

ADMINISTRATIVE APPEAL DECISION

MERLIN MARTIN PROPERTY

LOUISVILLE DISTRICT FILE NO. LRL-2014-921

OCTOBER 13, 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): Thomas J. Cavanaugh, U.S. Army Corps of Engineers, South Pacific Division, San Francisco, California

Appellant: Merlin Martin

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

Receipt of Request for Appeal: May 6, 2016

Appeal Meeting and Site Visit Date: September 13, 2016

Summary of Decision: The Appellant is challenging the Louisville District's approved jurisdictional determination (JD) which concluded that waters of the U.S. subject to federal regulation under the Clean Water Act (CWA) are present on-site. Reasons for Appeal 1 and 2 of the appeal are found to have merit. The District's decision is remanded for reconsideration and documentation as directed below. The District must further evaluate whether the drainages it determined were on the Merlin Martin Property (Property), prior to its conversion to agriculture, exhibited an ordinary high water mark, and, in the case of the ephemeral drainages (non-Relatively Permanent Waters), whether the drainages have a significant nexus with the nearest downstream Traditionally Navigable Water. Following that reconsideration and documentation, the District will provide the Appellant with its final determination as to whether those drainages are waters of the United States subject to jurisdiction under Section 404 of the CWA.

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 an RO. By letter dated June 16, 2016, the Division Engineer delegated the review of this approved JD to the South Pacific Division RO with decision authority of the final appeal decision to Ms. Suzanne Chubb, the Great Lakes and Ohio River Division Regulatory Chief. Regardless of this delegation, the Division Engineer retains overall responsibility for the administrative appeal process.

Background Information: The Property is located east of South County Road 550 West, south of Tudor Road, north of West Hendricks County Line Road, and west of South County Road 425 West near Stilesville, Hendricks County, Indiana.²

The District notified the Appellant on March 12, 2015, that they had determined that a discharge of excavated or fill material into tributaries to Mud Creek had occurred on the Property.³ This work included the encapsulation and grading of approximately 2,669 linear feet of tributaries which the District had determined were waters of the U.S. The District's review included a field visit to the site on October 27, 2014. The District provided an approved JD for the Property by email on September 1, 2015.⁴ The District concluded that the site contained approximately 2,669 linear feet or 0.06 acre of waters of the U.S. subject to jurisdiction under Section 404 of the CWA.

Pursuant to 33 CFR 331.6(c), the Appellant provided additional information to the District on September 28, 2015, for reconsideration of the approved JD.⁵ By letter dated November 19, 2015, the District reissued the approved JD (approved JD Forms dated August 3, 2015).⁶

On January 19, 2016, the Great Lakes and Ohio River Division received a Request for Appeal (RFA) from the Appellant. The Appellant was informed by letter dated April 8, 2016, that the RFA did not meet the criteria for appeal for actions associated with an unauthorized activity due to the lack of an accepted after-the-fact permit application.

Subsequently, the Appellant submitted a signed revised tolling agreement and after-the-fact permit application on May 6, 2016, to correct the deficiencies with the RFA. The Appellant disagrees with the District's conclusion that the 2,669 linear feet of waters on the Property were waters of the U.S. subject to jurisdiction under Section 404 of the CWA. The Appellant asserts that the basis of jurisdiction cited by the District is not supported by applicable law, regulations, and the factual circumstances. The Appellant was informed by letter dated June 16, 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 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 completed on May 6, 2016.
2. The District's AR, which was provided to the RO and the Appellant on July 28, 2016.

² Administrative Record (AR), page 1

³ AR, pages 49-54

⁴ AR, page 94 with approved JD Form dated August 3, 2015 at AR pages 96-103 and copied at AR pages 2-9

⁵ AR, pages 115-119

⁶ AR, pages 120-124

3. An informal meeting and site investigation held on September 13, 2016.

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: “The approved JD was not supported by sufficient evidence that any of the alleged tributaries actually existed prior to the agricultural improvements performed. Specifically, there is insufficient evidence that the alleged tributaries had indicia of an OHWM.”⁷

Finding: This reason for appeal has merit.

Action: The approved JD is remanded to the District Engineer. The District must further evaluate whether the drainages it determined were on the Property, prior to its conversion to agriculture, exhibited an ordinary high water mark (OHWM).

Discussion: For purposes of Section 404 of the CWA, the lateral limits of jurisdiction in non-tidal waters, absent adjacent wetlands, is the OHWM.⁸ The term OHWM means that line on the shore established by the fluctuations of water and indicated by physical characteristics.⁹ In general, Corps districts rely on physical evidence that is reliable and verifiable to identify the lateral limits of jurisdiction.¹⁰ Physical evidence may include the characteristics listed in 33 CFR 328.3(e) and 33 CFR 329.11(a)(1), such as a natural line impressed on the bank, shelving, scour, deposition, multiple observed flow events, bed and banks, and changes in plant community. In certain situations, potentially in the case of unauthorized activities, paragraphs 3c and 3e of Regulatory Guidance Letter (RGL) 05-05 advise:

c. Where the physical characteristics are inconclusive, misleading, unreliable, or otherwise not evident, districts may determine the OHWM by using other appropriate means that consider the characteristics of the surrounding areas, provided those other means are reliable. Such other reliable methods that may be indicative of the OHWM include, but are not limited to, lake and stream gage data, elevation data, spillway height, flood predictions, historic records of water flow, and statistical evidence.

e. Districts will document in writing the physical characteristics used to establish the OHWM for CWA and/or RHA jurisdiction. If physical characteristics are inconclusive, misleading, unreliable, or not evident, the Districts’ written documentation will include information about the physical characteristics (or lack

⁷ RFA, page 1

⁸ 33 CFR 328.4(c)

⁹ 33 CFR 328.3(e)

¹⁰ Regulatory Guidance Letter (RGL) 05-01, entitled “Ordinary High Water Mark Identification”, dated December 7, 2005

thereof) and other appropriate means that consider the characteristics of the surrounding areas, which it used to determine the OHWM.

Section III(B)(1)(ii)(c) of the District's approved JD Form documents that surface flow is discrete and confined, that water was present within Intermittent Stream A during the field investigation on October 27, 2014, and the surface flow within the ephemeral streams is evident by the OHWM visible in aerial photography from 2005 and 2011 when leaf cover was absent within the previously forested area. The approved JD Form also notes that Stream A has a bed and banks and that the following indicators of an OHWM were observed: 1) clear, natural line impressed on the bank, and 2) vegetation matted down, bent, or absent.

The District claimed jurisdiction based on an OHWM viewed in aerial photographs but did not explain whether or how it further verified that observation or what physical characteristics defined that OHWM. As the regulation defines the OHWM as a 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 District is obligated to document the existence accordingly.

The District must therefore, using best available information, provide a rationale consistent with regulation and guidance, for its determination that drainages on the site exhibited an OHWM prior to their encapsulation. For example, the District may wish to characterize the relationship between aerial imagery and physical characteristics of the OHWM in similar nearby areas in its evaluation, including portions of the drainages that persist up and down stream of the study area.

Reason for Appeal 2: "...there was no demonstration in the JD that water flow characteristics of the alleged non-relatively permanent waters (RPW), in combination with any functions provided by the non-RPWs (there is no allegation of any adjacent wetlands), if they existed as non-RPW, had more than an insubstantial or speculative effect on the chemical, physical, and/or biological integrity of the traditionally navigable water (TNW) at issue, the White River, which is more than 100 river miles away from the alleged waters."¹¹

Finding: This reason for appeal has merit.

Action: The District must further evaluate whether the drainages on the Property, it determined to be non-RPWs, have a significant nexus with the nearest downstream TNW and include a description of any data and observations that support its conclusion.

Discussion: As a result of the U.S. Supreme Court's *Rapanos*¹² 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).

¹¹ RFA, page 1

¹² 126 S. Ct. 2208 (2006)

The Rapanos Guidance requires the application of two standards to support an approved JD for certain water bodies. The first standard, based on the plurality opinion in the *Rapanos* decision, recognizes regulatory jurisdiction over TNWs and their adjacent wetlands, as well as a water body that is not a TNW, if that water body is a “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.

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 these 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. 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 approved JD Form, clarifies terms commonly used in the form, presents an overview on jurisdictional practices, and supplements the approved JD Form instructions.¹³

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 approved JD 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 ‘rivers, streams, and lakes.’” 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.”¹⁴ Where the downstream limit of a tributary is not representative of the entire tributary, the flow regime that best characterizes the entire tributary

¹³ *U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook* (May 30, 2007)

¹⁴ Jurisdictional Guidebook, page 40

should be used.¹⁵ 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.¹⁶

The Rapanos Guidance requires that information in the AR adequately supports any JD and that Corps districts demonstrate and document that a particular water either fits within the class of waters that do not require a significant nexus determination, or complete the significant nexus determination for the water.¹⁷ The District completed one approved JD Form for the Property and identified 2,669 linear feet of RPWs as well as non-RPWs within the review area and provided characteristics of the tributaries along with a significant nexus finding for the non-RPWs.¹⁸

The District indicated in Section II(B)(1)(a) that there were non-RPWs that flow directly or indirectly into TNWs, and completed Section III(B) and Section III(C) of the approved JD Form. While the District stated the non-RPWs on the Property have the capacity to carry pollutants, filter pollutants, and retain some local flood waters, as described in Section III(C)(1), the AR lacks an explanation of the professional judgment and data or observations used as the underlying rationale that the non-RPWs on the Property have a significant nexus with the nearest downstream TNW. The specific connections between the characteristics documented and the functions/services they play in affecting the TNW should be demonstrated in Section III(B) and Section III(C).¹⁹ The District did not follow Corps guidance for the purposes of determining the individual relevant reaches, and thus many of the individual tributary characteristics cannot be differentiated.

Therefore, the District must document the characteristics of each tributary, and evaluate whether the tributaries on the Property, if determined to be non-RPWs, have a significant nexus with the nearest downstream TNW. In doing so, the District must include a description of any data and observations that support its conclusion.

¹⁵ Rapanos Guidance FN 24, page 6

¹⁶ See for example, Jurisdictional Guidebook page 49, the “Review Area” for the approved JD Form “Refers to the relevant reach of the water body being reviewed for determination of CWA jurisdiction.” Also, Rapanos Guidance page 10, where a tributary has no adjacent wetlands, the District will consider the flow characteristics and functions of only the tributary itself in determining whether such tributary has a significant effect on the chemical, physical and biological integrity of downstream TNWs.

¹⁷ Rapanos Guidance, pages 12-13

¹⁸ AR, pages 2-9

¹⁹ Jurisdictional Guidebook, page 55.

CONCLUSION: Upon review and evaluation of the Request for Appeal and the District's administrative record, I have determined the appeal has merit. The District failed to provide a rationale, consistent with regulation and guidance, that the drainages on the site exhibited an ordinary high water mark prior to their encapsulation and that the non-RPWs on the Property had a significant nexus with the nearest downstream traditional navigable water. 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 determination will be made by the Louisville District Engineer, or her designated representative, pursuant to my remand.

FOR THE COMMANDER:

CHUBB.SUZANN
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Suzanne L. Chubb
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Great Lakes and Ohio River Division