

ADMINISTRATIVE APPEAL DECISION

LISA NUTT

LOUISVILLE DISTRICT FILE NO. LRL-2016-1050

OCTOBER 12, 2017

Division Engineer: R. Mark Toy, Brigadier General, U.S. Army Corps of Engineers, Great Lakes and Ohio River Division, Cincinnati, Ohio¹

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

Appellant: Lisa Nutt

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

Receipt of Request for Appeal: March 2, 2017

Informal Meeting: June 9, 2017

Summary: The Appellant is challenging the Louisville District's approved jurisdictional determination (JD) which concluded that waters of the United States (U.S.) subject to federal regulation under the Clean Water Act (CWA) are present on-site. The District determined the site contained a wetland and an impoundment of a jurisdictional water. The Appellant believes the Louisville District incorrectly applied law, regulation, or official promulgated policy in making their approved JD. The Appellant asserts the impoundment is not jurisdictional because it was created to provide water for cattle. Additionally, the Appellant believes the wetland and impoundment are not abutting a seasonal relatively permanent water (RPW) and the waters must be evaluated for jurisdiction by a significant nexus determination.

For reasons detailed in this document, Reason for Appeal 1 does not have merit and Reason for Appeal 2 has merit. The approved JD is remanded to the District for reconsideration, additional evaluation, and documentation sufficient to support the decision. The final Corps jurisdictional determination will be made by the Louisville District Engineer or her designated representative.

Background Information: Redwing Ecological Services, Inc (Redwing), on behalf of the Appellant, submitted a wetland delineation report dated October 20, 2016, to the Louisville

¹ Pursuant to 33 CFR 331.3(a)(1), the Division Engineer has the authority and responsibility for administering the administrative appeal process. The Division Engineer may delegate the authority and responsibility of the administrative appeal process for approved JDs, including the final appeal decision. Consistent with the Great Lakes and Ohio River Division memorandum dated November 4, 2016, titled "Delegation of Authorities in the Administrative Appeal Process for the Regulatory Program," the authorities and responsibilities, including the final appeal decision, for this appeal have been delegated to the RO. Regardless of this delegation, the Division Engineer retains overall responsibility for the administrative appeal process.

District for an approximate 13-acre site located at 6404 Leisure Lane in Louisville, Jefferson County, Kentucky.² The site is a single property in estate where Ms. Lisa Nutt, the Appellant, and Mr. Dan Tingle, Ms. Nutt's brother, have legal interest in the property as executors. The delineation report identified one wetland (Wetland 1) and one impoundment (Open Water 1) on the site and described the aquatic features as jurisdictional waters.

The District completed two site visits and provided an approved JD to the Appellant by letter dated January 18, 2017.³ On March 2, 2017, the Great Lakes and Ohio River Division received a Request for Appeal (RFA) from the Appellant dated February 28, 2017. The Appellant provided clarification of the reasons for appeal by email on April 9, 2017. The Appellant was informed by letter dated April 18, 2017, 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 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 February 28, 2017, and clarified reasons for appeal on April 9, 2017.
2. The District's AR provided to the RO and the Appellant on April 27, 2017.
3. An informal meeting held on June 9, 2017. Details of the meeting are contained within the Appeal Meeting Memorandum for Record (MFR) dated July 14, 2017. During the informal meeting the Appellant explained the rationale for disagreeing with the District's approved JD. The RO explained that the reasons for appeal provided by the Appellant on April 9, 2017, did not match what the Appellant was explaining during the appeal meeting and site visit. Therefore, the Appellant further clarified the reasons for appeal as stated in the Appeal Meeting MFR.

The appeal meeting MFR is considered 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 LOUISVILLE DISTRICT ENGINEER

Reason for Appeal 1: "I dispute the jurisdictional determination for the property at 6406 Leisure Lane. The .06 acre pond was dug out to provide water to cattle thus the .06 acres is not jurisdictional. This fact was omitted in the original determination."

Finding: The reason for appeal does not have merit.

² Administrative Record (AR), pages 16-58

³ AR, pages 14-15

Action: No further action is needed for Reason for Appeal 1.

Discussion: The Appellant asserts the District omitted material fact in their evaluation of the 0.06-acre impoundment. As stated in the reason for appeal, the Appellant described the impoundment as a pond that was man-made to provide a drinking water source for cattle. The impoundment was constructed by excavation and damming the lowest elevation of the property sometime in the 1950s.⁴ In essence, the Appellant believes the man-made impoundment created over fifty years ago is not jurisdictional because it was created for the purposes of watering livestock,⁵ and the Appellant claims the District omitted these facts when completing the approved JD.

The term “waters of the U.S.” is defined by regulations published in the Federal Register on November 13, 1986, at 33 CFR 328.3(a)(4) to include “impoundments of waters otherwise defined as waters of the U.S.” The Corps’ 1986 regulations at 33 CFR 328 and guidance issued as a result of U.S. Supreme Court decisions are the current regulatory criteria and associated guidance to determine geographic jurisdiction. According to the definition in regulation, when a water of the U.S., such as a jurisdictional tributary or wetland, has a natural or man-made restriction (berm, dike, barrier, dam, etc.) that results in water being impounded, the impounded water would also be considered jurisdictional.

The preamble to the 1986 regulation recognizes certain categories of waterbodies are generally not considered to be waters of the U.S. The preamble states the Corps may complete a case-by-case evaluation to determine when a particular waterbody is within one of the categories. As alluded to by the Appellant, one of the categories identified in the preamble to generally be non-jurisdictional includes impoundments or ponds used to provide water for cattle:

*(c) Artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing.*⁶

In this case, the District concluded the “impoundment was created from ‘waters of the U.S.’” and explained the impoundment was created after the construction of a dam within a stream that flowed into the unnamed tributary of Pennsylvania Run.⁷ The AR includes an aerial image from 1955 showing the impoundment and surrounding area and described the impoundment’s location on the landscape.⁸ The District described the impoundment as currently connected to downstream waters as “part of a complex of [palustrine emergent wetland], [palustrine scrub-

⁴ AR, page 59. The Appellant’s February 28, 2017 RFA indicates the pond was constructed in the 1960s or 1970s; however, based on the aerial image from 1955 in the AR at page 101, and information provided by Redwing, the impoundment was constructed prior to 1955.

⁵ See also AR, page 60

⁶ Federal Register, Vol. 51 No. 219, November 13, 1986, page 41217

⁷ AR, pages 11-12, 59-60, and 99-102

⁸ AR, pages 12 and 101

shrub wetland], and [palustrine forested wetland] that abuts an off-site, seasonally intermittent, unnamed tributary of Pennsylvania Run.”⁹

Based on a review of the AR, the District concluded the impoundment was created from a stream and *not* “created by excavating and/or diking *dry land*.” Therefore, the District concluded the impoundment was not one of the categories of waters described in the preamble. I find the AR demonstrates the District reviewed and considered characteristics of the impoundment, and the record provides the case-by-case determination that the impoundment was not created by excavating and/or diking dry land. I find this reason for appeal does not have merit.

Reason for Appeal 2: “The JD incorrectly determined the wetland and pond were abutting the off-site RPW. The wetland and pond on-site do not abut the tributary. Instead the entire parcel of 2.11 acres must be evaluated under the classification of a significant nexus determination per Section III C of the Jurisdictional Determination Form. The Corps must show that the volume, duration, and frequency of the flow of water from the 2.11 acres into the tributary (Penn Run) has a significant affect, not a purely speculative effect, on the chemical, physical and biological integrity of the traditional navigable water (TNW, Salt River).”

Finding: The reason for appeal has merit.

Action: The approved JD is remanded to the District Engineer for reconsideration and documentation. Upon remand, the District shall document the presence of the off-site tributary and include supporting information on the volume, duration, and frequency of the flow of water in the tributary and the proximity of the tributary to a TNW. If it is determined that a significant nexus evaluation is necessary, the District shall perform an analysis of whether the tributary and its adjacent wetlands have more than speculative or insubstantial effect on the chemical, physical, and biological integrity of a TNW.

Discussion: The first topic discussed is the Appellant’s belief the on-site wetland and impoundment do not abut the off-site tributary. The second topic is the Appellant’s belief the District must determine jurisdiction of the wetland and impoundment based on a fact-specific analysis to determine whether they have a significant nexus with a TNW.

Adjacent and Abutting

“Wetlands adjacent to [jurisdictional] waters” are also “waters of the U.S.” as defined by the 1986 regulations at 33 CFR 328.3(a)(7). Regulations at 33 CFR 328.3(c) define the term “adjacent” as “bordering, contiguous, or neighboring.” The Rapanos Guidance¹⁰ explains that wetlands which have a continuous surface connection with an RPW are directly abutting the tributary and are considered adjacent.¹¹ Surface water does not need to be continuously present

⁹ AR, page 12

¹⁰ Following the Supreme Court ruling in *Rapanos v. United States*, 547 U.S. 715 (2006), the U.S. Environmental Protection Agency and the Corps jointly issued a memorandum providing guidance in implementing the decision. A revised memorandum, *Clean Water Act Jurisdiction Following the U.S. Supreme Court Decision in Rapanos v. United States & Carabell v. United States* (“Rapanos Guidance”), was issued on December 2, 2008.

¹¹ Rapanos Guidance, page 7

between the wetland and tributary to have a continuous surface connection.¹² These abutting wetlands are jurisdictional waters of the U.S.¹³ Where wetlands are adjacent but not directly abutting the RPW, the Corps may assert jurisdiction “based on a fact-specific analysis to determine whether they have a significant nexus with [TNWs].”¹⁴

Redwing submitted a wetland delineation report dated October 20, 2016, for the 13-acre property boundary.¹⁵ The report concluded the property had a 2.05-acre wetland and 0.6-acre impoundment, referred to in the report as an open water pond.¹⁶ The wetland was described as an emergent and scrub-shrub wetland located in both the open field and around the impoundment. The impoundment was described as a “Palustrine, Unconsolidated Bottom, Permanently Flooded, Diked/Impounded” water that drains into the wetland on the southwest side of the impoundment along an overflow channel. The wetland delineation report concluded the wetland and impoundment were jurisdictional because the impoundment drains into the wetland and the wetland “drains off the property into an unnamed tributary of Pennsylvania Run.”¹⁷ The report did not characterize or delineate any areas outside of the 13-acre property.

The District completed two site visits to verify the delineation report, and gather additional information for areas outside of the property boundary in order to complete the approved JD. The District identified wetland areas off-site to the southwest of the property boundary, and explained the on-site wetland and impoundment were part of a continuous wetland complex that drains off-site towards the southwest and into an unnamed tributary of Pennsylvania Run.¹⁸ To demonstrate the on-site wetland and impoundment had a continuous surface connection with the off-site tributary, the District stated the tributary flowed directly “out of the wetland” complex.¹⁹

The AR includes evidence that the District evaluated information provided by Redwing, completed two site visits to confirm the delineation report and gather additional information, and determined the on-site wetland and impoundment were part of a continuous wetland complex that was adjacent and directly abutting the off-site unnamed tributary of Pennsylvania Run. Therefore, I find the District’s decision concerning adjacency was supported by substantial evidence in the AR, was reasonable and within the zone of discretion delegated to the District Engineer.

Significant Nexus Determination

As stated above, “Wetlands adjacent to [jurisdictional] waters” are “waters of the U.S.” as defined by the 1986 regulations at 33 CFR 328.3(a)(7). In this case, to determine and document jurisdiction of the wetland and impoundment on-site, the District identified the off-site unnamed

¹² Rapanos Guidance, page 7 fn. 28

¹³ Rapanos Guidance, page 7 and page 7 fn. 29

¹⁴ Rapanos Guidance, page 12

¹⁵ AR, pages 16-58

¹⁶ AR, page 16

¹⁷ AR, page 17

¹⁸ See for example AR, pages 12 and 60-102

¹⁹ AR, page 11

tributary of Pennsylvania Run as the jurisdictional water to which the wetland and impoundment were adjacent to.

Implementation of the Rapanos Guidance requires the Corps to strive for more thoroughness and consistency in the documentation of jurisdiction with an approved JD. To meet this requirement, the Corps uses a standardized form for approved JDs (AJD Form). The *U.S. Army Corps of Engineers Jurisdictional Form Instructional Guidebook* (Guidebook) describes a method 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.²⁰

The AJD Form in the AR indicates the District determined the wetland and impoundment are part of a continuous wetland complex that extends off-site and directly abuts an RPW that typically flows “seasonally.”²¹ RPWs are “waters that typically (e.g., except due to drought) flow year-round or waters that have a continuous flow at least seasonally (e.g., typically three months).”²² RPWs “do not include ephemeral tributaries which flow only in response to precipitation and intermittent streams which do not typically flow year-round or have continuous flow at least seasonally.”²³ The Rapanos Guidance explains the Corps may assert jurisdiction over wetlands abutting RPWs without a legal obligation to make a significant nexus determination.²⁴ However, the Rapanos Guidance states that as a matter of policy, the AR for an approved JD must contain “any available information that documents the existence of a significant nexus between a [RPW] that is not perennial (and its adjacent wetlands if any) and a [TNW], even though a significant nexus finding is not required as a matter of law.”²⁵ The Jurisdictional Guidebook 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.*²⁶

As indicated above, the significant nexus evaluation considers the tributary in combination with all of its adjacent wetlands. The evaluation must consider both the tributary and its adjacent wetlands “whether the review area identified in the JD request is the tributary, or its adjacent wetlands, or both.”²⁷ For RPW tributaries that are not perennial, the AJD Form instructs the

²⁰ *U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook* (May 30, 2007)

²¹ AR, pages 6-12

²² Rapanos Guidance, pages 6-7

²³ Rapanos Guidance, page 7

²⁴ Rapanos Guidance, page 12

²⁵ Rapanos Guidance, page 13

²⁶ Jurisdictional Guidebook, page 7

²⁷ AJD Form, page 2. See AR, page 7

District to “complete Section III.B.1 for the tributary, Section III.B.2 for any onsite wetlands, and Section III.B.3 for all wetlands adjacent to that tributary, both onsite and offsite.”²⁸

As indicated above, the District’s determination that the wetland and impoundment are adjacent and directly abutting the unnamed tributary to Pennsylvania Run is supported by substantial evidence in the AR. However, the AR does not contain substantial evidence to support the District’s determination that the tributary is an RPW. Section III.B.1 was left blank and there was no other information provided in the AR to document the characteristics and functions of the tributary. Even if there had been substantial evidence to support the District’s determination that the tributary was a seasonal RPW, under Corps policy, available information that documents the existence of a significant nexus for the wetland must also be established, which was not provided. Section III.B.2 and Section III.B.3 were left blank and there was no other information provided to document the existence of a significant nexus.

Accordingly, I find that the reason for appeal has merit. The AR does not contain substantial evidence to support the District’s determination that the on-site wetland and impoundment are jurisdictional. Upon remand, the District shall reconsider the JD and assess the off-site tributary itself, together with all adjacent wetlands, pursuant to the Rapanos Guidance.

CONCLUSION: Upon review and evaluation of the RFA and the District’s AR, I have determined the appeal has merit. The District incorrectly applied the current regulatory criteria and associated guidance to determine the site contained a jurisdictional wetland and a jurisdictional impoundment. As a result, the approved JD is remanded to the District for reconsideration, additional evaluation and documentation sufficient to support the decision. The final Corps jurisdictional decision will be made by the Louisville District Engineer, or her designated representative, pursuant to my remand.

FOR THE COMMANDER:

Jacob Siegrist
Appeal Review Officer
Great Lakes and Ohio River Division

²⁸ AJD Form, page 2 and Guidebook, pages 52 and 57