

ADMINISTRATIVE APPEAL DECISION

GALLAGHER & HENRY; FILE # LRC-2006-14112

CHICAGO DISTRICT

MAY 9, 2013

Review Officer (RO): Ms. Mary J. Hoffman, U.S. Army Corps of Engineers, Northwestern Division, Portland, Oregon

Appellant: Gallagher & Henry

Permit Authority: Clean Water Act (33 USC 1344 et seq.)

Receipt of Request for Appeal: May 24, 2012

Site Visit/Appeal Meeting: September 12, 2012

Summary of Decision: The Appellant is challenging the Chicago District's approved jurisdictional determination which concluded that the U.S. Army Corps of Engineers (Corps) has Clean Water Act (CWA) jurisdiction over wetlands located near 179th Street and Pheasant Lake Drive, Tinley Park, Cook County, Illinois (hereafter called the Warmke parcel). The Request For Appeal (RFA) challenged the approved jurisdictional determination on the basis that the District incorrectly applied law, regulation or officially promulgated policy when identifying Federal CWA jurisdiction over wetlands on the subject property. The Appellant cited two reasons for the appeal as follows:

1. The Corps' interpretation and application of the "Abandonment" criteria for voiding the prior converted cropland exclusion from CWA jurisdiction is in error.
2. The Corps' finding that Wetland B has a significant nexus to the closest Traditional Navigable Water (the Little Calumet River) is in error and is not supported by substantial evidence.

For reasons detailed in this document, Reason 1 is found to have no merit while Reason 2 has merit. The District followed codified regulations and applied current agency guidance in applying the prior converted cropland and associated abandonment criteria. However, the District's basis for its significant nexus conclusion is insufficient because it fails to provide the requisite explanation of the basis for its significant nexus conclusion. As a result, the Appellant's second Reason for Appeal has merit.

Background Information: Three jurisdictional determinations and one other appeal decision have been completed by the Corps for the Appellant's Warmke parcel. The initial request for a jurisdictional determination was received by the Chicago District (District) on January 17, 2006. The District provided an approved jurisdictional determination (AJD) on November 17, 2006.

The AJD was appealed to the Great Lakes & Ohio River Division (LRD) on January 12, 2007. On October 31, 2007, LRD advised the District to reevaluate the AJD in light of the recent U.S. Supreme Court Decision in *Rapanos v. United States & Carabell v. United States* (dated June 5, 2007). The Appellant, Gallagher & Henry (G&H), retained appeal rights pending the outcome of the reevaluation.

A new AJD was provided to G&H on October 6, 2010, which was then appealed to LRD on January 21, 2011. LRD reached an appeal decision on June 21, 2011, concluding that the Appellant's reasons for appeal were without merit.

In a July 7, 2011, letter to LRD, the Appellant requested that the AJD and appeal decision be reconsidered given the court decision issued by the U.S. District Court for the Southern District of Florida in *New Hope Power Company v. United States Army Corps of Engineers*, 2010 WL 383499 (S.D. Fla. September 29, 2010). The District agreed to reconsider the AJD to determine the applicability of the *New Hope Power* decision on the Warmke parcel.

The District amended the administrative record and provided a new AJD for the Warmke parcel on March 26, 2012. LRD received a request for appeal of the March 26th decision on May 24, 2012. This is the subject of the current appeal action.

Information Received and Its Disposition During the Appeal:

The administrative record (AR) is limited to information contained in the record as of the date of the Notification of Administrative Appeal Options and Process form. Pursuant to 33 CFR § 331.2, no new information may be submitted on appeal. To assist the Division Engineer in making a decision on the appeal, the RO may allow the parties to interpret, clarify, or explain issues and information already contained in the AR. Such interpretation, clarification, or explanation does not become part of the District's AR, because the District Engineer did not consider it in making the decision on the AJD. However, in accordance with 33 CFR § 331.7(f), the Division Engineer may use such interpretation, clarification, or explanation in determining whether the AR provides an adequate and reasonable basis to support the District Engineer's decision. The information received during this appeal review and its disposition is as follows:

1. The District provided a copy of the AR to the RO and the Appellant on July 13, 2012. The AR is limited to information contained in the record by March 29, 2012.
2. A site visit and informal meeting was held on September 12, 2012. The site visit consisted of a tour of the site to inspect the general character of the area. The informal meeting consisted of clarification of the reasons for appeal provided by the Appellant, and clarification of rationale used in the JD and AR provided by the District.

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

Appellant's First Reason for Appeal: The Corps' interpretation and application of the "Abandonment" criteria for voiding the Prior Converted (PC) cropland exclusion of CWA jurisdiction is in error.

Finding: This reason for appeal does not have merit.

Action: No action required.

Discussion: The Appellant submits that the Corps may not void the PC cropland exclusion of the CWA jurisdiction over Wetland B because of the "change of use" from farming to development.

In the October 6, 2010, AJD, the District based its determination *in part* on a conclusion that the Appellant's use of the parcel had shifted to non-agricultural (residential) purposes. As outlined in the Background Section above, the October 2010 AJD was replaced by a new AJD dated March 21, 2012, in which the District considered the applicability of the *New Hope Power* decision on the Warmke parcel. Information provided by G&H indicated that farming ceased when the site was mass graded in the fall of 1996 for a residential development. G&H's work disabled the drain tile, which resulted in wetland conditions returning to the area and the area was not farmed again.¹ The District's March 2012 AJD, the subject of this appeal, concluded that the Warmke parcel met the agricultural "abandonment" criteria, wetland conditions had returned to the area, and the area is subject to CWA jurisdiction.

The abandonment criteria set forth in the preamble to 1993 rulemaking² states as follows:

PC cropland which now meets wetland criteria is considered to be abandoned *unless*: For once in every five years the area has been used for the production of an agricultural commodity, or the area has been used and will continue to be used for the production of an agricultural commodity in a commonly used rotation with aquaculture, grasses, legumes or pasture production.

There is no evidence in the record that there has been any cropping, management of the drainage systems, or maintenance activities related to agricultural production on the area at issue. Accordingly, the area has been agriculturally abandoned and the PC cropland exception to the CWA does not apply here.

Next, G&H expressly encouraged the RO to apply the holding of *New Hope Power* to the AR of the District's jurisdictional determination with regard to a "change in use." The *New Hope Power* holding with regard to "change in use," however, does not apply here because the District's determination is based on the abandonment criteria referenced above. Nevertheless,

¹ Pg 5 of District's Record of Decision dated July 20, 2010 (revised March 21, 2012) referencing a *Report of Soils Exploration: Fill Pads, Warmke Property* dated September 9, 2008, Prepared for G&H by the Testing Service Corporation.

² 58 Fed. Reg. 168 at 45034 (August 25, 1993).

the court in *New Hope Power* concurs with the conclusion that abandonment is a proper method for prior converted croplands to return to Corps CWA jurisdiction under 58 Fed. Reg. 168. See *New Hope*, 746 F. Supp. 2d at 1276 (“The only method provided for prior converted croplands to return to the Corps’ jurisdiction under this regulation is for the cropland to be ‘abandoned,’ where cropland production ceases and the land reverts to a wetland state.”).

The District followed current promulgated guidance and applied Federal standards regarding the PC cropland abandonment criteria. The District’s AR sufficiently documents its determination that wetlands on the subject property are wetlands subject to Federal jurisdiction under Section 404 of the Clean Water Act. As a result this reason for appeal does not have merit.

Appellant’s Second Reason for Appeal: The Corps’ finding that Wetland B has a significant nexus to the closest TNW (the Little Calumet River) is in error and is not supported by substantial evidence.

Finding: This reason for appeal has merit because the Corps failed to provide the requisite explanation of the basis for its significant nexus conclusion.

Action: The AJD is remanded to the District with instruction to follow procedures set forth in the 2008 *Rapanos* Guidance.³

Discussion: The Appellant argues that the Corps’ finding of jurisdiction was not supported by substantial evidence under Justice Kennedy’s “significant nexus” test in *Rapanos*.

The AR describes the flow path from the onsite wetlands to the nearest TNW, the Little Calumet River, at a distance of approximately 5-10 miles. The District found that the onsite wetlands drain from Wetland A on the northern portion of the site a short distance southwest to Wetland B. Wetland B then 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 pipes to Midlothian Creek. The District states that from the site to Midlothian Creek water has been observed flowing uninterrupted, passing through three open water detention basins and bypassing three dry-bottom detention basins. At times of larger flood events water will enter the dry-bottom detention basins, but typically bypasses them.

Further, the District’s AR describes a storm sewer pipe, which replaced a historic tributary to Midlothian Creek, as a clearly identifiable hydrologic connection to a Relatively Permanent Water (RPW), Midlothian Creek, which drains to the Little Calumet River, a TNW. The District recorded findings on two AJD forms included in the AR, both dated January 20, 2012. One AJD form compiles information regarding Wetland A (0.6 acre), and Wetland B (12 acres), which records the significant nexus determination (the “Wetland A&B AJD”). The second AJD form records findings that a third wetland (0.01 acre) located on the eastern side of a large spoil pile in the center of the parcel was determined isolated.

³ Current CWA guidance may be referenced at:

<http://www.usace.army.mil/Missions/CivilWorks/RegulatoryProgramandPermits/RelatedResources/CWAGuidance.aspx>

The District concluded that the hydrologic connection between on-site wetlands A and B and the Little Calumet River demonstrates the ability of the tributary, Midlothian Creek, to carry pollutants, flood waters, nutrients and organic carbon to the TNW. It also concluded that the thirteen acres of wetland on the project site limit the amount of water being sent down stream; this storm water 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.

According to the *Rapanos* Guidance, a case-by-case significant nexus analysis to determine whether waters and their adjacent wetlands are jurisdictional is required when wetlands are adjacent to but do not directly abut the relatively permanent, non-navigable tributary (Midlothian Creek). A significant nexus may be found where the tributary (Midlothian Creek), including its adjacent wetlands, has more than a speculative or insubstantial effect on the chemical, physical and biological integrity of the TNW (Little Calumet River).

The *Rapanos* Guidance specifically states in part:

Corps districts and EPA regions shall document in the administrative record the available information whether a tributary and its adjacent wetlands have a significant nexus with the traditional navigable water, including the physical conditions of flow in a particular case and available information regarding the functions of the tributary and any adjacent wetlands. *The agencies will explain their basis for concluding whether or not the tributary and its adjacent wetlands, when considered together, have more than speculative or insubstantial effect on the chemical, physical, and biological integrity of the traditional navigable water.*

Rapanos Guidance, *supra*, n.1, at 11 (emphasis added).

The District's AR provides an evaluation and summary of the physical, chemical and biological characteristics of the Warmke parcel wetlands. (Wetland A&B AJD at 4.) The AR also provides a list of "all wetlands adjacent to the tributary." (Id. at 5-6.) This list includes 165 distinct wetlands adjacent to Midlothian Creek, and a summary of functions of "all adjacent wetlands." The summary states, "[t]hese wetlands decrease sedimentation, pollutants, and flood waters downstream while offering beneficial nutrients and habitat providing a *positive effect* to the downstream Midlothian Creek, a Relatively Permanent Water, and to the Little Calumet River, a [TNW]." (Id. at 7.) (emphasis added.) Further, the AJD states that "[t]he wetland alone and in combination with the wetlands in the area *significantly* affect the chemical, physical, and biological integrity of the Little Calumet River." (Id. at 8.)

The District, however, failed to explain the basis for these summary conclusions, and in so doing, failed to follow the procedures contained in the *Rapanos* Guidance. Although one may induce from the summary statements that the combined effect of the tributary and its adjacent wetlands is more than merely speculative or insubstantial, the Corps and EPA jointly drafted the *Rapanos* Guidance to avoid such inductive analysis. The District failed to provide the required explanation (i.e. failed to show its work justifying its summary conclusions) and must follow the

Rapanos Guidance procedures before it may retain jurisdiction over the subject wetlands. Accordingly, the jurisdictional determination is remanded to the District with the instruction to follow the *Rapanos* Guidance as discussed in this administrative appeal decision.

Conclusion: After reviewing and evaluating the RFA, the District's AR, and the recommendation of the RO, I have determined that the District's conclusions regarding the first reason for appeal were reasonable, supported by the AR, and do not conflict with the laws, regulations, or policy requirements of the Corps regulatory program. Regarding the second reason for appeal, I have determined that the District's conclusion is supported by summary statements; however, the District failed to provide the requisite explanation of its basis for those summary conclusions. As a result, I am remanding this jurisdictional determination to the District to address the items as discussed under Reason for Appeal No. 2 above. The final Corps jurisdictional decision will be made by the Chicago District Engineer, or his designated representative, pursuant to my remand.



Suzanne Chubb
Regulatory Program Manager
Great Lakes & Ohio River Division