

ADMINISTRATIVE APPEAL DECISION

ERNEST AND LAUREN PARK; FILE NO. NAE-2008-02668

NEW ENGLAND DISTRICT

Review Officer: Mike Vissichelli, U.S. Army Corps of Engineers, North Atlantic Division

Appellant: Ernest and Lauren Park

Date of Receipt of Request for Appeal (RFA): 11 March 2013 (Revised RFA submitted on 18 April 2013)

Appeal Meeting Date: 9 May 2013

ACCEPTED REASON FOR APPEAL:

The North Atlantic Division office accepted the following reason for appeal as detailed in the RFA by Ernest and Lauren Park dated 18 April 2013:

1. The district's determination was based upon an incorrect application of law, regulation or officially promulgated policy.
2. The district did not correctly apply the current regulatory criteria and associated guidance in determining that there are "waters of the United States" on the site.
3. The district's determination relied on incorrect data and omitted material facts provided to them by the appellant.
4. The district's determination was arbitrary and capricious.

SUMMARY OF DECISION:

The appellant's request for appeal does not have merit. The U.S. Army Corps of Engineers New England District ("the district") decision is based on a correct application of law, regulation or officially promulgated policy, correctly applies the current regulatory criteria and associated guidance in determining that there are "waters of the United States" on the site, and relies on data and material facts that demonstrate that the decision was not arbitrary or capricious.

BACKGROUND INFORMATION:

The appellant was provided an approved jurisdictional determination (AJD) for the subject property as part of an enforcement action taken by the district. The appellant placed fill consisting of gravel to create an access road to an upland area where the appellant plans to construct a single family home. The area where the appellant placed the fill is located in an area that the district identified as jurisdictional waters under the Clean Water Act¹. The appellant disagrees that the wetlands on his property are subject to federal jurisdiction, and has submitted a RFA contesting the district's determination that the onsite waters have a connection and a significant nexus to

¹ 33 U.S.C. 1344

traditionally navigable waters (TNW). The initial request for appeal submitted on 11 March 2013 was incomplete. On 18 April 2013 the appellant submitted a revised RFA that was accepted and is the subject of this appeal.

INFORMATION RECEIVED DURING THE APPEAL AND ITS DISPOSITION:

- 1) The district provided a copy of the administrative record (AR), which was reviewed and considered in the evaluation of this RFA.
- 2) With the RFA, the appellant provided documents containing its comments and analysis of the district's jurisdictional determination. The submittals were accepted as clarifying information in accordance with 33 CFR 331.7 (f).

EVALUATION OF THE REASONS FOR APPEAL:

Appeal Reason 1: The district's determination was based upon an incorrect application of law, regulation or officially promulgated policy.

Appeal Reason 2: The district did not correctly apply the current regulatory criteria and associated guidance in determining that there are "waters of the United States" on the site.

Finding: These reasons for appeal do not have merit.

Action: No Action Required.

Discussion: I combined the discussion on appeal reasons 1 and 2 for discussion purposes since they are basically the same issue. The following discussion primarily details the appellant's concerns with the district's application of the Rapanos Guidance². An overarching allegation by the appellant throughout the RFA is that the district should have done a significant nexus evaluation. I have determined that the district sufficiently documented that the onsite wetland abuts a non-navigable tributary of TNWs that are relatively permanent where the tributaries typically flow year-round or have continuous flow at least seasonally. Per the Rapanos guidance, "the agencies will assert jurisdiction over those adjacent wetlands that have a continuous surface connection with a relatively permanent, non-navigable tributary, without the legal obligation to make a significant nexus finding."

The appellant's engineer provided information that contradicts some of the findings of the district. He states that there is no significant nexus between the onsite wetlands and any TNWs and that there are no RPWs coming off the site. The engineer claims that the onsite wetland is isolated based on topography and that there is no active discharge from the onsite wetland to the tributary that flows to the Saugatuck River.

² 2 December 2008 Joint Memorandum between the Environmental Protection Agency (EPA) and Department of the Army entitled "Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v United States & Carabell v United States".

The appellant provided a completed AJD form prepared by their engineer to support their findings. Although they state that the onsite wetland is isolated, the appellant's AJD form and supporting documentation provided with the RFA proves otherwise. It states that the wetland does provide flow into the tributary; although very small and not continuous, throughout the year. The appellant's AJD says that the flow is dependent on rainfall and runoff from the surrounding watershed. This argument is contrary to the RFA which states that the wetland is isolated.

Further, the appellant does not believe that the district adequately documents the connection from the site to the TNW, via surface flow, and that the areas do not have a hydrologic connection because of topographical changes.

The district's findings that the wetlands directly abut the tributary and connect from the site to the TNW via surface flow are supported by the administrative record, which contains visual observation in the field, a report from the site prepared for the conservation commission³, and maps provided from several sources⁴. These resources all show a clear connection where the onsite wetlands directly abut the adjacent tributary that continues from the site to the Saugatuck Reservoir.

The adjacent tributary is characterized in the district's AJD form as a seasonal RPW that connects to a TNW with two to five flow events annually. The appellant challenges the district's findings that the tributaries have sufficient flow in them throughout the year to support a determination that they are RPW's. The appellant states that the district's determination that the waters only flow during two to five events per year and that groundwater likely contributes flow is speculative and unsupported. The appellant states that the primary source of flow is rainwater and runoff. The appellant does not provide significant information to rebut the district's findings on flow events other than their own opinions and speculative information to support this conclusion. The district states, in its AJD, that the wetlands provide a source of water for the adjacent stream throughout the year. The district does provide soils information in the AR that supports that hydrology exists within the wetland to contribute flow in the unnamed tributary. The soils information shows that the wetlands consists of very deep, very poorly drained organic soils that generally are wet with a shallow water table⁵. In addition, the district does reference other indicators that support its findings that include channel morphology, observed flow during site visits, hydrophytic vegetation in and around the channel, and they reference resources such as published USGS maps that show the channel as a perennial waterbody.

³ Environmental Evaluation of Watercourse Crossings for 53 Ledgewood Drive East in Weston, CT. Prepared by Aleksandra Moch, dated 9 January 2007.

⁴ U.S. Fish and Wildlife Service National Wetland Inventory Maps, Natural Resources Conservation Service Web Soil Survey, United States Geological Service Connecticut Streamstats. The appellant raises questions to the validity of Streamstats data and its consideration of the impacts of recent development on the watershed. While these are valid questions the district provides several resources to support their determination and do not rely solely upon the Streamstats data.

⁵ USDA Soils Description for Freetown Soils type.

The appellant states that even if the tributary did contribute flow to the TNW, there would be no impact to the waters in the Saugatuck River since the watershed is so small and the distance between the site and the TNW is so large. In his RFA, the appellant provided his engineer's analysis to support his position that the volume, duration and frequency of flow is insignificant to impact the physical, chemical or biological integrity of the TNW. The appellant states that the information the district's conclusions were based upon, are not based on anything other than estimates from casual observations.

The appellant's argument that the district did not quantify the significance of the connection between the onsite wetland, the tributary and the TNW are not relevant. In accordance with the Rapanos Guidance²:

The agencies will assert jurisdiction over relatively permanent non-navigable tributaries of traditional navigable waters without a legal obligation to make a significant nexus finding. In addition, the agencies will assert jurisdiction over those adjacent wetlands that have a continuous surface connection with a relatively permanent, non-navigable tributary, without the legal obligation to make a significant nexus finding. As explained above, the plurality opinion and the dissent agree that such wetlands are jurisdictional. The plurality opinion indicates that 'continuous surface connection' is a 'physical connection requirement'. Therefore, a continuous surface connection exists between a wetland and a relatively permanent tributary where the wetland directly abuts the tributary (e.g., they are not separated by uplands, a berm, dike, or similar feature).

As discussed earlier, the district does document that the onsite wetland directly abuts an unnamed tributary that is a seasonal RPW in the AR; therefore, a significant nexus determination is not necessary.

The appellant alleges that the district uses speculative language in the AJD form. The district does make some assumptions based on the best available information when discussing the flow regime of the tributary. However, the district does provide documentation, as discussed above, that supports its finding that the tributary is a seasonal RPW.

The appellant questions the district's determination on what is the TNW. The appellant states that the Saugatuck River is the closest RPW and they argue that the reservoir itself is not the TNW. The appellant also states that the TNW portion of the Saugatuck River does not start until after the limits of the reservoir. As discussed above, the AR supports the district's findings that the tributary between the onsite wetland and the Saugatuck Reservoir is a seasonal RPW. The district's AJD form identifies the Saugatuck River as the TNW. The Saugatuck Reservoir is an impoundment of the Saugatuck River. At the appeal meeting, the district clarified that it is their belief that the river below the reservoir is the TNW. The district also stated that the reservoir itself

could be the TNW, since it is part of the river. Regardless, it does not matter if the TNW is the reservoir or the river further downstream, for the purpose of establishing jurisdiction because the onsite wetlands maintain a continuous surface connection between the onsite waters and the Saugatuck River. Based on the guidance, it is irrelevant whether the point at which the river is defined as a TNW is within the boundaries of the reservoir or beyond the Post Road (U.S. Route 1) as identified by the appellant in the RFA. The guidance as discussed, states that if a continuous surface connection exists that sufficiently supports jurisdiction then a significant nexus is not necessary.

Appeal reasons 1 and 2 do not have merit. The district applied the correct laws, regulations and guidance in making its determination, and provided sound reasoning to support its determination in the AR.

Appeal Reason 3: The district's determination relied on incorrect data and omitted material facts provided to them by the appellant

Finding: This reason for appeal does not have merit.

Action: No Action Required.

Discussion: The appellant states in its RFA that they provided information to the district that was not considered in their AJD. Several of the discussion points in Appeal Reasons 1 and 2 (Isolated wetlands, no hydrologic connection, no significant nexus, speculative language, volume, duration and frequency of flow, water quality, source of flow for stream) provided by the appellant are not relevant, as a significant nexus evaluation was not necessary in accordance with the Rapanos guidance¹.

Appeal reason 3 does not have merit. The district did not rely on incorrect data or omit material facts provided by the appellant in preparing the AJD. The facts provided by the appellant either were considered or were not relevant to the district's determination. The district provided a clear basis for its determination in the AR. Although much of the information provided by the appellant was not considered in that determination, the district is not in error since the information was not relevant to the issue of a significant nexus determination. A significant nexus determination was not necessary in accordance with the Rapanos guidance because the district identified that the onsite wetlands directly abut an unnamed tributary that is a seasonal RPW with continuous flow to the Saugatuck River, a TNW.

Appeal Reason 4: The district's determination was arbitrary and capricious

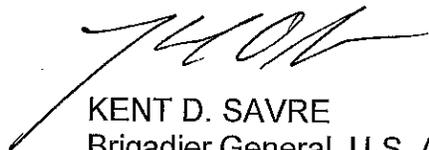
Finding: This reason for appeal does not have merit.

Action: No Action Required.

Discussion: The administrative record shows that the district's decision was not arbitrary and capricious since it was based on sound logic, analysis, and factual information. The appellant alleged that numerous factors were not considered by the district in issuing its final AJD (i.e., wetlands are isolated, no hydrologic connection to RPW, no significant nexus to TNW, speculative language, lack of sufficient volume, duration and frequency of flow to support a RPW, water quality, source of flow for stream). These factors are all requirements of a significant nexus determination under the Rapanos guidance. As discussed above, a significant nexus determination was not required in this instance. Consequently, the district did not need to consider the information provided by the appellant and was not arbitrary and capricious in its findings that the subject wetlands are jurisdictional under the Clean Water Act¹. The district's determination is not otherwise arbitrary, capricious or an abuse of discretion, and is not plainly contrary to applicable law or policy.

OVERALL CONCLUSION:

I find that the district's AR supports its decision that the wetlands on the appellant's property are subject to federal jurisdiction and regulation under Section 404 of the Clean Water Act¹. For the reasons stated above, the appeal does not have merit. The administrative appeals process for this permit action is hereby concluded.


KENT D. SAVRE
Brigadier General, U.S. Army
Commanding