ADMINISTRATIVE APPEAL DECISION

EDWARD SLATTERY; FILE NO. 2011-112

HUNTINGTON DISTRICT

OCTOBER 4, 2011

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

Appellant: Mr. Edward Slattery, represented by Mr. Mark Jaehnen

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

Receipt of Request for Appeal: July 13, 2011

Appeal Meeting: Teleconference held on September 2, 2011

Summary of Decision: The Appellant's request for appeal has merit and the approved jurisdictional determination (JD) is remanded to the Huntington District (District) to provide an analysis of the flow regimes of Streams 1 and 2. If one or both of the tributaries are found to be seasonal relatively permanent waters (RPWs) or non relatively permanent waters, the District shall complete a significant nexus evaluation on the tributaries in question, including an analysis of whether the tributaries, in combination with all of their adjacent wetlands (if any), have more than a speculative or insubstantial effect on the chemical, physical, and/or biological integrity of the nearest Traditional Navigable Water (TNW), the East Fork of the Little Miami River.

Background Information:

The Appellant's agent, Mark Jaehnen of JVAC Construction Management, LLC, submitted a letter dated January 25, 2011, to the District requesting guidance for construction of a pond on the Appellant's 34-acre property located at 4471 Olive Branch-Stonelick Road, north of State Route 32, in Batavia Township, Clermont County, Ohio. On February 25, 2011, the District responded to Mr. Jaehnen's request with a letter detailing the necessary requirements to process a permit application and JD.

On March 17, 2011, the District, the Appellant and his agent conducted a pre-application meeting and a site visit at the property to look at the area of the proposed impoundment including two unnamed tributaries to Shayler Run. Water was observed to be flowing in both tributaries on the date of the site visit. The District documented that the property contains a wooded area, a residence, and fields.

In an e-mail dated April 14, 2011, the District requested that the Appellant provide dated photos of the streams with no flow observed to aid in their determination of whether the streams have ephemeral or intermittent flow regimes. The Appellant did not provide the requested information.

The District explained in an e-mail to the Appellant, dated May 5, 2011, that if water was present within the streams following three days of no rain, then groundwater likely influences the streams in which case the streams would have an intermittent flow regime instead of an ephemeral flow regime. The District requested photographs of the streams following 3 days of no rain but did not receive the requested information.

On June 13, 2011, the District issued an approved JD to the Appellant identifying Streams 1 and 2, 974 linear feet and 182 linear feet respectively, as intermittent, seasonally flowing RPWs that flow to Shayler Run and then to the East Fork of the Little Miami River, a TNW, and are therefore subject to federal jurisdiction. The District's letter stated that the two unnamed tributaries to Shayler Run are waters of the U.S., subject to regulation under Section 404 of the CWA. The District based their determination on the information contained within the Administrative Record (AR).

The Appellant is appealing the District's June 13, 2011, approved JD because he disagrees that the tributaries are waters of the U.S. The Appellant believes that the tributaries do not convey sufficient water flow to be waters of the U.S.

Appeal Evaluation and Findings:

Reason 1: The Appellant disagrees that the tributaries are waters of the U.S. because they do not convey sufficient water flow to be waters of the U.S.

Finding: This reason for appeal has merit.

Action: Upon remand, the District shall reconsider the JD and provide further analysis of the volume, duration, and frequency of flow of water in Streams 1 and 2. If it is determined that Streams 1 and/or 2 are seasonal RPWs or non RPWs, the District shall complete a significant nexus evaluation on the tributaries in question, including an analysis of whether the tributaries, in combination with all of their adjacent wetlands (if any), have more than a speculative or insubstantial effect on the chemical, physical, and/or biological integrity of the nearest TNW, the East Fork of the Little Miami River.

Discussion:

The Appellant disagrees with the District's determination that the two unnamed tributaries are subject to federal jurisdiction. Specifically, the District identified that Streams 1 and 2 are intermittent, seasonally flowing RPWs that flow indirectly into the East Fork of the Little Miami River, a TNW, and are therefore jurisdictional. The Appellant alleges that the determination is inaccurate. The Appellant states that although there has been a small wet area

throughout the first part of 2011 on his property, the wet conditions exist from higher than normal precipitation and on-site wastewater system discharges that are contributing to the amount of water present in the unnamed streams. The Appellant states that the streams were dry during the spring, summer, and fall of 2010 when there were no on-site wastewater system discharges (the home was unoccupied during that time).

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, Appendix A, page 6, addresses seasonal RPW tributaries by stating that the agencies will assert jurisdiction over non-navigable tributaries of traditional navigable waters that are relatively permanent where the tributaries typically flow year-round or have continuous flow at least seasonally (e.g. typically three months). The *Rapanos Guidance* Guidebook, pages 56-57, instructs agencies to provide data supporting this conclusion in Section III.B of the JD form, and as a matter of policy include in the record any available information that documents the existence of a significant nexus between a RPW that is not perennial and a TNW. The *Rapanos Guidance* Guidebook, page 7, states that 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.

Section III.B.1.c of the District's JD form states that the tributaries provide seasonal flow with an estimated twenty or more flow events per year but provides limited basis for this statement. According to the JD form, the flow regime consists of some flow except during the dry season, with heavier flow following rain or snow melt. Section III.D.2 of the District's JD forms document that flow was observed on March 17, 2011, following approximately 36 hours after an estimated 0.20 inches of rainfall. (Specifically, monthly rainfall tables within the AR indicate that on March 15, 2011, two days prior to the District's March 17, 2011 site visit, 0.20 inches of rain fell, and prior to that no substantial rain had fallen since March 9, 2011, when the area received 1.06 inches of rain.) During the site visit, the District observed water flowing in the streams and took photographs that are present in the AR. The District's JD forms acknowledge that the Appellant stated that the streams are dry in the summer. In their JD forms, the District also documents that the streams are mapped on the 1975 Clermont County Soil Survey.

Despite the precipitation data in the District's AR, average annual rainfall in the District's JD forms, monthly rainfall data in tables within the AR, and the District's observations of water flow in Streams 1 and 2, there is no analysis of how the average annual rainfall compares with the monthly average for March 2011, the month that the District observed water flowing in the streams. In other words, the District does not correlate the rainfall data and site-specific observations with the average or normal rainfall, and there is no analysis to support whether the on-site observations should be considered normal or abnormal circumstances. The single site

visit observation that water was flowing in Streams 1 and 2 and the presence of rainfall data in the AR does not provide sufficient documentation that the volume, duration and frequency of water flow supports a seasonal RPW. Further, the District's estimate that twenty or more flow events occur per year is insufficiently supported by a rationale. Upon remand, the District shall reconsider the JD and provide further analysis of the volume, duration, and frequency of water flow in Streams 1 and 2.

If one or both tributaries are found to be seasonal RPWs, a significant nexus evaluation shall be performed to determine whether the tributaries, in combination with all of their adjacent wetlands (if any), have more than a speculative or insubstantial effect on the chemical, physical, and/or biological integrity of the East Fork of the Little Miami River, the nearest TNW[1]. The same analysis shall be performed if one or both of the tributaries are found to be non-RPWs. This information is typically placed in Section III.C of the JD form.

Although the District provided some information in Sections III.B and IV.B of their JD forms that could potentially be used for a significant nexus determination, they did not provide an analysis within Section III.C of their JD forms or elsewhere in the AR to demonstrate the existence of a significant nexus between each of the tributaries and the East Fork of the Little Miami River. Upon remand, if the District determines that Streams 1 and/or 2 are seasonal RPWs or non-RPWs, the District shall provide sufficient documentation and analysis of whether a significant nexus exists between the tributaries and the East Fork of the Little Miami River.

Additional Information:

Photographs of the tributaries submitted by the Appellant on August 2, 2011, after the request for appeal was accepted, were determined to be new information and were not considered in this administrative appeal in accordance with 33 CFR 331.7(e)(6).

[1] The *Rapanos* Guidance memo dated December 2, 2008, page 13, states: "As a matter of policy, Corps districts and EPA regions will include in the record any available information that documents the existence of a significant nexus between a relatively permanent tributary that is not perennial (and its adjacent wetlands if any) and a traditional navigable water, even though a significant nexus finding is not required as a matter of law." The *Rapanos* Guidance memo, page 10, states: "principle considerations when evaluating a significant nexus include 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 jurisdictional determination is remanded to the Huntington District to provide an analysis of the flow regimes of Streams 1 and 2. If one or both of the tributaries are determined to be seasonal RPWs or non RPWs, the District shall complete a significant nexus evaluation on each of the tributaries in question, including an analysis of whether each of the tributaries, in combination with all of their adjacent wetlands (if any), have more than a speculative or insubstantial effect on the chemical, physical, and/or biological integrity of the East Fork of the Little Miami River, the nearest TNW. 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