

ADMINISTRATIVE APPEAL DECISION

LILY POND STONE, LLC

FILE NO. LRC-2009-00023

CHICAGO DISTRICT

16 APRIL 2010

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

Appellant: Lily Pond Stone, LLC represented by Mr. Thomas Merryman

Authority: Clean Water Act, Section 404 (33 USC 1344)

Receipt of Request for Appeal: 17 June 2009

Appeal Meeting and Site Visit Date: 5 January 2010

Summary of Decision: I find that the appellant's request for appeal has merit. The District's administrative record (AR) does not contain sufficient information in support of its decision that the wetland is subject to Federal jurisdiction and regulation as waters of the United States. I am remanding the approved Jurisdictional Determination (JD) decision back to the District for reconsideration in light of this decision.

Background Information:

Lily Pond Stone, LLC (the "Appellant") is appealing the Chicago District's (the "District") decision to take jurisdiction over a wetland on property commonly known as the Hana Farm site located north of the intersection of Doty Road and U.S. Route 14, Woodstock, McHenry County, Illinois.

The District issued an approved JD to the previous property owner (Mr. David Castle) on 27 August 2003. This original JD stated that one wetland identified on the subject property lacks a hydrological surface connection to a navigable waterway and is therefore not under Army Corps of Engineers jurisdiction. A subsequent approved JD was issued by the District to Mr. Castle for the same property on 3 March 2009. This second JD stated that the subject property contains waters of the United States subject to jurisdiction under Section 404 of the Clean Water Act (CWA).

The District documented that Wetland 1 drains to the south through drain tiles and surface ditches before discharging into a relatively permanent water (RPW) located south of Route 14 that is a tributary to the Kishwaukee River and subsequently the Rock River, a traditional navigable water (TNW). The decision included an Approved JD form as supporting

documentation dated 27 January 2009 that states that a significant nexus exists between the onsite wetland and the TNW.

On 1 May 2009, Mr. Robert T. Hanlon, agent for the Appellant, filed a Request for Appeal (RFA) with the Great Lakes and Ohio River Division (LRD). In this request Mr. Hanlon disagreed with the 3 March 2009 JD issued to Mr. Castle that a significant nexus exists between the onsite wetland and a navigable water. In a 22 May 2009 response to Mr. Hanlon's letter, LRD found that the RFA was not acceptable for two reasons – the timeliness of the RFA and an RFA submittal by a non-affected party (Title 33 Code of Federal Regulations (CFR) Part 331.1 and 331.6(a) and RGL 06-01 dated 25 January 2006). Specifically, the RFA was not received within 60 days of the date of the District's decision and Mr. Merryman was not an affected party to the approved JD. The Division letter further clarified that the approved JD was issued to Mr. Castle and not Mr. Merryman and therefore only Mr. Castle had appeal rights associated with the approved JD.

On 22 May 2009, Mr. Merryman submitted a request for an approved JD to the District. The District issued Mr. Merryman an approved JD on 22 May 2009 identical to the one sent to Mr. Castle.

Mr. Hanlon re-filed a RFA on Mr. Merryman's behalf in a letter dated 8 June 2009 and LRD accepted the RFA on 2 November 2009.

The Review Officer held an appeal meeting at the offices of Mr. Hanlon followed by a site walk on 5 January 2010. Representatives of the appellant and District participated.

Information Received During the Appeal and its Disposition:

- 1) The District provided a copy of the administrative record (AR), which was reviewed and considered in the evaluation of this RFA.
- 2) With the RFA, the appellant provided documents containing their comments and analysis of the District's JD. The submittals were accepted as clarifying information in accordance with 33 CFR 331.7(e). At the appeal meeting and in the District's AR there were several references to the District's original JD on the same property dated 27 August 2003. The Review Officer requested and received a copy of that AR from the Chicago District and it was considered as clarifying information.

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

Appeal Reason 1: The AR does not support the Chicago District's determination that a significant nexus exists between a navigable waterway and the subject property.

Finding: This reason for appeal has merit.

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Action: The District should reconsider its JD by providing further site specific analysis and details of the wetland and its associated tributary reaches to determine whether a significant nexus exists between the onsite wetland, its associated tributaries and the Rock River.

Discussion: The Appellant states in their RFA that they believe the District was incorrect in its determination that a significant nexus is present between the onsite wetland and the closest TNW, the Rock River. In reviewing the AR it is evident that the District analyzed some site specific factors, including specific functions performed at the site and their effect on the nearest TNW, including the effects that the District believes the onsite wetland has on the chemical, physical and biological integrity of the Rock River. However, there is inadequate documentation to support that a significant nexus exists between the onsite wetland and the TNW. Specifically, the District has not tied the functions attributed to the onsite wetland and tributaries to the downstream TNW.

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 the Supreme Court ruling in *Rapanos v. United States* (547 U.S. 715 (2006) (hereinafter "*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 JD form to document approved JDs; 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, and an appendix titled "Legal Definition of 'Traditional Navigable Waters'". A revised memorandum was issued on December 2, 2008. The appellant's reason for appeal is focused on the jurisdictional status of the wetland following the *Rapanos* ruling.

The JD Guidebook, page 29, states:

Wetlands adjacent to non-RPWs that flow directly or indirectly into TNWs are jurisdictional under the Clean Water Act (CWA) where there is a 'significant nexus' with a TNW. For each specific request, field staff will need to perform a significant nexus evaluation to determine if [the] tributary is jurisdictional under the CWA.

The *Rapanos* guidance further clarifies that finding a continuous surface connection is not required to establish adjacency.

As described in the AR, the onsite wetland, approximately 95 acres in size, contains an excavated hole in the southeast portion that accepts a drain tile from the east and a 15-inch drain tile from the excavated channel that extends approximately 4200 feet through the wetland. From this point within the wetland, water from the wetland enters a 15-inch pipe and travels south-southeast approximately 730 feet and discharges into an excavated ditch. The ditch is characterized as a non-RPW. The ditch conveys water above ground to the south for approximately 800 feet before entering another drain tile. This drain tile continues southeasterly approximately 1900 feet before discharging offsite into an excavated ditch characterized as an

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RPW. The unnamed RPW flows into the Kishwaukee River, also an RPW, which flows to the Rock River, a TNW.

The AR details that the nearest TNW, the Rock River, is located 30 miles away from the site. However, there is not a clear determination that supports that a significant nexus exists between the onsite wetland and the TNW.

The JD Guidebook, page 7, states:

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.

Although the District documented the volume, duration and frequency of flow at the site, its impact to the downstream TNW is not clearly supported in the AR. Further, it is not detailed how that volume, duration and frequency of flow contributes to the physical, chemical or biological integrity of the TNW. In addition, no consideration is given in the AR to the distance (30 miles) between the onsite wetland and the TNW and how that affects the physical, chemical and biological integrity of the TNW.

The AR should be revised to more cohesively connect the available site-specific details regarding volume, duration and frequency of water flow in the wetland and non-navigable tributaries, onsite aquatic functions, and the proximity of the wetland and its tributaries to the Rock River, the nearest TNW. The affect these factors have on the physical, chemical and biological integrity of the TNW should be analyzed and detailed in the AR and the revised Jurisdictional Determination to determine if there is a significant nexus between the onsite wetland and the Rock River.

The JD Guidebook, page 47, states:

JDs require documentation that identifies if there is the presence and/or absence of jurisdiction and the boundaries of the water body. Maps, aerial photography, soil surveys, watershed studies, scientific literature, previous JDs for the review area, and local development plans may assist staff in completing accurate JDs. This information should be referenced in the file with any conclusions formulated from this information stated in the Approved JD form.

This section of the JD Guidebook also states:

Identification and evaluation of the functions relevant to the significant nexus determination will be more complete when incorporating literature citations and/or references from studies pertinent to the parameters being reviewed.

Section III.C (Significant Nexus Determination) of the District's JD form states that various functions occur in the onsite wetland. The statements in the AR referring to production and

export of organic matter, groundwater recharge, water quality and ecological effects may be factual; however they come across as generic or speculative in nature as they are not supported by site-specific findings or scientific literature. Some references - to the McHenry County Advanced Identification (ADID) and EcoCAT (Ecological Compliance Assessment Tool) – are provided but the specific importance of the wetland and its tributaries to the downstream TNW is not clearly explained. The JD Form mentions a farmed wetland under Section III.B.2 but the impact of farming or other onsite or neighboring land use activities was not addressed in the significant nexus determination.

The AR does not support the District's decision to assert jurisdiction over the onsite wetland due to a lack of supporting documentation that a significant nexus exists between the onsite wetland and the TNW. District conclusions on the onsite wetland functions and their effect on downstream waters should be substantiated and supported. The AR should be revised accordingly and the JD reconsidered in light of the revised AR.

Finally, there is no mention in the AR of the 27 August 2003 JD. Under Corps regulations, approved JDs remain valid for five years unless new information warrants revision of the determination prior to the expiration date, or a District Engineer identifies specific geographic areas with rapidly changing environmental conditions that merit re-verification on a more frequent basis (Regulatory Guidance Letter (RGL) 05-02, dated 14 June 2005). The original approved JD expired on 27 August 2008. The 2003 JD clearly stated that the onsite wetland was not subject to Corps jurisdiction because there was no surface hydrologic connection between the onsite wetland and the offsite RPW. Although the decision was made prior to the *Rapanos* decision and expired prior to the District's latest JD, there should be some discussion and explanation in the AR about the differing JDs and the factors that contribute to those differing decisions.

Conclusion:

For the reasons stated above, I find that the appeal has merit. The District's AR does not contain sufficient information to support its decision that the wetland is subject to Federal jurisdiction and regulation as waters of the United States under Section 404 of the CWA. I am remanding the approved JD decision back to the District to revise the AR as necessary and to reconsider its decision in light of the revised AR. The District shall complete these tasks by 1 June 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 to request a time extension if a site visit is required and the expected date of the final JD is delayed beyond the above date.


SUZANNE L. CHUBB
Regulatory Program Manager
Great Lakes & Ohio River Division