

ADMINISTRATIVE APPEAL DECISION

KNANAYA CATHOLIC SOCIETY OF CHICAGO; FILE NO. 2009-233

CHICAGO DISTRICT

NOVEMBER 16, 2010

Review Officer: Pauline Thorndike, U.S. Army Corps of Engineers (Corps), Great Lakes and Ohio River Division (LRD)

Appellant: Knanaya Catholic Society of Chicago, represented by Mr. Bernard Bono of Bono Consulting

Permit Authority: Rivers and Harbors Act, Section 10 (33 U.S.C. 403) and the Clean Water Act, Section 404 (33 U.S.C. 1344)

Receipt of Request for Appeal: November 16, 2009

Appeal Meeting: Teleconference held on August 17, 2010

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

Background Information: The appellant's seven acre property is located at 107 Rohrssen Road in Hanover Township, Cook County, Illinois. A request for a jurisdictional determination (JD), dated April 20, 2009, was submitted to the Chicago District (District). The District performed a site visit on August 11, 2009, and issued an approved JD on September 16, 2009. The approved JD identified wetland W-I, approximately 0.87-acre in size, as a jurisdictional water of the U.S. subject to regulation under Section 404 of the Clean Water Act (CWA). As clarified during an August 17, 2010, teleconference with the Review Officer, the wetland was determined to be adjacent to a seasonal relatively permanent water (RPW), a storm water pipe, that flows directly or indirectly into a traditional navigable water (TNW).

A 2008 aerial photograph contained within the District's Administrative Record (AR) indicates that the area is vegetated with trees and/or shrubs and is surrounded to the west and south by a residential development. The Floristic Quality Study information located within the AR supports that the site predominately consists of trees and some shrubs. The USGS quadrangle map from 1964 depicts a tributary located in the southeastern portion of the site; this tributary is not evaluated in the AR. In an e-mail dated August 18, 2010, the District clarified that there is currently no surface evidence of the tributary.

According to the administrative record, the 0.87-acre wetland drains offsite to the northwest into a storm sewer pipe located just south of Rohrssen Road in/near the backyard of an adjacent house to the west of the Knanaya property. The storm sewer then drains approximately 1,000

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feet south to an open water pond that drains south to Poplar Creek, a tributary of the Fox River. The Fox River is the nearest downstream TNW and is located 2-5 river miles from the on-site wetland.

During the teleconference, the District clarified their understanding of the water flow path:

Water flows from the wetland to the adjacent storm water system only during high water events, and continues to a pipe, then a detention pond, then flows to an open/grassy field, to a forested wetland area, to a culvert at the southern end of the forested wetland, to Dale Drive and in a 2-3' wide unnamed channel/tributary with confined flow along Dale Drive. The water then flows to another unnamed tributary and wetland, and continues to Poplar Creek, a tributary of the Fox River which is a TNW.

The appellant is appealing the September 16, 2009, approved JD because they disagree that the wetland is a water of the U.S. The appellant believes that because the wetland drains to a municipal storm sewer system and ultimately into a detention pond, with no evidence that the waters could naturally flow to the Fox River, the wetland is not subject to regulation under Section 404 of the CWA.

Appeal Evaluation, Findings and Instructions to the Chicago District Engineer:

Reason 1: Waters present on the site are not waters of the U.S. because they enter a man made pathway/conduit and do not naturally flow to the Fox River.

Finding: This reason for appeal has merit.

Action: The District did not perform an adequate significant nexus evaluation for the wetland located on-site, as required in the joint Department of the Army-EPA Memorandum dated December 2, 2008. The District shall complete a significant nexus evaluation on the wetland in question, including a detailed description of the water flow path between the on-site wetland and the nearest TNW, and an analysis of whether the tributary, in combination with all of its adjacent wetlands, has 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.

Discussion: The appellant described that the waters "occasionally present" on the subject site flow into the neighboring Hoffman Estates municipal storm water sewer system and ultimately into a detention pond together with storm water from the adjacent lots in Hoffman Estates. The appellant states that on-site waters (i.e. the wetland) enter a man made pathway/conduit, miles away from the Fox River or any other natural pathway leading to the river or its tributaries.

The appellant's agent articulated in a letter dated November 9, 2009, that the site drains to the northwest to the adjacent wooded property in Cook County. From there water drains overland to storm sewers in the rear lots of houses on Acorn Court, in the White Oak 4 Subdivision in Hoffman Estates. The storm water drains through approximately 1000 feet of sewer pipe to the

detention basin in the White Oak 4 Subdivision. The storm water then flows through a storm water management flow restrictor and is released into a grassy field to the south. During the consultant's field inspection, the detention pond was dry and there was no discharge through the restrictor to the grassy field. The field south of the restrictor was also dry and there was no defined channel through the grassy field. The appellant attached a map showing the flow of water from the site, to the storm sewer system, to the detention pond, to a grassy field, to another pond, and then as overland flow into the woods.

This reason for appeal focuses on two jurisdictional questions – whether the manmade conveyance (storm sewer) connecting the wetland to a downstream detention pond supports that the wetland is a regulated water of the U.S., and whether the detention pond is connected to a downstream water of the U.S. A third issue identified by the Review Officer is whether the District's significant nexus evaluation was adequately documented to determine the jurisdictional status of the on-site wetland.

Evaluation of Manmade Conveyances and Waters

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 storm sewer system.

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, 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.

Evaluation of a Connection to Downstream Waters

The appellant disagrees that the detention basin connects to the Fox River, by either manmade (pipe) or natural connections. During the appeal teleconference, the appellant explained that only during high water events or heavy rain does a little bit of water flow from the wetland to the storm sewer (as little as 1-3 times/year). When the water does make it through the storm sewer, the water continues through the detention pond, then flows through the grassy field, and finally dissipates in the woods as overland flow and is unlikely to continue downstream.

The *Rapanos Guidance* Guidebook, p. 58, directs the Corps to document the water flow between an RPW or non-RPW and a TNW. The District's administrative record does not provide adequate detail on the water flow path from the open water pond to the downstream Poplar Creek, a tributary to the Fox River. The District's JD form at III.B.1 states "Wetland drains northwest into a pipe that drains 1,000 feet south to openwater pond that drains south to Poplar Creek, a tributary to the Fox River."

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As described in the Background section of this document, the District clarified during the appeal teleconference that water flows from the detention pond to an open/grassy field, to a forested wetland area, to a culvert at the southern end of the forested wetland, to a 2-3' wide unnamed channel/tributary with confined flow along Dale Drive, to another unnamed tributary and wetland, and continues to Poplar Creek, a tributary of the Fox River. However, the District's administrative record does not provide this level of detail on the connection/water flow route between the on-site wetland to the nearest TNW. Upon remand, the District shall describe in further detail the connection/water flow route between the on-site wetland and the nearest TNW.

Furthermore, the District also clarified during the appeal teleconference that the storm sewer pipe had an intermittent (seasonal RPW) flow regime. However, the District's administrative record does not provide this information consistently. One section of the District's JD form indicates that the adjacent tributary's flow regime is a non-RPW (Section II.B.1), yet another section indicates that the water flow regime is an RPW (Section III.D.6). Upon remand, the District shall document the water flow regime of the adjacent tributary (i.e. pipe).

Evaluation of Significant Nexus

This issue of whether a significant nexus was adequately documented to determine the jurisdictional status of the on-site wetland was identified by the Review Officer. A significant nexus determination is required as part of the *Rapanos 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 TNWs.

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.

The District properly documented the wetland's characteristics (size, type, and quality) and the proximity to a TNW in Section II.B.2 of their JD form. The District's significant nexus determination was later documented in Section III.C of their JD form as "Wetland drains northwest into a pipe that drains 1,000 feet south to openwater pond that drains south to Poplar Creek, a tributary to the Fox 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 evaluate the significant nexus that the wetland had on the nearest downstream TNW. Upon remand, the District shall complete an analysis of whether the tributary (i.e. pipe), in combination with all of its adjacent wetlands, has 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

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document the hydrologic, ecologic, and other functions performed by the tributary and all of its adjacent wetlands. In summary, the District shall complete a significant nexus evaluation, complete the JD form as required in the *Rapanos Guidance*, and reconsider its JD as appropriate.

Finally, although the District's JD form stated that their office does not concur with data sheets/delineation report submitted on behalf of the applicant, the District's administrative record does not explain why they did not concur with this information. Upon remand, the District shall explain why they did not concur with the data sheets/delineation report.

Overall Conclusion:

For the reasons stated above, I conclude that this request for appeal has merit. The District's AR does not contain, in accordance with Corps guidance, an adequate significant nexus evaluation between the onsite wetland and a TNW. The District shall complete a significant nexus evaluation on the wetland in question, including a detailed description of the water flow path between the on-site wetland and the nearest TNW, and an analysis of whether the tributary, in combination with all of its adjacent wetlands, has 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.

The approved JD is remanded to the District to reconsider and document its JD as appropriate. The District shall complete these tasks by December 30, 2010, (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 will be delayed beyond December 30.



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