

ADMINISTRATIVE APPEAL DECISION

GALLAGHER & HENRY; FILE NO. 2006-14112

CHICAGO DISTRICT

JUNE 21, 2011

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

Appellant: Gallagher & Henry

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

Receipt of Request for Appeal (RFA): January 25, 2011

Appeal Meeting: Teleconference held on April 25, 2011

Summary of Decision: The administrative record (AR) of the District's approved jurisdictional determination (JD) decision shows that the District's conclusions were reasonable and do not conflict with the laws, regulations, or policy requirements of the Corps regulatory program. The Appellant's appeal does not have merit.

Background Information:

The Appellant's 60 acre property is located south of 179th Street and west of Pheasant Lake Drive, in Tinley Park, Cook County, Illinois. The property contains a 0.6 acre wetland (currently labeled Wetland A), a 12 acre wetland (currently labeled Wetland B), and an isolated unmapped 0.01 acre wetland. Residential neighborhoods surround the site.

In January 2006, the Appellant submitted a JD request to the District for the property. The delineation report identified the same wetlands as described above. Later in July 2006 the Appellant submitted a new letter that included a revised wetland delineation combining the two wetlands into one 13.12 acre wetland complex re-labeled as Wetland A. The District issued an approved JD on November 17, 2006, identifying 13.12-acre Wetland A as subject to federal jurisdiction on the property. The JD also identified a new 0.01 acre of isolated wetland labeled as Wetland B.

The Appellant disagreed with the District's November 2006 JD and appealed it on January 12, 2007, following the U.S. Supreme Court decision in *Rapanos v. United States*, 547 U.S. 715 (2006). The Appellant's RFA indicated that there is no significant nexus from the onsite wetland to navigable waters based on this Supreme Court ruling. On June 5, 2007, the EPA and the Corps jointly issued guidance intended to foster nationally-consistent implementation of the CWA following the *Rapanos* ruling. The JD was remanded to the District on October 31, 2007, to undertake any necessary data collection and analysis, and to re-evaluate and document its

determination consistent with the *Rapanos* guidance issued in June 2007. A revised *Rapanos* guidance memorandum was issued on December 2, 2008.

The Appellant provided several submittals during the District's re-evaluation including onsite information on soils, vegetation, and hydrology evaluated using the 1987 U.S. Army Corps of Engineers Wetland Delineation Manual (1987 Wetland Delineation Manual). The District performed a site visit on March 24, 2010, and coordinated their JD with the U.S. Environmental Protection Agency (EPA) in April 2010 per guidance in the Corps Regulatory Guidance Letter (RGL) 07-01. EPA concurred with the Corps findings that Wetlands A and B were jurisdictional. At that time, the Appellant requested that the District suspend their review so they could review the Corps submittal to EPA. The Appellant felt that several facts were left out of the submittal to EPA. The Appellant also disagreed that a significant nexus was present between the on-site wetland and a downstream TNW.

On October 6, 2010, the District issued a new approved JD identifying 0.6-acre Wetland A and 12-acre Wetland B, consistent with the January 6, 2006, wetland delineation report prepared by JFNew, the Appellant's first consultant. The District stated that these two wetlands exhibit a significant nexus to the Little Calumet River, a traditional navigable water.

The District documented that Wetland A is located in the northern center of the site, and water from the wetland drains southwest through an eroded farmed area to Wetland B. According to a phone conversation between the Administrative Appeal Review Officer (RO) and the District, the eroded farmed area is a wetland. This is not clear in the AR although the map associated with the District's approved JD shows a hand-drawn unlabelled wetland in this area. Wetland B drains south off-site via an eroded ditch to an open water detention basin, then into a storm sewer pipe that bypasses a dry detention basin, outlets into an open water detention basin, then flows north bypassing two more dry detention basins before it outlets into another open water detention basin, then flows into Midlothian Creek. Midlothian Creek is a relatively permanent water (RPW) that flows directly to the Little Calumet River, a Traditional Navigable Water (TNW), located approximately 5-10 miles from the property. The isolated 0.01 acre wetland is located in the center of the site, east of a large pile of fill. The AR documents that nearly 4 of the 12 acres of Wetland B was graded by the applicant in 1996, and several large piles of fill are present on the site.

Appeal rights were provided to the Appellant on November 29, 2010. Normally an Appellant cannot appeal an approved JD more than once, but in this case-specific circumstance the first RFA was returned to the District because of an intervening change in national guidance and the appeal was not evaluated. The second RFA was accepted so that the appeal could be evaluated. The Appellant disagreed with the District's determination and appealed its decision in a letter dated January 21, 2011, and received on January 25, 2011. According to the Appellant, the District's application of the relevant wetland delineation criteria was in error, and Wetland B does not have a significant nexus to the closest TNW (the Little Calumet River) nor is that determination supported by substantial evidence in the record.

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

Reason 1: The Corps' application of the relevant wetland delineation criteria is in error.

Finding: This reason for appeal does not have merit.

Action: No action required.

Discussion: In their RFA the Appellant states that the Corps failed to adequately consider their September 9, 2008, Testing Service Corporation (TSC) soils report demonstrating that the majority of Wetland B did not contain hydric soils. The Appellant also objects that the Corps used an older wetland delineation report, referred to as the JFNew report dated January 6, 2006, and updated July 10, 2007, instead of an October 10, 2008, Encap, Inc. report, in their JD. All of these reports were prepared by the Appellant's consultants. According to the Appellant, the JFNew report does not follow the 1987 Wetland Delineation Manual protocol. Further, the Appellant believes that the wetlands should not be regulated based on a Natural Resource Conservation Service (NRCS) letter dated July 10, 2009, designating the area as prior converted cropland (PC).

Both the JFNew and Encap, Inc. reports were submitted by the Appellant, however, they reach different conclusions on the extent of jurisdictional wetland areas. The Appellant believes that the Encap, Inc. report contains updated information and more accurate conclusions compared to the older JFNew report. The Encap report indicates that no wetlands are located on the site. The reasoning provided in the report is that prior to 1996 no wetlands were located within the area, and the existing wetlands do not meet hydric soil criteria.

The District's memorandum for the record (memo) dated October 4, 2010, characterizes 12 acres of Wetland B as a wetland because it meets the three wetland criteria using the 1987 Wetland Delineation Manual (hydrophytic vegetation, hydric soils, and hydrology) and the 2010 Midwest Regional Supplement to the 1987 Wetland Delineation Manual (Version 2.0). The District generally agrees with the information in the JFNew report. The District's determination is based on resource maps and field observations including soil samples collected while in the field. According to the District's memo, Wetland B is identified as a wetland on the National Wetlands Inventory map (undated). Also, Wetland B is identified on the DuPage and Cook County soil surveys, dated 1979, as an area with hydric soil.

A data form completed by the District on March 24, 2010, supports the District's conclusion that the soils at a location within Wetland B are hydric. The form documents indicators of hydric soils including redox depressions and a depleted matrix, and also documents the soil matrix with mottles as hydric. The data form also supports their conclusion that hydrology is present. Several primary indicators of wetland hydrology were documented, including presence of surface water, saturation, and water-stained leaves. Additionally, the form documents hydric vegetation. According to a telephone conversation between the District and the RO, the District sampled additional data points within the wetland area and reached the same conclusion, but did not document their findings in data forms. The JFNew report dated January 2006 reaches the same conclusion that Wetland B is a wetland and includes additional data points within the wetland area and site.

The District evaluated the wetland areas under normal circumstances¹. The District's March 24, 2010, form documents that the area was graded by the applicant in 1996. Although the soil was altered, it has remained undisturbed for 14 years so the current condition was considered to be the normal circumstance.

The Appellant submitted a TSC soils report of boring samples taken on September 11, 2008, to the District. The boring logs indicate that the sample areas were predominately clay. At the time, the District planned to analyze the presence of wetlands using the atypical section of the 1987 Wetland Delineation Manual². The District responded in an e-mail dated December 15, 2008, requesting that the Appellant describe the soil type beneath the fill (i.e. the native soils) instead of the top layer of fill material. The District further stated that the boring report does not discuss the presence of wetlands in the area. The Appellant responded to the District's concerns by submitting the Encap, Inc. report. According to a telephone conversation between the RO and the District, the District's March 24, 2010, data form was completed at boring location H-B. The soil in this area was documented in the District's data form as hydric. Because all three wetland criteria were present at the boring location, the District no longer used the atypical section of the 1987 Wetland Delineation Manual, and instead proceeded to evaluate the wetland areas under normal circumstances.³

The District disagrees with the Appellant's Encap, Inc. report findings that Wetland B does not contain hydric soils. The timeline attached to the District's October 4, 2010 Memorandum for the Record documented that the Encap, Inc. wetland delineation report data forms do not properly document positive hydric soil indicators at data points E, H, K, L, M, and N. Hydric soils are present when positive hydric soil indicators are found in the sample location. At the time of the Encap, Inc. report, one type of hydric soil indicator available on the data form was low chroma. However, the Appellant indicated that this positive hydric soil indicator was not present. In summary, although the soil profile data in the Encap, Inc. report data forms documents low matrix chroma and presence of mottles, the same data forms incorrectly state that there are no positive hydric soil indicators.

¹ The term "normal circumstance", as defined in the 1987 Wetland Delineation manual, is "the soil and hydrologic conditions that are normally present, without regard to whether the vegetation has been removed." The determination of whether normal circumstances exist in a disturbed area "involves an evaluation of the extent and relative permanence of the physical alteration of wetlands hydrology and hydrophytic vegetation" and consideration of the "purpose and cause of the physical alterations to hydrology and vegetation."

² The atypical section of the 1987 Wetland Delineation Manual is used when positive indicators of hydrophytic vegetation, hydric soils, and/or wetland hydrology could not be found due to effects of recent human activities or natural events.

³ Methods described in the atypical section (Section F) of the 1987 Wetland Delineation Manual should be used only when a determination has already been made in Section D or E that positive indicators of hydrophytic vegetation, hydric soils, and/or wetland hydrology could not be found due to effects of recent human activities or natural events.

The interim Midwest Regional Supplement to the 1987 Wetland Delineation Manual was implemented in Fall 2008 (after the completion of the Encap, Inc. report data forms), and version 2.0 was implemented in October 2010 around the time of the District's approved JD decision. The Midwest Regional Supplement provided a new set of hydric soil indicators. These hydric soil indicators would have been met based on the soil profile data in the Encap, Inc. report, and were used by the District when reaching their decision. Therefore, the AR supports that the soils within the wetland area are hydric.

The District properly followed the 1987 Wetland Delineation Manual and the Midwest Regional Supplement when reaching their decision. Therefore, this reason for appeal has no merit.

Further, according to a February 25, 2005, memo between the Natural Resources Conservation Service (NRCS) and Corps, prior-converted cropland (PC) is identified for the purpose of implementing the Food Security Act, and refers to wetlands that were converted from a non-agricultural use to cropland prior to December 23, 1985. A certified PC determination made by NRCS remains valid as long as the area is devoted to an agricultural use. If the land changes to a non-agricultural use, the PC determination is no longer applicable and a new wetland determination is required for CWA purposes⁴. The Appellant intends to build a housing development on the property, and in the mid 1990s a small quantity of fill was placed in the wetland with the intention of building the development. Because the land usage has changed to non-agricultural, the PC determination for the site made in June 1993 and clarified in a letter dated July 10, 2009⁵, is no longer valid. Therefore, it is appropriate for the District to regulate the wetland areas previously designated as PC, and this reason for appeal has no merit.

Reason 2: The Corp's finding that Wetland B has a significant nexus to the closest TNW (the Little Calumet River), and that Wetland B is adjacent to Midlothian Creek, is in error.

Finding: This reason for appeal does not have merit.

Action: No action required.

Discussion: In their RFA, the Appellant states that the District's significant nexus is not supported by substantial evidence in the AR. The Appellant alleges that the District provides no site specific evidence to support its conclusion that Wetland B provides ecologic benefits to the Little Calumet River and the JD form does not list any data sources to support its conclusion. Furthermore, the Appellant alleges that the District does not address any of the site specific evidence and analysis provided by the consultant demonstrating that the wetlands do not provide any beneficial functions for the Little Calumet River.

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

⁴ This NRCS-Corps memo is the current PC guidance. Regulatory Guidance Letter (RGL) 90-7 referenced by the Appellant in their RFA is obsolete, as indicated in RGL 05-06.

⁵ The wetland was previously determined by NRCS to be a farmed wetland, but that designation was changed to PC in 1993 because wetland signatures were not present more than 2 out of 5 years.

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 TNWs⁶. Furthermore, the *Rapanos* guidance, page 58, directs the Corps to document the water flow from a non-RPW directly or indirectly into a TNW⁷.

The District's significant nexus determination was as follows:

This office has determined that the 0.63 acre Wetland A and the 12.24 acre Wetland B do exhibit a significant nexus to the Little Calumet River, a navigable water because there is a significant physical, chemical and biological relationship with the navigable water. The 0.01 acre wetland on the eastern edge of the spoil pile in the center of the site was determined to be isolated.

The subject property contains headwater wetlands, Wetland A and B, that exhibit a physical hydrologic connection to a traditional navigable waterway (TNW). The site drains from Wetland A on the northern portion of the site a short distance southwest⁸ to Wetland B. Then Wetland B drains south via an eroded ditch to an open water detention pond. From the open water detention pond water drains east then north via storm sewer pipe to Midlothian Creek. From the site to Midlothian Creek water passes through three open water detention basins and bypasses three dry-bottom detention basins. Water only enters the dry-bottom detention basins during large flood events but primarily bypasses them entirely. During a field visit conducted on March 24, 2010 flowing water was observed at each basin to Midlothian Creek, which is a Relatively Permanent Water that flows directly to the Little Calumet River. This hydrologic connection demonstrates the ability of the tributary to carry pollutants, flood waters, nutrients and organic carbon to the TNW.

⁶ 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."

⁷ 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. 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. For the JD in question, the storm sewer connects a water of the U.S. (Wetlands A and B) to another water of the U.S. (Midlothian Creek, a relatively permanent water).

⁸ The District's memo states that Wetland A drains southwest through an eroded farmed area to Wetland B.

The physical connection to the Little Calumet River facilitates the onsite wetlands and others like it in the watershed to reduce the amount of pollutants and floodwaters reaching the TNW. The onsite wetland functions include providing stormwater storage, habitat, sediment/toxicant retention and nutrient removal/transformation. The 13 acres of wetland on the project site limit the amount of water being sent downstream, this stormwater storage function helps reduce the frequency and extent of downstream flooding and reduces downstream bank erosion and sedimentation in Midlothian Creek and the little Calumet River. The wetland provides habitat to numerous amphibians, birds and mammals. The area surrounding the project site is mostly residential, leaving this site as one of the only remaining wetlands. As a result a myriad of wildlife is attracted to this wetland. Specifically, a variety of bird species have been observed using the site for habitat and foraging. Wetlands also help maintain cooler water temperatures required for aquatic species downstream.

The sediment and pollutant/toxicant retention provided by the subject wetland has a direct positive effect on the Little Calumet River in regards to water quality and aquatic food webs that are not adapted to thrive in sediment-choked environments. Wetlands improve water quality in a number of ways. They exhibit effective nitrogen removal functions, detain phosphorus, filter and stabilize suspended sediments, and offer detoxification benefits. The onsite wetlands have a low floristic quality due to the historic of agricultural and other anthropogenic disturbances at the site. However the wetlands still perform significant nexus functions for the watershed due to its large size and the presence of species like *Phragmites australis* which is well known for its ability to filter out pollutants and often is used to treat waste water.

The decrease of sedimentation, pollutants, flooding, and nutrients and habitat provided by the subject wetland provides a positive effect to the downstream relatively permanent waters and traditional navigable waters. The wetland alone and in combination with other wetlands in the area significantly affect the chemical, physical, and biological integrity of the Little Calumet River. These factors contribute to the finding of a significant nexus between the on-site wetlands and the TNW.

In their JD form, the District provides site-specific information regarding the functions and services of the on-site wetlands and their impact on the Little Calumet River. Further, in a memo dated July 20, 2010, the District addresses many of the Appellant's concerns regarding significant nexus.

The District documents their adjacency determination in their JD form. The District also documents the water flow to the nearest TNW. The District provided detailed information on the direct physical connection between the wetland and the Little Calumet River in several locations within the JD form and memo. The *Rapanos* guidance, p. 5, states that an intermittent hydrologic connection is acceptable and does not require a continuous surface connection. The water flow between the wetland and nearest RPW (Midlothian Creek) is described in the District's JD form as intermittent flow.

The Appellant is concerned that the dry detention basins never held water and therefore no significant nexus exists between the wetland and the Little Calumet River. However, the District specifically notes in several locations within the JD form and memo that the water primarily bypasses the dry-bottom detention basins and only enters the dry basins during large flood events. The by-pass consists of a stormwater pipe located next to the dry-bottom detention basins, and intermittent water flows through the pipes while by-passing the dry-bottom detention. Therefore, the dry detention basins are inconsequential to the physical surface connection between the on-site wetland and downstream Little Calumet River.

Overall, the District properly completed their analysis on how the tributary (i.e. pipe), in combination with all of its adjacent wetlands (i.e. on-site wetlands), has more than a speculative or insubstantial effect on the chemical, physical, and/or biological integrity of the Little Calumet River, the nearest TNW. In doing so, the District properly documented the hydrologic, ecologic, and other functions performed by the tributary and all of its adjacent wetlands. Additionally, the District properly documented the water flow path between the wetland and Little Calumet River. Therefore, this reason for appeal has no merit.

The Appellant referenced previous appeal decisions in their RFA. Corps regulations at 33 CFR 331 state that an appeal decision is applicable only to the instant appeal and has no other precedential effect. The regulations further state that such a decision may not be cited in any other administrative appeal, and may not be used as precedent for the evaluation of any other jurisdictional determination or permit application. Therefore, the cited appeal decisions were not considered in this administrative appeal review.

Overall Conclusion: I find that the District's administrative record supports its decision. The AR of the District's JD decision shows that the District's conclusions were reasonable and do not conflict with the laws, regulations, or policy requirements of the Corps regulatory program. Therefore, for the reasons stated above, the appeal does not have merit.

Pauline D. Thorndike
Administrative Appeal Review Officer
Great Lakes & Ohio River Division