

ADMINISTRATIVE APPEAL DECISION

FOUR-S DEVELOPMENT

HUNTINGTON DISTRICT FILE NO. LRH-2014-738

JULY 20, 2016

Review Officer (RO): Mr. Jacob Siegrist, Great Lakes and Ohio River Division, U.S. Army Corps of Engineers

Appellant: Four-S Development

Permit Authority: Section 404 of the Clean Water Act (33 USC § 1344 et seq.)

Receipt of Request for Appeal: March 16, 2016

Site Visit/Informal Meeting: May 10, 2016

Summary: The Appellant is challenging the Huntington District's (District) approved jurisdictional determination (JD) which concluded that waters of the United States are present on-site and subject to federal regulation under the Clean Water Act (CWA). The Appellant believes the Huntington District incorrectly determined the length and jurisdictional status of the ephemeral stream channels (Streams 1, 2, 3, 4, 5, 6, 7, 8, and 9) based on the current Corps regulatory criteria and associated guidance for identifying and delineating streams.

For reasons detailed in this appeal decision, I find the appeal has merit. The approved JD is remanded to the District for reconsideration and documentation. The final Corps jurisdictional determination in this case will be made by the Huntington District Engineer or his designated representative.

Background Information: TERRADON Corporation submitted a JD report dated November 3, 2014, to the District on behalf of Four-S Development.¹ The report described a 172-acre property (site) located adjacent to Interstate 64 and Route 34 in Teays Valley, West Virginia. The report identified two streams totaling 2,952 feet that flow into an in-stream impoundment on the site.

The District and Appellant completed a joint site visit on August 4, 2015. By email on August 5, 2015, the Appellant submitted an application for a Department of the Army permit with proposed impacts to 1,215 feet of perennial streams and 5,117 feet of ephemeral streams (6,332 feet of streams total) for a commercial development.² The Appellant then submitted a revised delineation report dated August 14, 2015, that identified 1,215 feet of perennial streams, 4,867 feet of ephemeral streams (6,082 feet of streams total), and an impoundment were on the site.³

¹ Administrative Record (AR), pages 605-665. TERRADON Corporation is an agent for Four-S Development. This document will refer to TERRADON Corporation and Four-S Development as simply the Appellant.

² AR, pages 458-471

³ AR, pages 386-446

Following District requests for additional information on August 17, 2015, and October 6, 2015, the Appellant delineated the impoundment at 2.94 acres and identified 89 feet of Stream 10, a perennial stream, for a total revised onsite stream length of 6,174 feet.⁴

In a letter dated January 20, 2016, the District provided the Appellant with an approved JD for the 174-acre site which concluded that approximately 6,174 feet of streams and a 2.94-acre impoundment are waters of the United States subject to jurisdiction under Section 404 of the CWA.⁵ The approved JD identified 1,302 feet of relatively permanent waters (RPW) as perennial streams, 4,872 feet of non-relatively permanent waters (NRPW) as ephemeral streams, and a 2.94-acre impoundment of a RPW. The District's findings were documented in a memorandum for record dated January 7, 2016, and thirteen approved JD forms.⁶

On March 16, 2016, the Great Lakes and Ohio River Division received a Request for Appeal (RFA) from the Appellant dated March 14, 2016. The Appellant provided clarification of the reasons for appeal contained within the RFA by email on March 18, 2016. The Appellant was informed by letter dated April 8, 2016, that the RFA met the criteria for appeal and was accepted.

Information Received and its Disposition During the Appeal Review:

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 and in accordance with 33 CFR § 331.7(f), the Review Officer (RO) may allow the parties to interpret, clarify, or explain issues and information already contained in the AR. The information received during this appeal review includes:

1. The Appellant's RFA dated March 16, 2016, with clarification on March 18, 2016.
2. The District's AR which was provided to the RO and the Appellant by letter dated April 12, 2016.
3. A site visit and informal meeting held on May 10, 2016. Details of the site visit and meeting are contained within the Appeal Meeting and Site Visit Memorandum for Record dated June 7, 2016.

The submittals were accepted as clarifying information in accordance with 33 CFR § 331.7(d). No new or additional information was received or used during the appeal review.

APPEAL EVALUATION, FINDINGS, AND INSTRUCTIONS TO THE HUNTINGTON DISTRICT ENGINEER

Appellant's Reason for Appeal: The Appellant believes the Huntington District incorrectly determined the length and jurisdictional status of the ephemeral stream channels (Streams 1, 2, 3, 4, 5, 6, 7, 8, and 9) on the site based on the current regulatory criteria and associated guidance for identifying and delineating streams.

⁴ AR, pages 248-252, 270-337, and 348

⁵ AR, pages 10-12

⁶ AR, pages 13-126

Finding: This reason for appeal has merit.

Action: The approved JD is remanded to the District for reconsideration and documentation as discussed below.

Discussion: The Reason for Appeal is a consolidated summary of numerous objections the Appellant provided in their RFA dated March 16, 2016, with clarification on March 18, 2016, including:

“...the District misidentified areas within the property as ephemeral streams when they should have been identified as non-jurisdictional waterbodies...”

“...ephemeral streams [1, 2, 3, 4, 5, 6, 7, 8, and 9] appear to be overextended in both length and jurisdictional extent.”

“...the determinations of the ephemeral streams at the subject property appear to be inconsistent in delineation when compared to similar project.”

“...the Corps has made an ‘incorrect application of the current regulatory criteria and associated guidance for identifying and delineating wetland (and streams)’ in determining the jurisdictional determination of ephemeral stream length.”

“...there may be confusion with the ‘current regulatory criteria and associated guidance for identifying and delineation wetlands (and streams)’ for this Approved JD...”

Based on discussion during the appeal meeting, the Appellant concurred with this consolidated reason for appeal.⁷

As a result of the U.S. Supreme Court *Rapanos*⁸ decision, the U.S. Environmental Protection Agency and the Department of the Army issued a memorandum entitled, *Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in Rapanos v. United States & Carabell v. United States*, dated June 5, 2007, and amended December 2, 2008 (Rapanos Guidance).

The Rapanos Guidance requires the application of two standards to support an agency approved JD for certain water bodies. The first standard, based on the plurality opinion in the *Rapanos* decision, recognizes regulatory jurisdiction over traditional navigable waters (TNW) and their adjacent wetlands, as well as a water body that is not a TNW, if that water body is "relatively permanent water" (RPW, i.e., it flows year round, or at least "seasonally") and over wetlands adjacent to such water bodies if the wetlands directly abut the water body. In accordance with this standard, the Corps and EPA may assert jurisdiction over the following categories of water bodies: (1) TNWs, (2) all wetlands adjacent to TNWs, (3) relatively permanent non-navigable tributaries of TNWs, and (4) wetlands that directly abut these tributaries.

⁷ See Memorandum for Record dated June 7, 2016, of the appeal meeting and site investigation.

⁸ 126 S. Ct. 2208 (2006)

The second standard, for tributaries that are not “relatively permanent” (non-RPW), is based on the concurring opinion of Justice Kennedy and requires a case-by-case "significant nexus" analysis to determine whether waters and their adjacent wetlands are jurisdictional. A significant nexus may be found where a tributary, including its adjacent wetlands, has more than a speculative or insubstantial effect on the chemical, physical and biological integrity of a TNW. Consequently, the agencies may assert jurisdiction over every water body that is a non-RPW if that water body is determined (on the basis of a fact-specific analysis) to have a significant nexus with a TNW. The classes of water bodies that are subject to CWA jurisdiction, if such a significant nexus is demonstrated, are: (1) non-navigable tributaries that do not typically flow year-round or have continuous flow at least seasonally (non-RPW), (2) wetlands adjacent to such tributaries, and (3) wetlands that are adjacent to but that do not directly abut a relatively permanent non-navigable tributary.

Implementation of the *Rapanos* decision requires the Corps to strive for more thoroughness and consistency in the documentation of an approved JD. To meet this requirement, the Corps uses a standardized approved JD form (AJD Form). The *U.S. Army Corps of Engineers Jurisdictional Form Instructional Guidebook* (Jurisdictional Guidebook) establishes standard operating procedures to conduct and document an approved JD, provides instructions to complete the AJD Form, clarifies terms commonly used in the form, presents an overview on jurisdictional practices, and supplements the AJD Form instructions.⁹

As part of an approved JD, the District determines whether a tributary in question is a TNW, RPW, or non-RPW, and provides data and rationale to support the conclusion in the appropriate sections of the AJD Form. The Jurisdictional Guidebook defines a tributary as a "natural, man-altered, or man-made water body that carries flow directly or indirectly into a TNW," and examples include "river, streams, and lakes."¹⁰ For the purposes of determining and documenting jurisdiction, the Jurisdictional Guidebook describes a tributary as “the entire reach of the stream that is of the same order (i.e., from the point of confluence, where two lower order streams meet to form the tributary, downstream to the point such tributary enters a higher order stream). The flow characteristics of a particular tributary will be evaluated at the farthest downstream limit of such tributary.”¹¹ Where the downstream limit of a tributary is not representative of the entire tributary, the flow regime that best characterizes the entire tributary should be used.¹² Information regarding the characteristics of the tributary and its adjacent wetlands, if any, and the determination for whether or not the tributary is jurisdictional under *Rapanos*, is documented on the AJD Form for each relevant reach and serves as the basis for the approved JD.¹³

A tributary determined to be non-RPW requires a significant nexus analysis. The significant nexus analysis is the fact specific analysis that assesses flow characteristics and functions of the

⁹ *U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook* (May 30, 2007)

¹⁰ Jurisdictional Guidebook, page 40

¹¹ Jurisdictional Guidebook, page 40

¹² *Rapanos* Guidance FN 24, page 6

¹³ See for example, Jurisdictional Guidebook, page 49, the “Review Area” for the AJD Form “Refers to the relevant reach of the water body being reviewed for determinations of CWA jurisdiction.”

tributary and any adjacent wetlands (collectively referred to as the relevant reach) to determine if they have an effect that is more than speculative or insubstantial on the chemical, physical, and biological integrity of the downstream TNW. A significant nexus analysis includes consideration of various hydrologic and ecologic factors such as proximity to the TNW, size of the watershed, potential of the tributary to carry pollutants and flood waters to the TNW, or provision of aquatic habitat that support the TNW.¹⁴

In this case, the District completed thirteen AJD Forms to document the aquatic features on-site. The thirteen forms correspond to the thirteen aquatic resources identified by the Appellant on Figure 1 “Revised 12/28/15” at AR, page 126. The aquatic resources identified by the Appellant do not match the definition of a tributary for the purposes of determining the relevant reach and completing the AJD Forms. Since the District did not identify relevant reaches consistent with the Rapanos Guidance and instructions provided in the Jurisdictional Guidebook, the characteristics of the tributaries have not been appropriately considered in order to determine jurisdiction and to complete a significant nexus analysis, where required.

As a result, I find that this reason for appeal has merit. The District did not correctly evaluate the aquatic features on the site. Upon remand, the District shall assess the aquatic resources consistent with the definition of relevant reach provided in current guidance and reconsider the JD. As necessary, the District shall complete a fact specific significant nexus analysis that assesses flow characteristics and functions of the tributaries and any adjacent wetlands to determine if they have an effect that is more than speculative or insubstantial on the chemical, physical, and biological integrity of the downstream TNW.

While the Corps is ultimately responsible for completing an approved JD, the District can rely on information provided by applicants and their consultants, such as a stream delineation.¹⁵ The Appellant provided the stream delineation that documented and substantiated the District’s approved JD. The Appellant explained in their August 12, 2015, delineation report that the streams on-site were delineated “in accordance with current state and federal regulations”.¹⁶ The report also states:

Ephemeral streams beds are located above the water table year-round, and runoff from precipitation is the primary source of water. Stream channel morphology is also assessed to determine the bed and bank conditions as well as the ordinary high water mark (OHWM).¹⁷

The District utilized the Appellant’s delineation report and the results of a site investigation to complete the approved JD.

¹⁴ Rapanos Guidance, page 8-12

¹⁵ RGL 08-02, page 2 and Q&A 35

¹⁶ AR, page 282

¹⁷ AR, page 283

The length of stream channels on-site is supported with adequate information in the AR, and I find no evidence in the AR that the District misinterpreted or omitted information provided by the Appellant.

CONCLUSION: For the reasons stated above, I find that the appeal has merit. The approved JD is remanded to the District for reconsideration and documentation. The final Corps jurisdictional decision in this case will be made by the Huntington District Engineer or his designated representative.

FOR THE COMMANDER:



Suzanne L. Chubb
Chief of Regulatory
Great Lakes & Ohio River Division