

ADMINISTRATIVE APPEAL DECISION

PATIO HOMES AT DIAMOND HAWK 2006-1930

BUFFALO DISTRICT

FEBRUARY 29, 2008

Review Officer: Michael Montone, U.S. Army Corps of Engineers, Great Lakes and Ohio River Division

Appellant: Mr. Samuel Tadio¹

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

Receipt of Request for Appeal: October 22, 2007

Background Information: In June, 2006, Genesee Engineering Planning and Surveying, P.C. (GEPS) submitted a request for an approved jurisdictional determination (JD) to the Buffalo District (District) for a parcel of land approximately 8.8 acres in area and slated for development of the Diamond Hawk Patio Homes. GEPS submitted a preliminary wetland determination performed by Nussbaumer and Clark, Inc. which concluded that no wetlands were present on site.

The proposed project site is located on the north side of Rehm Road, west of Patsy Lane and east of the new Diamond Hawk golf course, in the Town of Cheektowaga, Erie County, New York. The proposed project site is bordered by a mobile home park to the north, the golf course to the west, Rehm Road to the south and undeveloped forest land to the east. An outparcel containing two single family residences is encompassed by the project site along its border with Rehm Road. The entire project site is undeveloped and slowly descends in grade from the north to Rehm Road. A drainage channel runs from the detention basin to the north of the property (associated with mobile home park) south, parallel to and near the eastern border. Various documents submitted by the appellant refer to this drainage channel as a drainage swale or a ditch. Documents prepared by the District refer to this drainage channel as a tributary. However, both appellant and District documented that the drainage channel flows south along the eastern portion of the project site, crosses under Rehm Road, and continues through the portion of the golf course located south of Rehm Road and ultimately discharges into Scajaquada Creek.

¹ Mr. Samuel Tadio is a developer who owns the land in question and is the principle investor of Diamond Hawk Garrett LLC., the operator of the Diamond Hawk golf course (adjacent to project site). Mr. Tadio is also President of Sky Harbor Corporation, the primary developer for the proposed patio homes, and owner of a nearby mobile home park.

On April 24, 2007, the District responded to the GEPS request with a preliminary jurisdictional determination (JD) that stated the site displayed strong indications that federal wetlands were present throughout the entire site. The District concluded that based on their findings, a complete review would be required and recommended that a thorough wetland delineation be completed. The District's preliminary JD was based on two site investigations performed by the District on April 20 and 24, 2007 during which the District observed indicators of hydric soils, hydrophytic vegetation and wetland hydrology. The District also stated the likelihood that the potential wetlands were connected to a navigable waterway by onsite drainage features. During the appeal conference, the District clarified that the April 24, 2007, preliminary JD letter was the only documentation of the two site visits.

On May 23, 2007, the appellant submitted his concerns with the District's preliminary JD. Specifically, the appellant requested a meeting to discuss the apparent differences between the District's observations and the conclusions of the appellant's wetlands consultant. The appellant also asserted that the District's determination that wetlands on a golf course adjacent to the project site were isolated should also apply to any wetland within the project site. According to the District's administrative record, a meeting took place on June 7, 2007 between the District and representatives of the appellant.

On July 26, 2007, the appellant submitted a new wetland determination report prepared by Stantec Consulting Services (Stantec) along with a letter from the appellant's attorney, Mr. Charles Grieco of Jaeckle Fleischmann and Mugel, LLP. In its wetland delineation report, Stantec identified approximately 5.6 acres of wetlands within the project site and concluded that the wetlands were non-jurisdictional. In his letter, Mr. Grieco asserted that wetlands present on site were not jurisdictional based on the U.S. Supreme Court's decision in *Rapanos v. United States*, ___ U.S. ___, 126 S.Ct. 2208, (2006) ("*Rapanos*").

According to the District's administrative record, the Stantec delineation did not show the entire project site and the District requested additional information. On August 27, 2007, the appellant submitted revised maps displaying the eastern portion of the project site. The updated maps identified approximately 7.2 acres of wetlands. On September 18, 2007, the appellant submitted additional updated maps that displayed approximately 1,100 linear feet of drainage swale that was not depicted on previously submitted maps.

On September 26, 2007, the District issued an approved JD for the subject property. In its approved JD, the District stated the presence of waters of the U.S. on site, including approximately 7.2 acres of wetlands and 1,100 linear feet of an unnamed tributary. The District documented this determination using the Approved JD Form as required by the U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook. The District also documented its determination in a file memorandum ("*Rational for Decision*") dated September 26, 2007.

The appellant disagrees with the District's approved JD and submitted a request for appeal (RFA), dated October 16, 2007, to the Division. On November 14, 2007, an appeals meeting was facilitated by the Administrative Appeal Review Officer. Representatives of the appellant and District were present.

Summary of Decision: The District’s administrative record supports its decision that wetlands regulated under the Clean Water Act are present on the appellant’s property and the appeal does not have merit for the reasons discussed below.

Appeal Evaluation, Findings and Instructions to the Buffalo District Engineer (DE):

Appellant’s Stated Reasons for Appeal:

Reason 1: The appellant disagrees with the District’s conclusion that the wetlands on the subject property directly abuts a “relatively permanent water” as the term is defined under Corps guidance or the U.S. Supreme Court’s decision in *Rapanos*. Rather, the appellant asserts that as depicted on his watershed plan, the eastern portion of the subject property is adjacent to a man-made ditch, which accepts at most a de minimus amount of water from the subject property (either through surface runoff or through a drop inlet located on Rehm Road).

Finding: This reason for appeal does not have merit.

Action: No action required.

Discussion: During the appeal meeting, the appellant acknowledged that the wetlands identified within the project site directly abut the drainage channel (referred to as a “ditch” by the appellant and an “unnamed tributary” by the District). Given this acknowledgement, the key issue left to address is whether the District properly considered the drainage channel a “relatively permanent water” (RPW). The appellant also clarified that a point critical to this reason for appeal is the temporal discontinuity of flow within the drainage channel at the culvert location on Rehm Road. According to the appellant, the culvert collects water from multiple sources such as residential properties and the roadway at a drop inlet, but only receives water from surface flow from the adjacent wetlands during times of very high precipitation.

During the appeal meeting, the appellant acknowledged the presence of hydric, saturated soils within the drainage channel. The appellant also stated that while it has no evidence to support the District’s statement that “...flow is not likely to occur during most of the summer, except during and after storm events” it agrees with this statement based on personal experience. Based on personal experience, the appellant stated that the only time there is water in the drainage channel is when there is an overflow from the detention basin. To support its assertion that the drainage channel is not a RPW, the appellant also stated that only once in past 20 years has the drainage channel had “appreciable” (ankle deep) water in it and that was a result of the surrounding area being flooded. Lastly, the appellant stated that when the golf course was permitted by the District in 2002, the section of the drainage channel that passes through the golf course was not depicted as a jurisdictional water.

It is important to note that the appellant is not contesting the presence of wetlands. The appellant’s arguments are focused on the jurisdictional status of these wetlands following the *Rapanos* decision. 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 that takes into account *Rapanos*. The collective guidance is referred to herein as the “*Rapanos* Guidance” and contains four major parts: a memorandum titled “Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in *Rapanos v. United States & Carabell v. United States*”; a coordination memo establishing a process for coordinating specific JDs between the EPA and the Corps; a JD form to document approved JDs; and a JD form instructional guidebook (“JD Guidebook”) that provides specific instructions for completing the approved JD form and offering supplemental information for the preparation of JDs.

The guidance memorandum provides:

A non-navigable tributary of a traditional navigable water is a non-navigable water body whose waters flow into a traditional navigable water either directly or indirectly by means of other tributaries. Both the plurality opinion and the dissent would uphold CWA jurisdiction over non-navigable tributaries that are “relatively permanent” – waters that typically (e.g., except due to drought) flow year-round or waters that have a continuous flow at least seasonally (e.g., typically three months). Justice Scalia emphasizes that relatively permanent waters do not include tributaries “whose flow is ‘coming and going at intervals ... broken, fitful.’” Therefore, “relatively permanent” waters do not include ephemeral tributaries which flow only in response to precipitation and intermittent streams which do not typically flow year-round or have continuous flow at least seasonally. However, CWA jurisdiction over these waters will be evaluated under the significant nexus standard described below. The agencies will assert jurisdiction over relatively permanent non-navigable tributaries of traditional navigable waters without a legal obligation to make a significant nexus finding.

In addition, the agencies will assert jurisdiction over those adjacent wetlands that have a continuous surface connection with a relatively permanent, non-navigable tributary, without the legal obligation to make a significant nexus finding. As explained above, the plurality opinion and the dissent agree that such wetlands are jurisdictional. The plurality opinion indicates that “continuous surface connection” is a “physical connection requirement.” Therefore, a continuous surface connection exists between a wetland and a relatively permanent tributary where the wetland directly abuts the tributary (e.g., they are not separated by uplands, a berm, dike, or similar feature).

The District, in asserting jurisdiction over these wetlands and the drainage channel that flows through the project site stated the following in their September 26, 2007 approved JD letter:

...the subject wetland was found to directly abut a relatively permanent water (RPW) that flows directly into a traditional navigable water (TNW), the Niagara River. Based on this evaluation and guidance provided within the [JD Guidebook] this wetland and the approximately 1,100 feet of unnamed tributary that occurs on-site are jurisdictional waters of the U.S.

Thus, in this case, the District must substantiate the following to assert jurisdiction in the present case: the wetlands in question meet the criteria of the Corps’ 1987 Wetlands Delineation Manual; the wetlands directly abut the drainage channel; the drainage channel is a non-navigable water

body (tributary) whose waters flow into a traditional navigable water either directly or indirectly by means of other tributaries, the drainage channel is an RPW.

Wetlands

As discussed above, the appellant and District concur on the presence of wetlands per the Corp's 1987 Wetlands Delineation Manual and this is not an issue on appeal.

Directly Abuts

According to the *Rapanos* Guidance, the District will assert jurisdiction over wetlands that "directly abut" non-navigable tributaries of traditional navigable waters that are relatively permanent (also referred to as an RPW). The *Rapanos* Guidance states that wetlands "directly abut" a RPW when wetlands have a continuous surface water connection to an RPW. However, the *Rapanos* Guidance also clarifies that a continuous surface water connection does not require surface water to be continuously present between the wetland and the tributary. As referred to above, a continuous surface connection relies on a physical connection. Accordingly, the *Rapanos* Guidance states that a wetland abuts a tributary if it is not separated from the tributary by uplands, a berm, dike, or similar feature.

In Section III.B.2.(i)(b) of the Approved JD Form, the District documented that the wetland "directly abuts the [drainage channel] and during the wet seasons (late fall, spring and winter) and during storm events throughout the year surface water flows from the wetland directly into the tributary." In Section III.D.4. of the Approved JD Form, the District documented that the drainage channel "...flows through the wetlands and is continuous with the wetlands." Further documentation by the District in its Rationale for Decision supports the determination that the wetland is continuous with the drainage channel by demonstrating the presence of wetland soils and plants within the drainage channel. Therefore, I find that there is sufficient documentation within the District's administrative record to substantiate that the wetland on site directly abuts the drainage channel.

Non-navigable Tributary to a TNW

The *Rapanos* Guidance states that a non-navigable tributary of a TNW is a non-navigable water body whose waters flow into a TNW either directly or indirectly by means of other tributaries.

The appellant submitted information (the letter from Mr. Grieco and the Stantec wetland delineation report) to the District that acknowledges that the drainage channel "...runs along the eastern border of the Site before being routed under Rehm Road, through the adjacent golf course and eventually intersecting with the Scajaquada Creek approximately two miles from the subject property), which eventually flows (sometimes above ground and sometimes routed through pipes) into the Niagara River."

The District also documented in section III.B.1.ii. of the Approved JD form that the drainage channel flows through Scajaquada Creek before entering the Niagara River, a TNW. Therefore, I find that there is sufficient documentation within the District's administrative record to

substantiate that the drainage channel is a non-navigable water body (tributary) whose waters flow into a TNW (Niagara River) either directly or indirectly by means of another tributary (Scajaquada Creek).

Relatively Permanent Water (RPW)

The appellant argues that flow at the culvert (or drop inlet) location does not necessarily originate from the drainage channel on site. The appellant asserts that the drop inlet collects water from multiple sources and water from the site only flows into this area during or after high precipitation events. During the appeal meeting, the appellant stated that a miniscule contribution of water to a tributary does not establish a “significant nexus,” as that phrase is used in the *Rapanos* decision and discussed in the *Rapanos* Guidance, simply because there is downstream flow. According to the appellant, 99.9% of water in the tributary does not come from the project site. While this argument was phrased in terms of a significant nexus, the appellant stated the same can be applied to the argument that the drainage channel on site does not have substantial flow to be considered an RPW.

The *Rapanos* Guidance states that a RPW will typically flow year-round or have a continuous flow at least seasonally (e.g., typically three months).

The District documented in section III.B.1.ii. of the Approved JD form that:

Although perennial flow is not expected, the tributary flows more than seasonally. The size of the drainage area, presence of hydric soils throughout most of its length, a defined bed and bank, presence of hydrophytic plant species, presence of abutting and adjacent wetlands, presence of several storm water inputs, and observations of flow during District performed site visits support this conclusion.

During the appeal meeting, the District clarified that drainage or flow was observed on all three site visits at the location of the culvert that drains the site. The District also clarified that during the September site visit, the District followed the drainage channel well south of the project site and observed flowing water in the drainage channel.

The District adequately documented the presence of field indicators (e.g. hydric soils, hydrophytic vegetation, periods of inundation and flowing water) within the drainage channel. The presence of these field indicators substantiates the District’s determination that the drainage channel maintains continuous flow at least seasonally.

District Action Taken in 2002

Lastly, the appellant argues that the District’s September 26, 2007 approved JD is inconsistent with a previous approved JD issued by the District on October 22, 2002 for lands encompassed by the adjacent golf course. Specifically, the appellant asserts that the section of the drainage channel that passes through the golf course was not depicted as a jurisdictional water. The appellant had made the same argument during the District’s evaluation of the appellant’s request for an approved JD on the current project site.

Copies of the District's October 22, 2002 approved JD and its supporting documentation were contained within the District's administrative record. According to these documents, the drainage channel is referred to by the District as a "previously modified stream channel which eventually flows into Scajaquada Creek." It is clear from these documents that the District based its assertion of jurisdiction over two wetlands (within the golf course and totaling approximately 18 acres) based on the presence of the drainage channel. However, the drainage channel was not depicted on the associated drawings identifying waters of the U.S.

During the appeal meeting, the District clarified that in 2002 the District considered the drainage channel a "non-jurisdictional connection", but based on current guidance and site visits the District now considers the drainage channel an RPW.

According to Corps regulations, the District may make changes to an approved JD based on new information. The *Rapanos* decision and subsequent agency guidance represents new information. As discussed above, the District adequately documented their approved JD based on the *Rapanos* Guidance.

Therefore, for the reasons stated above, I find that the District's administrative record supports its determination that wetlands on site directly abut an RPW and this reason for appeal does not have merit.

Reason 2: The appellant disagrees with the District's determination that the wetlands on the subject property possess a "significant nexus" to a traditional navigable water (TNW). As demonstrated in the July 16, 2007, letter from Jaekle, Fleishman & Mugal L.L.P. and supporting documentation, the de minimus amount of water from the subject property that could flow ultimately into a TNW can have no conceivable significant effect on the chemical, physical and biological integrity of any downstream TNW.

Finding: This reason for appeal does not have merit.

Action: No action required.

Discussion: The *Rapanos* Guidance states that the District "...will assert jurisdiction over those adjacent wetlands that have a continuous surface connection with a relatively permanent, non-navigable tributary, without the legal obligation to make a significant nexus finding." The JD Guidebook (see page 57), provides the following clarification regarding the documentation requirements to support a determination that finds the presence of wetlands directly abutting RPWs that flow directly or indirectly into TNWs.

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...

If flow between the RPW and TNW is at least seasonal, then... [it must be demonstrated] that water flows from an RPW directly or indirectly into [a] TNW... [and] that the wetland is directly abutting an RPW.

As a matter of policy, field staff will include in the record any available information that documents the existence of a significant nexus between a wetland directly abutting an RPW that is not perennial and a TNW.

As discussed in Reason 1, the District's administrative record supports its determination that wetlands on site directly abut an RPW. Per *Rapanos* Guidance, the District need not then evaluate the existence of a "significant nexus" between the wetlands and a TNW. The District did provide relevant information as a matter of policy pursuant the Guidance, but it does not provide the basis for the approved JD. Therefore, I find that this reason for appeal does not have merit.

Reason 3: The appellant asserts that the District misapplied the principles articulated in *Rapanos*.

Finding: This reason for appeal does not have merit.

Action: No action required.

Discussion: This reason is a general statement that summarizes the issues identified in reasons 1 and 2. No further discussion is required and this reason for appeal does not have merit.

Reason 4: The appellant asserts that the District's response to its request for an approved JD was untimely. The appellant argues that it first submitted its request in June 2006 but did not receive a response from the District until April 2007. According to the appellant, the developer relied on the District's failure to timely assert jurisdiction as a determination that no such jurisdiction existed and proceeded to finalize the site engineering, agency approvals and the bidding out of the construction plans at a cost of over \$60,000, plus the cost of the land, permitting, financing costs, legal costs and numerous other miscellaneous expenses which in total cost the developer/owner well over \$100,000. Based on the April 2007 correspondence from the District a second mitigation report was completed by Stantec.

Finding: This reason for appeal does not have merit.

Action: No action required.

Discussion: During the appeal meeting, the appellant clarified it submitted the preliminary JD to the District in June 2006. According to the appellant, the District's lack of response triggered time and energy expenditures by the appellant. The appellant also claims that the delay in the District's response had an impact on the District's approved JD because the delayed response was an embarrassment to the District and influenced the project manager's eventual decision to assert jurisdiction.

Programs Directorate
Subject: Diamond Hawk Appeal Decision

The District responded during the appeal meeting that this was not the case.

According to Corps regulations at 33 CFR 331.5(a)(2) the reason for requesting an appeal of an approved JD must be more than a simple request for appeal because the affected party did not like the approved JD. Examples of reasons for appeal include: procedural error; an incorrect application of law, regulation or officially promulgated policy; omission of material fact; incorrect application of the current regulatory criteria and associated guidance for identifying and delineating wetlands; or use of incorrect data.

Financial harm, as asserted by the appellant in this reason for appeal does not meet the criteria for appeal. There are no Corps regulations that require the District to respond to a request for an approved JD within a certain timeframe. Furthermore, I find no evidence in the administrative record that the District acted out of embarrassment when making its approved JD. Therefore, this reason for appeal does not have merit.

Conclusion: I find that the District's administrative record supports its decision that wetlands regulated under the CWA are present on the appellant's property. For the reasons stated above, the appeal does not have merit.



Michael Montone
Appeal Review Officer
Great Lakes and Ohio River Division