

ADMINISTRATIVE APPEAL DECISION

**ORCHARD PARK COMMERCE CENTER JOINT VENTURE
STERLING BUSINESS PARK**

BUFFALO DISTRICT FILE NO. LRB-1996-97613

MAY 5, 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, Great Lakes and Ohio River Division, U.S. Army Corps of Engineers

Appellant: Orchard Park Commerce Center Joint Venture

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

Receipt of Request for Appeal: October 11, 2016

Informal Meeting: January 9, 2017

Summary: The Appellant is challenging the Buffalo 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 Wetland 1 is adjacent to a seasonal relatively permanent water (RPW) and that the RPW tributary, in combination with the adjacent Wetland 1, have a significant nexus to a traditional navigable water (TNW). The Appellant believes the Buffalo District incorrectly applied law, regulation, or official promulgated policy in making their approved JD. The Appellant asserts Wetland 1 is isolated and is not adjacent to an RPW; the tributary is not an RPW; and Wetland 1 does not have a significant nexus to a TNW.

For reasons detailed in this document, the reasons for appeal have 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 Buffalo District Engineer or his designated representative.

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.

Background Information: Earth Dimensions, Inc. (EDI) submitted a wetland delineation report to the Buffalo District on behalf of Orchard Park Commerce Center Joint Venture dated December 6, 2010.² The report identified eight wetlands and one detention pond in three separate parcels. Wetland 1, the aquatic resource in the review area at issue in this appeal, was delineated and identified within the report. The report did not provide information related to jurisdiction or hydrologic connectivity of Wetland 1 nor make a recommendation of jurisdiction for Wetland 1. The District completed a site investigation on July 5, 2011, and provided an approved JD to the Appellant by letter dated November 1, 2011.³ In the approved JD, the District determined that Wetland 1 is adjacent to a seasonal RPW tributary (referred to by the Appellant as a stormwater collection system/ditch) and that together, they have a significant nexus with the downstream TNW, Lake Erie. Therefore, the District determined that Wetland 1 was a water of the U.S. subject to federal regulation under the CWA.

Subsequently, the Appellant provided additional hydrologic information by report dated September 8, 2014, and a new wetland delineation for Wetland 1 by report dated July 9, 2015.⁴ The District completed a site investigation on September 23, 2015, and provided an approved JD to the Appellant by letter dated August 11, 2016.⁵ Similar to the previous approved JD, the District determined Wetland 1 is a water of the U.S. subject to federal regulation under the CWA.

On October 11, 2016, the Great Lakes and Ohio River Division received a Request for Appeal (RFA) from the Appellant dated October 6, 2016, which explained their reasons for appeal. The Appellant was informed by letter dated November 7, 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 dated October 6, 2016.
2. The District's AR provided to the RO and the Appellant on November 21, 2016.
3. An informal meeting held on January 9, 2017. Details of the meeting are contained within the Appeal Meeting Memorandum for Record (MFR) dated February 1, 2017.

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.

² Administrative Record (AR), pages 133-218

³ AR, pages 102-127

⁴ AR, pages 92-99 and 22-82

⁵ AR, pages 2-21

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

Reason for Appeal 1: The Appellant asserts Wetland 1 is isolated and is not adjacent to an RPW.

Finding: The reason for appeal has merit.

Action: The approved JD is remanded to the District Engineer. The District shall include sufficient information, as appropriate, to support its decision as to whether Wetland 1 is adjacent to another water of the U.S., and describe the data and observations that support its conclusions.

Discussion: The term “waters of the U.S.” is defined by regulations at 33 CFR 328.3(a)(7) to include “[w]etlands adjacent to [jurisdictional] waters.” Regulations at 33 CFR 328.3(c) define the term “adjacent” as “bordering, contiguous, or neighboring.” The Rapanos Guidance⁶ explains that wetlands which have a continuous surface connection with an RPW are directly abutting the tributary and are considered adjacent.⁷ These abutting wetlands are jurisdictional waters of the U.S.⁸ Where wetlands are not directly abutting the RPW, these wetlands are “adjacent” if one of the following three criteria is satisfied:

First, there is an unbroken surface or shallow sub-surface connection to jurisdictional waters. This hydrologic connection may be intermittent. Second, they are physically separated from jurisdictional waters by man-made dikes or barriers, natural river berms, beach dunes, and the like. Or third, their proximity to a jurisdictional water is reasonably close, supporting the science-based inference that such wetlands have an ecological interconnection with jurisdictional waters.⁹

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*¹⁰ (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.

⁶ 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.

⁷ Rapanos Guidance, page 7

⁸ Rapanos Guidance, page 7 and page 7 fn. 29

⁹ Rapanos Guidance, pages 5-6

¹⁰ *U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook* (May 30, 2007)

The District determined Wetland 1 is a 9.07-acre¹¹ wetland that is adjacent to an RPW that flows indirectly into a TNW. Specifically, the District determined that the wetland is adjacent to, but not directly abutting, a seasonal RPW tributary by means of a “Discrete wetland hydrologic connection...on a seasonal or intermittent basis.”¹² The district characterized this connection as “Sheetflow occurs between Wetland 1 and the nearest storm drain, which is located about 100 feet to the north of Wetland 1.” The AJD Form describes the sheet flow between the wetland and storm drain as intermittent with the explanation that “[s]urface flow occurs in the spring and following heavy/prolonged precipitation events.”¹³

However, the District’s AR does not adequately demonstrate that Wetland 1 is adjacent to the seasonal RPW via a “discrete wetland hydrologic connection.” The District’s stated findings of a sheetflow connection during spring snowmelt or after prolonged rain events¹⁴ is being plainly disputed by the Appellant as a reason for appeal and is inconsistent with materials and information provided by the Appellant in the AR.¹⁵ The AR lacks technical analysis or an explanation of the professional judgment and available data and observations used to support the District’s determination that Wetland 1 is adjacent to the RPW. In the absence of sufficient information to document the District’s conclusion and because there is conflicting information provided by the Appellant in the AR, the District’s determination of adjacency is unfounded.

Reason for Appeal 2: The Appellant asserts the stormwater collection system/ditch is not an RPW.

Finding: The reason for appeal has merit.

Action: The approved JD is remanded to the District Engineer. The District shall further evaluate the classification of the stormwater collection system/ditch, and describe the data and observations that support its conclusions.

Discussion: Pursuant to regulations at 33 CFR 328.3(a)(5), jurisdictional waters include “tributaries” of a TNW. The Rapanos Guidance states that “a tributary includes natural, man-altered, or manmade water bodies that carry flow directly or indirectly into a [TNW].”¹⁶

¹¹ The approved JD letter dated August 11, 2016, at AR page 2 characterizes Wetland 1 as 9.07 acres. The approved JD Form at AR pages 6-14 identify Wetland 1 as both 9.07 acres and 9.27 acres. The Appellant’s 2015 delineation report at AR pages 22-82 delineated the wetland as 9.07 acres, while the Appellant’s 2010 delineation report at AR pages 133-218 delineated the wetland as 9.27 acres. The District stated they agreed with the Appellant’s 2015 delineation that Wetland 1 was 9.07 acres.

¹² AR, page 10

¹³ AR, page 9

¹⁴ See for example AR, page 8 “Wetland 1 is located at the headwaters of the unnamed tributary and therefore provides hydrology to the tributary on a seasonal basis, such as during the spring snowmelt period and after heavy precipitation events”; page 9 “Surface flow occurs in the spring and following heavy/prolonged precipitation events”; page 10 “Wetland 1 flows on a seasonal or intermittent basis directly into a stormwater receiver...”; page 11 “...steady flow occurs in the spring snowmelt period and after large/prolonged rain events”; and, page 12 “During the spring snowmelt period and following heavy precipitation events, Wetland 1 slowly releases flood waters to its primary drainage.”

¹⁵ For example, the District reached contrary conclusions than those offered by the Appellant’s report at AR pages 92-99, but offered no explanation in the AR for not agreeing with the report.

¹⁶ Rapanos Guidance, page 6 fn. 24

Furthermore, “[b]oth the plurality opinion and the dissent [in Rapanos] would uphold CWA jurisdiction over non-navigable tributaries that are ‘relatively permanent’ – 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).”¹⁷ Thus, an RPW is a jurisdictional water of the U.S.

The Jurisdictional Guidebook notes that,

...a tributary is 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 (i.e., the point the tributary enters a higher order stream).¹⁸

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.¹⁹ Information regarding the characteristics of the tributary is documented on the AJD Form for each relevant reach.²⁰

The District identified the limits of the tributary on the AJD Form at AR pages 7-8 and provided clarification at the appeal meeting.²¹ According to the District, the relevant reach identified as a seasonal RPW²² starts at a stormwater inlet and flows west underground in a stormwater conveyance (i.e. pipe) along Lake Avenue for 81 feet. The water flows out of the pipe and into a roadside drainage ditch that flows south along Route 219 for 140 feet. Water then crosses under Route 219 through 40-inch culverts and continues west for 380 feet in a man-made ditch. The man-made tributary starts to assume more natural characteristics then flows under North Benzing Road and continues west for an unspecified distance. The relevant reach ends when the tributary outlets to an unnamed perennial stream. The perennial stream flows southwest for approximately a mile into the South Branch of Smoke Creek. The South Branch of Smoke Creek flows approximately five miles in a northwest direction before directly flowing into Lake Erie, a TNW.²³

The District described the physical characteristics of the tributary as an artificial man-made and man-altered tributary that is 5-7 feet wide with water depths between 2-4 feet and side slopes estimated at 2:1. The tributary was described as relatively straight and stable due to regular maintenance of the area by grading and mowing. The flow characteristics of the tributary were characterized as seasonal with 20 or more flow events per year. The tributary had ordinary high

¹⁷ Rapanos Guidance, pages 6-7

¹⁸ Jurisdictional Guidebook, page 40

¹⁹ Rapanos Guidance, page 6 fn. 24

²⁰ 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.”

²¹ Appeal meeting Memorandum for Record dated January 31, 2017

²² A “seasonal RPW” is considered an RPW with continuous flow at least seasonally (e.g., typically 3 months).

²³ AR, pages 7-8

water mark²⁴ indicators consisting of a clear, natural line impressed on the bank, multiple observed or predicted flow events, and abrupt changes in plant community. The District classified the tributary as a seasonal RPW based on observed flow within the tributary during site investigations, hydrophytic vegetation along the banks of the tributary, a review of aerial imagery, and the determination that Wetland 1 contributes an intermittent source of flow into the tributary.²⁵ The District indicated that Wetland 1 slowly releases flood waters to the tributary during the spring snowmelt and following heavy precipitation and the wetland functions “to moderate downstream flows.”²⁶ However, as explained in the discussion for appeal reason 1, the District’s AR does not adequately demonstrate that Wetland 1 is adjacent to the seasonal RPW via a “discrete wetland hydrologic connection.” Therefore, the inclusion of the wetland’s hydrologic connection as evidence to support the classification of the tributary as a seasonal RPW is flawed.

Reason for Appeal 3: The Appellant asserts Wetland 1 does not have a significant nexus to a TNW.

Finding: The reason for appeal has merit.

Action: The approved JD is remanded to the District Engineer. The District shall determine if Wetland 1 is adjacent to another water of the U.S. and then, if necessary, complete a significant nexus determination.

Discussion: As described in the Rapanos Guidance, the District will decide jurisdiction over “...wetlands adjacent to non-navigable tributaries based on a fact-specific analysis to determine whether they have a significant nexus with [TNWs].”²⁷ 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.²⁸

In the significant nexus analysis, the District identified characteristics of wetland functions and services, and concluded that there was a chemical, biological, and physical connection to the TNW. The District correctly followed the Rapanos Guidance as well as the Jurisdictional Guidebook by indicating in Section II(B)(1)(a) there were wetlands adjacent to but not directly abutting an RPW that flow directly or indirectly into TNWs, and completed Section III(B) and

²⁴ For purposes of Section 404 of the CWA, the lateral limits of jurisdiction in non-tidal waters, absent adjacent wetlands, is the ordinary high water mark [33 CFR 328.4(c)].

²⁵ AR, pages 7-12

²⁶ AR, page 11

²⁷ Rapanos Guidance, pages 8-12

²⁸ Jurisdictional Guidebook, page 7

Section III(C) of the AJD Form. However, because the District's AR failed to support the conclusion that Wetland 1 is adjacent to another water of the U.S. or that the tributary was a seasonal RPW, the use of the significant nexus determination to determine jurisdiction in this circumstance was premature.

CONCLUSION: Upon review and evaluation of the Request for Appeal and the District's AR, I have determined the appeal has merit. The District failed to adequately support its determination regarding wetland adjacency which contributed to a flawed classification of the tributary as a seasonal RPW and a flawed significant nexus evaluation as required under the guidance and promulgated policies of the Corps Regulatory Program. 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 Buffalo District Engineer, or his designated representative, pursuant to my remand.

FOR THE COMMANDER:

Digitally signed by SIEGRIST.JACOB.A.1374288837
DN: c=US, o=U.S. Government, ou=DoD, ou=PKI,
ou=USA, cn=SIEGRIST.JACOB.A.1374288837
Date: 2017.05.05 15:53:15 -04'00'

Jacob Siegrist
Appeal Review Officer
Great Lakes and Ohio River Division