

ADMINISTRATIVE APPEAL DECISION

T&R PROPERTIES; FILE NO. 0005-7595

HUNTINGTON DISTRICT

July 30, 2010

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

Appellant: T&R Properties, represented by Mr. Ron Sabatino

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: August 13, 2009

Appeal Meeting and Site Visit Date: None

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 a significant nexus.

Background Information: The appellant's nine acre property is located south of Orange Road, east of Highfield Drive, and west of Green Meadows Drive in Orange Township, Delaware County, Ohio. An initial request for a jurisdictional determination (JD) on a 131.7 acre parcel, a portion of which contains the nine acre property in question, was received by the Huntington District (District) on September 21, 1993. The District performed a site visit on September 9, 1993, prior to the official request for a JD, and issued an approved jurisdictional determination on January 6, 1994, stating that the wetlands [on-site] are part of an unnamed tributary of Deep Run, and that the size of jurisdictional waters of the United States including wetlands were found to total 2.83 acres. The District also verified a Nationwide Permit (NWP) 26 on July 5, 1994, authorizing impacts to 2.23 acres of wetland within the same 131.7 acre site. The authorized impacts occurred outside the nine acre parcel in question.

The District received a new JD request, dated December 9, 2008, that included a delineation report completed by CEC, Inc., the appellant's consultant. The District performed site visits on February 27 and June 9, 2009. The District issued an approved JD on July 21, 2009, identifying 649 linear feet of stream characterized as a seasonally intermittent, relatively permanent water (RPW). The RPW was determined to be a jurisdictional water of the U.S. subject to regulation under Section 404 of the Clean Water Act (CWA). The previous January 1994 approved JD expired on January 6, 1997, and was superseded by the July 21, 2009, approved JD.

In addition to the JD request, the District received an application dated December 9, 2008, to relocate a ditch (the subject RPW) in order to develop residential housing. In a letter to the

applicant dated July 21, 2009, the District stated that they were unable to determine if the proposed development meets the criteria for authorization under any current NWP. Specifically, the District was unable to determine if the proposal was a single and complete project with independent utility from the surrounding development that was permitted in 1994, and if not, whether the aggregate total loss of waters of the United States would then exceed ½ acre NWP limitation. The District suggested that the applicant submit an Individual Permit application for their proposal.

The nine acre property is a mowed field surrounded by residential and commercial development. Topography on-site is relatively flat. The subject RPW flows southwest through the site into a culvert at the southwestern property boundary. The culverted RPW then outlets south of the site along the eastern side of Highfield Drive. The RPW immediately enters another culvert and flows from east to west beneath Highfield Drive. The culvert outlets immediately west of Highfield Drive, and the RPW then flows south along Highfield Drive and directly into Deep Run. Deep Run is a tributary of the Olentangy River, a traditional navigable water (TNW). The RPW is approximately two river miles from the TNW.

The appellant is appealing the July 21, 2009, approved JD because he disagrees that the RPW is a water of the U.S. The appellant believes that the linear ditch-like feature on the site is an upland ditch, excavated to drain surface water runoff from an adjacent industrial park, and is not a seasonally intermittent RPW subject to regulation under Section 404 of the CWA.

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

Reason 1: A JD verified by the District in 1994 identified no ditches, streams, wetlands, or other water features present on the site.

Finding: This reason for appeal has partial merit.

Action: The District's administrative record (AR) shall explain why the 2009 approved JD differs from the 1994 approved JD.

Discussion: The 1994 approved JD identified a total acreage of waters of the U.S. and did not specifically identify or distinguish waters from wetland features. However, the 2009 approved JD identified 649 linear feet of stream characterized as a seasonally intermittent, relatively permanent water (RPW). No other regulated waters or wetlands were identified.

Corps regulations at 33 CFR 331.2 define an approved JD as an appealable action which may be superseded by another JD based on new information or a final JD that results from a JD remanded to the District on appeal. Multiple Corps Regulatory Guidance Letters (RGLs) also address the authority of the Corps to change JDs based on new information (RGL 90-06, 94-01, and 05-02). Further, approved JD expiration dates are addressed in RGL 94-01. The approved JD dated January 6, 1994, expired on January 6, 1997, and was no longer valid after the expiration date. The guidance does not prohibit the District from issuing subsequent JDs that may be contrary to, and supersede, previous JDs.

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Although the 1994 JD expired prior to the District's latest JD, there should be some discussion and explanation in the AR as to why the 1994 JD differs from the 2009 JD, including the factors that contribute to those differing decisions. Therefore, this reason for appeal has partial merit.

Reason 2: A 1988 aerial photograph of the site does not show the ditch present on site.

Finding: This reason for appeal does not have merit.

Action: No action is required.

Discussion: Although the 1988 aerial photograph depicts no on-site waterways, it was taken more than twenty years prior to the issuance of the approved JD in question. The AR supports that conditions have changed since the photograph was taken. According to a District Memorandum for the Record dated July 10, 2009, a linear feature is present in 1997, 2002, 2004, and 2006 aerial photographs. These aerial photographs are in the administrative record and can be found in Appendix C of the 2008 wetland delineation report submitted to the District by CEC, Inc, the appellant's consultant. The District's JD was based on on-site observations in addition to other information available to the District in 2009 as reflected in Section IV of the JD form for this file. Therefore, this reason for appeal does not have merit.

Reason 3: The ditch does not exhibit year round flow or seasonal continuous flow and was excavated wholly into uplands, to drain uplands, as confirmed by the 1993 Corps verified wetland delineation report by others.

Finding: This reason for appeal has partial merit.

Action: The District did not perform a significant nexus evaluation for the seasonal RPW, as required as a matter of policy in the joint Department of the Army-EPA Memorandum dated December 2, 2008. Therefore, the decision is remanded for appropriate action. Upon remand, the District "will include in the administrative record any available information that documents the existence of a significant nexus between a relatively permanent tributary that is not perennial (and its adjacent wetlands if any) and a traditional navigable water, even though a significant nexus finding is not required as a matter of law."

The appellant's arguments are focused on the jurisdictional status of the seasonal RPW 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 Department of the Army jointly issued guidance intended to foster nationally-consistent implementation of the CWA following the *Rapanos* ruling. The collective guidance is referred to herein as the "*Rapanos Guidance*" and contains four major parts: 1) a memorandum titled "Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States*"; 2) a JD form to document approved JDs; 3) 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

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JDs; and 4) an appendix titled "Legal Definition of 'Traditional Navigable Waters'". A revised memorandum was issued on December 2, 2008.

According to the appellant, the District's JD states that the ditch has seasonally intermittent flow, which confirms that the ditch is dry the majority of the year and flows intermittently and occasionally. The *Rapanos Guidance*, specifically the joint Army-EPA Memorandum, states "The agencies generally will not assert jurisdiction over . . . ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water."

This reason for appeal focuses on two jurisdictional questions – whether the flow regime in the waterway supports that it is a regulated water of the U.S. and whether the ditch is a regulated water of the U.S. A third issue identified by the Review Officer is whether a significant nexus determination is required for evaluating the jurisdictional status of a seasonal RPW. The status and applicability of the 1994 approved JD was addressed in the discussion section for Appeal Reason 1.

Evaluation of Flow Regime

The appellant states that the ditch does not exhibit year round flow or seasonal continuous flow and was excavated wholly in uplands, to drain uplands. The appellant also noted that the District's JD letter states that the ditch has seasonally intermittent flow. The appellant suggests the District's letter confirms that the ditch is dry the majority of the year and flows intermittently and occasionally.

Corps regulations at 33 CFR 328.3(a)(1-7) defines waters of the U.S. to include intermittent streams, where the use, degradation or destruction of which could affect interstate or foreign commerce. The definition also includes tributaries of these waters.

Corps regulations at 33 CFR 329.11 and 328.3(e) describes the geographic and jurisdictional limits of waters of the U.S. as:

The "ordinary high water mark" on non-tidal rivers is the line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank; shelving; changes in the character of soil; destruction of terrestrial vegetation; the presence of litter and debris; or other appropriate means that consider the characteristics of the surrounding areas.

The *Rapanos Guidance*, with regard to relatively permanent non-navigable tributaries of TNWs, states:

The agencies will assert jurisdiction over non-navigable tributaries of TNWs that are relatively permanent where the tributaries typically flow year-round or have continuous flow at least seasonally (e.g., typically three months).

In their JD form, the District documented that the unnamed tributary was a relatively permanent water that flows directly or indirectly into a TNW. The District documented the presence of bed and banks, and an ordinary high water mark characterized by a clear, natural line impressed on

the bank and vegetation matted down, bent, or absent. The District also documented that the tributary was manipulated (man-altered), as it is culverted upstream and is intermittently culverted downstream of the site, and the District's JD form stated that it appears that the tributary may have been excavated within the site. The tributary substrate was documented to contain cobbles, sands, gravel, and muck. The tributary's channel width was documented to be four feet, average depth at less than one foot, and average side slopes of 4:1 or greater. In their JD form, the District stated that intermittent flow was observed during multiple site visits and a soil survey map depicts a stream with intermittent flow within the site. In their July 10, 2009, memo, the District noted that the unnamed tributary exhibited either continuous or intermittent flow during three site visits (June 24, 2008 by the applicant's consultant, and February 26 and June 9, 2009 by the District).

The District also referenced the Ohio Automated Flood Warning System stream gage data for the State of Ohio that indicated there was no measurable rainfall for three days prior to the February 26 and June 9, 2009, site visits. For the June 9, 2009 site visit, the District documented that five of the eighteen gauges recorded rainfall in the amount of 0.04 inches. During this time, the District noted only one short stream segment lacking continuous flow on June 9, 2009, but water was present in the majority of the channel. The District stated that based on the gauge data, it appears that the stream has continuous flow despite the lack of any substantial rainfall for several days. Based on the above information, the District concluded that the stream is a RPW, exhibiting seasonally intermittent flow.

Based on the documentation in the District's AR, the District properly characterized the flow regime of the tributary in question. In addition, the District documented an ordinary high water elevation, bed/banks and substrate, and therefore classified the tributary as a jurisdictional water of the U.S.

Evaluation of Ditches

The appellant cites the *Rapanos Guidance* when stating that agencies "generally will not assert jurisdiction over" ditches excavated wholly in uplands to drain uplands. The appellant states that the original purpose of the ditch was to intercept storm water from the development north of the site and runoff from two tiles, implying that the ditch should not be regulated for this reason. The appellant provided a copy of a plan drawing showing the constructed ditch ("Figure 2 - T&R Properties Hidden Springs II Site Development Plan") and a copy of a tile map showing the tiles ("Figure 3 - Field Tile Map").

The *Rapanos Guidance* Guidebook, page 36, states (emphasis in italics):

Ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water generally are not jurisdictional under the CWA, because they are not tributaries or they do not have a significant nexus to TNWs. *If a ditch has relatively permanent flow into waters of the U.S. or between two (or more) waters of the U.S., the ditch is jurisdictional under the CWA.* Even when not themselves waters of the United States, ditches may still contribute to a surface hydrologic connection between an adjacent wetland and a TNW. For each specific

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request relating to ditches or similar features, field staff will need to make a case-by-case determination on jurisdictional status of resource.

The *Rapanos Guidance* directs the Corps to assert jurisdiction over a ditch with relatively permanent flow into waters of the U.S. Therefore, due to the District's determination that the flow regime is relatively permanent, the purpose of the ditch has no bearing on the JD.

Exemptions provided at 33 CFR 323.4, including maintenance of drainage ditches, address activities that do not require CWA permits. These exemptions do not apply to determinations of jurisdictional waters of the U.S.

Although there is a discrepancy between the District and the appellant's characterization of the onsite aquatic feature, where the District describes the feature as a manipulated (man-altered) tributary and the appellant describes the feature as an artificial (man-made) ditch, it is apparent that the District's conclusions were reasonable and do not conflict with the laws, regulations or policy requirements of the Corps regulatory program.

Evaluation of Significant Nexus

According to the administrative record, no information relevant to a significant nexus evaluation was included for the seasonal RPW in question. Information relevant to a significant nexus evaluation is required as a matter of policy, not law, for seasonal RPWs. Therefore, this reason for appeal has merit.

A significant nexus analysis will assess the flow characteristics and functions of the tributary itself and the functions performed by any wetlands adjacent to the tributary to determine if they significantly affect the chemical, physical, and biological integrity of downstream TNWs. Where a tributary has no wetlands, flow characteristics and functions of only the tributary itself will be considered in determining whether the tributary has a significant effect on the chemical, physical and biological integrity of downstream TNWs.

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 evaluated the flow of water, they did not evaluate the significant nexus that the water had on the nearest downstream TNW. Upon remand, the District shall include information relevant to a significant nexus evaluation on the seasonal RPW and reconsider its JD.

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 policy, any available information that documents the existence of a significant nexus between the onsite seasonal RPW and a traditional navigable water, even though a significant nexus finding is

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not required as a matter of law. The District shall include information relevant to a significant nexus evaluation for the seasonal RPW in question. The approved JD is remanded to the District to reconsider and document its JD as appropriate. The District shall complete these tasks within 60 days from the date of this decision (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 is delayed beyond 60 days from the date of this decision.



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