section 9 or 10 of the Rivers and Harbors Act, or
- A federal court has determined that the water body is navigable-in-fact under federal law, or
- They are waters currently being used for commercial navigation, including commercial waterborne recreation (e.g., boat rentals, guided fishing trips, water ski tournaments, etc.), or
- They have historically been used for commercial navigation, including commercial water-borne recreation ; or
- They are susceptible to being used in the future for commercial navigation, including commercial water-borne recreation. Susceptibility for future use may be determined by examining a number of factors, including the physical characteristics and capacity of the water (e.g., size, depth, and flow velocity, etc.) to be used in commercial navigation, including commercial recreational navigation, and the likelihood of future commercial navigation or commercial water-borne recreation. Evidence of future commercial navigation use, including commercial water-borne recreation (e.g., development plans, plans for water dependent events, etc.), must be clearly documented. Susceptibility to future commercial navigation, including commercial water-borne recreation, will not be supported when the evidence is insubstantial or speculative. Use of average flow statistics may not accurately represent streams with "flashy" flow characteristics. In such circumstances, daily gage data is more representative of flow characteristics.

Here, the AR contains District assertions that Chena Slough meets the criteria for TNW, stating that it is popular for fishing and boating, is recommended for outdoor recreation in a local guide book (AR, Page 66), and that cleanup/canoe rental at Chena Slough is recreational commerce (AR, Page 67). These statements are conclusory, however, and do not clearly demonstrate that the Chena Slough supports commercial water-borne recreation. In short, the Rapanos guidance requires commercial recreational activity or susceptibility for future commercial recreational activity. The District only indicates, at best, that Chena Slough has the potential to support recreational activities, but there is no tie to the commercial nature of those activities. Consequently, the District's evidence supporting that Chena Slough is a TNW is insubstantial or speculative.

OVERALL CONCLUSION:

For the foregoing reasons, HCC's RFA has merit. The AJD is remanded to the District to reevaluate its jurisdictional determination including, but not limited to, whether the onsite wetlands are adjacent to Channel C via an unbroken, shallow subsurface connection

taking into consideration the *Great Northwest* court decision and whether Chena Slough is a TNW under the Rapanos guidance. Further, the District did not complete the supporting AJD and should do so in its final determination. Any reissued AJD should contain the appropriate site specific significant nexus analysis, as necessary, in accordance with the pertinent regulations and guidance.

The District shall complete its review upon remand within 60 days from the date of this decision, and upon completion, provide the Division office and HCC with its decision document and final AJD.

A handwritten signature in black ink, appearing to read 'Gregory J. Gunter', with a stylized flourish at the end.

GREGORY J. GUNTER
Colonel, EN
Acting Commander