

ADMINISTRATIVE APPEAL DECISION

**EDWARD VIA VIRGINIA COLLEGE OF OSTEOPATHIC MEDICINE
VIRGINIA TECH CORPORATE CAMPUS
FILE NO. NAO-2007-1371**

NORFOLK DISTRICT

15 December 2011

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

Appellant: Edward Via Virginia College Of Osteopathic Medicine, Virginia Tech Corporate Campus

Date of Receipt of Request for Appeal: 16 September 2011

Date of Acceptance of Request for Appeal: 22 September 2011

Appeal Meeting Date: 9 November 2011

ACCEPTED REASON FOR APPEAL:

The North Atlantic Division office accepted the following reason for appeal as detailed in the Request for Appeal (RFA) by Edward Via Virginia College Of Osteopathic Medicine, Virginia Tech Corporate Campus dated 15 September 2011:

The appellant alleges that the Norfolk District's (the district) decision:

1. Is arbitrary and capricious
2. Omits material facts
3. Uses incorrect data
4. Did not correctly apply the current regulatory criteria and associated guidance in determining that there are "waters of the United States" on the subject property
5. Is not supported by substantial evidence

SUMMARY OF DECISION:

The appellant's request for appeal has merit. The administrative record does not support the district's determination that the subject property contains wetlands directly abutting Relatively Permanent Waters (RPW's) that flow directly or indirectly into Traditionally Navigable Waters (TNW) in accordance with 33 Code of Federal Regulations Parts 320-332, the *U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook* (6/1/2007) (JD Guidebook), and the Environmental Protection Agency/Department of the Army Memorandum, *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States and Carabell v. United States* (2 December 2008 (Rapanos Memo)).

BACKGROUND INFORMATION:

The site is located at the Virginia Tech Corporate Center campus in Blacksburg, Montgomery County, Virginia. Portions of the project site were the subject of a past USACE permitting action and authorization was provided under the State Program General Permit 07-SPGP-01 for construction of facilities associated with the Virginia College of Osteopathic Medicine in 2008. Two previous Approved Jurisdictional Determinations (AJD's) have been issued for the site, one dated 7 January 2008 and another dated 28 February 2008. Both AJD's verified that jurisdictional waters were present on the site and that the boundaries of delineated wetlands and waters on the site plans provided by the appellant were accurate.

The appellant submitted a letter dated 11 February 2011 requesting that the Corps reach a final determination that certain lands associated with the Edward Via College of Osteopathic Medicine are not subject to federal jurisdiction under Section 404 of the Clean Water Act (CWA).

Following the request for a new AJD, the district conducted site visits on 1 March 2011 and 20/21 April 2011. The appellant and their representatives were present at the 21 April 2011 site visit with the district. Findings of the site visits were summarized in the administrative record and a final AJD was issued on 19 July 2011 stating that wetlands and waters regulated under Section 404 of the CWA are present on the site as identified in the following plans: Altizer, Hodges and Varney, Inc. dated 20 December 2007; Altizer, Hodges and Varney, Inc. dated 27 April 2011 and Environmental Services and Consulting dated 27 February 2008.

The appellant had several issues with the 19 July 2011 AJD and submitted a timely and acceptable RFA dated 15 September 2011.

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. The AR was received on 13 October 2011, but was determined to be incomplete. A revised, complete AR was received on 3 November 2011.
- 2) With the request for appeal, the appellant provided documents containing their comments and analysis of the District's jurisdictional determination. The submittals were accepted as clarifying information in accordance with 33 CFR 331.7 (f). The appellant provided a written 'Memorandum of Law' summarizing their request for appeal at the appeal meeting. The information was accepted because it clarified the initial RFA and provided precipitation data not provided in the AR to support references made in the AJD. The rain data was accepted as it was not considered new information; rather it was clarifying information for references made in the AR.

EVALUATION OF THE REASONS FOR APPEAL/APPEAL DECISION FINDINGS:

Appeal Reason 1: The appellant alleges that the district's conclusion in the AJD that the wetlands onsite are adjacent to a stream that is a RPW is arbitrary and capricious, omits material facts, uses incorrect data and misapplies the Supreme Court's opinion in *Rapanos v. United*

States as well as the Corps' Rapanos Guidance. Furthermore, the appellant alleges that the AJD is not supported by substantial evidence in the AR.

Finding: This reason for appeal has merit. I have determined that the district did omit material facts and did not support the AJD with substantial evidence. It has been determined that the district was arbitrary and capricious because its determination was made without reasonable grounds or adequate consideration of the circumstances. The district failed to address information contained in the AR presented in the letter to the district dated 11 February 2011 and its associated report. In omitting factual information and not supporting the decision with substantial evidence, the district did not follow the guidance in the JD Guidebook and the Rapanos Memo and, therefore, its final decision was based on incorrect data.

Action: The district should revise the AR to provide complete and factual information that eliminates all inconsistencies and supports its findings in accordance with the Rapanos Guidance and the JD Guidebook. The revised AR should provide a detailed analysis of the information provided by the appellant in their request for appeal. The analysis shall provide rationale behind why the district's determination supports or disputes the appellant's position that the onsite wetlands and waters are not jurisdictional. If upon further review, the district changes its findings, but determines that jurisdictional waters are still present at the site, consideration shall be further expanded in the AR to address the appellant's belief that there is no significant nexus between the onsite wetlands and waters and the nearest TNW. The AJD shall be reconsidered in accordance with the revised AR and reissued.

Discussion: Documentation provided by the appellant with its request for an AJD dated 11 February 2011 provides detailed information of site characteristics as well as analysis of information on the drainage area, volume, frequency and duration of flow from the site. The district used some of the factual information provided by the appellant in the district's 'Memo to the File' dated 19 July 2011, the Jurisdictional Determination Form supporting the district's findings in their AJD dated 19 July 2011, and its memorandum entitled 'Field Visit Findings Virginia Tech Corporate Campus 21 April 2011' dated 15 July 2011. The information provided by the appellant that was used by the district in its documentation and is limited to site morphology characteristics and historical information about the site. The AR fails to analyze factual information provided by the appellant on flow characteristics and it does not dispute the appellant's position that the wetlands and waters on site are not subject to jurisdiction under Section 404 of the CWA.

The revised Rapanos guidance¹ defines RPW's as waters that typically (e.g., except due to drought) flow year-round or that have a continuous flow at least seasonally (e.g., typically three months). The AJD form states in section II.B.1.a that there are waters of the U.S. present including RPW's that flow directly or indirectly to TNW's, wetlands directly abutting RPW's and impoundments of jurisdictional waters. The AJD form describes the onsite tributary in

¹ As defined in the 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*".

section III.B.1.ii.c as providing intermittent, but not seasonal flow an average of 2-5 times per year.

The overall findings of the AJD indicate that the site has perennial waters, which is the basis for the determination of jurisdiction over onsite wetlands and waters. These findings are unsupported because the documentation within the AJD is contradictory and does not clearly support the district's findings that the onsite waters are perennial. Section III.D.2 of the AJD form has a section where data and rationale indicating that the tributary is perennial should be included. Information provided in this section states that the tributary has flow and is an RPW. It then refers back to Section III.B.1, which provides characteristics on the tributary, but does not provide data or rationale to support that the tributary is perennial. The information that is provided is incomplete and not supported by facts.

Further contradictory information is provided in Sections II.B.1 and III.B.1. The AJD states that the onsite tributary is intermittent but not seasonal with an average of 2-5 flow events per year (see III.B.1.ii.c). In the previous section of the AJD (see III.B.1.ii.b) it is stated that the ponds are impoundments of a perennial channel. Earlier findings in section II.B.1.a find that the onsite waters are relatively permanent. In addition to the district's findings being contradictory by saying the waters are intermittent and perennial; there is no detailed information to support the district's findings that 2-5 flow events occur per year. Areas in the AJD form to provide further support of the flow regime of the onsite waters such as details on the characteristics of the tributary and duration and volume of flow in the tributary are incomplete (See Section III.B.1.ii.b & c).

Additional information to support the AJD as required by the JD Guidebook is missing in Section III. Sections III.B.2 and III.B.3 on wetlands are incomplete as is the documentation required to support the findings in Section III.D.7 that demonstrate that the impoundment was created from waters of the US.

The flow regime appears to start with headwater wetlands, which flow through a channel identified in the AJD as perennial, with abutting wetlands, into Pond A, underground through a pipe, into Pond B, overland through undefined surface flow in a maintained grass area when Pond A overflows, into a ditch that runs along U.S. Route 460, into a manmade detention pond which outflows through an outlet structure which carries the water via pipe under U.S. Route 460 and outlets to Slate Branch. Information supporting the duration and frequency of flow along the path of the aforementioned conveyances is not conclusive. The AJD form is not clear on the differing flow regimes of the onsite channel identified as perennial, its affect on the ponds (A and B) and the flow regime after water leaves Pond B where there is no defined channel and water is conveyed via sheet flow and a ditch to a storm water basin through a pipe and out to Slate Branch (a RPW). The documentation in the administrative record and the AJD form state that waters on the site are tributaries of TNW's where tributaries typically flow year round (see Section III.D.2 of the AJD form). The AR does do not clearly support that a perennial RPW exists at the site because it does not provide data and rationale to support that the tributary is perennial as is required in accordance with the JD Guidebook. It is not evident and appears contradictory whether the onsite tributary is perennial. If the tributary is perennial, it is not

evident why the outlet to Pond B which the JD states flows 2-5 times per year and the ditch would not both also be perennial.

The information contained in the AJD form and the AR is incomplete and does not support the district's findings. In addition, information contrary to the district's findings is contained in the AR and is not disputed. The appellant's letter of 11 February 2011 contained a report prepared by Robert J. Pierce, PhD dated 15 December 2010, which provides a detailed analysis of the onsite waters contrary to the findings of the JD. Neither the JD or the AR address the opposing findings.

Appeal Reason 2: The appellant alleges that the district was arbitrary and capricious and omitted material facts in making their determination that the waters above Pond A on the site are jurisdictional under section 404 of the Clean Water Act. Specifically, the appellant alleges that the water above Pond A flows from the frequent and regular spray irrigation (sprinklers) on the site that occurs on both sides of the tributary.

Finding: This reason for appeal does not have merit.

Action: No action required.

Discussion: It is the appellant's belief that the existing spray irrigation system is the source of a majority of the hydrology that flows in the tributary above Pond A. Information provided in the appellant's 15 December 2011 report, prepared for the appellant by Robert J. Pierce, does not support these allegations (see page 40 of the AR). The report states that historically there were seeps, ephemeral channels and spring boxes in the area of what are currently the ditches in question under this RFA. Evidence of wet areas on the aerial photographs provided in the AR (at pages 53, 54 and 55) also indicate that the area historically was subject to wet conditions. As a further indication that the area was historically wet, the appellant's report indicates that Ponds A and B were constructed between 1962 and the late 1980's. In reviewing the aerial photographs (AR at 54, 55), the ponds appear to have been created prior to any maintained development of the area and, therefore, it is believed that these were built prior to any present spray irrigation. Although spray irrigation may contribute to the hydrology of the area as it is developed today, it appears based on information contained in the AR and provided by the appellant that the area has historically been wet. No clear data is present in the AR to support that the spray irrigation provides the majority of the hydrology that flows above Pond A.

Appeal Reason 3: The appellant alleges that the AJD incorrectly applies law, regulation and officially promulgated policy because the tributary stream is not a water of the United States. They allege it is a man made drainage ditch that carries only irrigation and storm water into Slate Branch.

Finding: This reason for appeal has merit.

Action: In reconsidering the AJD, the district shall revise the AR to address the nature of the ditch and the ponds to determine if they are waters of the United States. The districts

determination of the onsite wetlands and waters shall be reconsidered based upon the revised information.

Discussion: See discussion in appeal reason 2 regarding the source of hydrology. As stated in the preamble to the Corps' Final Rule of 13 November 1986: ". . .we generally do not consider the following waters to be 'Waters of the United States' . . . (b) Artificially irrigated areas which would revert to upland if the irrigation ceased."² Thus, waters, including wetlands, created as a result of irrigation would not be considered waters of the U.S. even when augmented on occasion by precipitation. This is further clarified in RGL 07-02³ under the definition of drainage ditch where it states:

Where a natural or man-altered water body is used as part of an irrigation ditch system, such as where the water body is used to transport irrigation water between manmade ditches, that segment generally is not considered an irrigation ditch for purposes of this exemption⁴, except where the Section 404(f)(1) exemption has been determined to apply based on a case-by-case evaluation. Following a case-by-case evaluation, such a natural or man-altered water body may be considered an irrigation ditch eligible for this exemption if it has characteristics suggesting a limited functional role in the broader aquatic ecosystem, such as infrequent or low volume flow, minimal habitat value, or small channel size.

As discussed previously, the AR provides supporting evidence that the area was wet prior to any development of the site. It is not clear, however, if the ponds and the ditch were constructed as part of an irrigation system or for drainage. The AR does not clearly indicate if the tributary is or is not subject to jurisdiction under the CWA in accordance with the RGL.

Appeal Reason 4: The appellant alleges that the AJD is arbitrary and capricious and incorrectly applies law, regulation and officially promulgated policy because the hydrologic connection between the wetlands and Slate Branch depends at least in part on sheet flow and ephemeral flow.

Finding: This reason for appeal has merit.

Action: See appeal reason 1.

Discussion: See appeal reason 1.

Appeal Reason 5: The appellant alleges that the district's AJD is not supported by substantial evidence in its findings that water flows on a relatively permanent basis between Wetlands A and Pond A and between Pond B and Slate Branch.

² 51 Federal Register 41217, November 13, 1986

³ Regulatory Guidance Letter 07-02, July 4, 2007 - Exemptions for Construction or Maintenance of Irrigation Ditches and Maintenance of Drainage Ditches Under Section 404 of Clean Water Act.

⁴ Although this guidance is intended to clarify when 404(f) exempts from permitting requirements discharges of dredged or fill material into waters of the U.S. associated with the construction and maintenance of irrigation ditches and maintenance of drainage ditches, the definitions help provide clarity in determining the difference between waters that may or may not be subject to jurisdiction under the CWA.

Finding: This reason for appeal has merit.

Action: See appeal reason 1.

Discussion: See appeal reason 1.

Appeal Reason 6: The appellant alleges that the district used incorrect data regarding the size of the alleged non-wetland waters of the U.S. in the review area (See AJD form Section II.B.1.b).

Finding: This reason for appeal has merit.

Action: Clearly identify what the non-wetland waters of the U.S. are in the review area and revise the AR and the reconsidered AJD with correct information on the size of the non-wetland waters of the U.S. in the review area.

Discussion: Section II.B.1.b states that there are 2027.8 linear feet (LF) of non wetland waters within the review area. Information contained in the memorandum entitled "Field Visit Findings Virginia Tech Corporate Campus 21 April 2011", dated 15 July 2011 provides detailed pictures and information on lengths of the various water resource features on the site. This memorandum identifies the following non-wetland waters on the site: two 30 foot drainage features in Wetland A (60 LF), intermittent channel between Wetland A and Pond A (322 LF), Pond A (108 LF), Underground pipe between ponds A & B (322 LF), Pond B (454 LF), Sheet flow from Pond B to ephemeral ditch (66 LF), ephemeral ditch (271 LF), and a pipe from storm water basin to Slate Branch (570 LF).

Assuming all of these areas are non-wetland waters of the U.S. within the review area, the memo's total comes out to 2,173 LF, which is 145 LF more than the total in the AJD form. It appears some of these areas were not included in the review area (i.e., piped area between storm water basin and Slate Branch). The appellant's reason for appeal has merit because the AR lacks clarity in identifying the non-wetland waters of the U.S. in the review area.

Appeal Reason 7: The appellant alleges that the AJD is arbitrary and capricious and incorrectly applies law, regulation and officially promulgated policy because none of the aquatic features between the wetlands and Slate Creek are themselves waters of the U.S. Consequently, the appellant alleges that the wetlands cannot be water of the U.S.

Finding: This reason for appeal has merit.

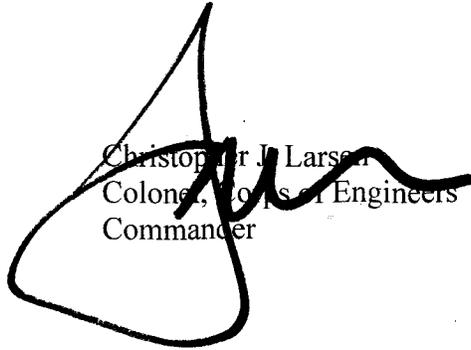
Action: See appeal reason 1.

Discussion: See appeal reason 1.

An additional reason for appeal is provided by the appellant alleging that the AJD was arbitrary and capricious because it reflects a reflex decision by the Corps to assert jurisdiction regardless of the facts. Discussions on the merits of arbitrary and capricious allegations are detailed above.

OVERALL CONCLUSION:

For the reasons stated above, I find that the appeal has merit since the district's AR does not support its determination that the subject property contains jurisdictional wetlands and waters. I am remanding the AJD back to the district for reconsideration in light of this decision. The district shall complete these tasks within 60 days from the date of this decision and upon completion, provide the division office and appellant with its decision document and final AJD.



Christopher J. Larsen
Colonel, Corps of Engineers
Commander

