

ADMINISTRATIVE APPEAL DECISION
SCOTT CAMP; FILE NO. NAO-2009-01852
NORFOLK DISTRICT

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

Appellant: Scott Camp

Date of Receipt of Request for Appeal (RFA): September 23, 2013

Appeal Meeting Date: February 23, 2013

ACCEPTED REASON FOR APPEAL:

The North Atlantic Division office accepted the following reason for appeal as detailed in the RFA by Scott Camp dated September 20, 2013:

The Norfolk District's determination was based upon an incorrect application of law, regulation or officially promulgated policy.

SUMMARY OF DECISION:

The appellant's request for appeal has merit. The administrative record (AR) does not contain substantial evidence to support the district's determination that the east/west ditches are subject to Federal jurisdiction and regulation as waters of the United States under Section 404 of the Clean Water Act.¹ I am remanding the approved jurisdictional determination (AJD) back to the district for reconsideration in light of this decision.

BACKGROUND INFORMATION:

The appellant received a preliminary jurisdictional determination (PJD) for the site on March 27, 2013. The appellant requested an AJD which was provided to them by the district on July 25, 2013. The site consists of approximately 641 acres and has been managed for silviculture for approximately the last 50 years. As part of the silvicultural practices, ditches were added to the site in the 1960's.

The district's AJD focused on specific portions of the property that the appellant desires to develop in the imminent future, while other portions of the site are covered by the PJD. The district met with the appellant and his representatives numerous times over the last 5 years. The appellant agrees with the findings within the AJD with the exception of the district's determination that the east/west ditches are subject to jurisdiction under Section 404 of the Clean Water Act. The east/west ditches as identified within the AJD for the property are the subject of this appeal.

¹ 33 U.S.C. 1344

INFORMATION RECEIVED DURING THE APPEAL AND ITS DISPOSITION:

1. The district provided a copy of the 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.

Finding: This reason for appeal has merit.

Action: The district shall provide further analysis on the existence of an ordinary high water mark and the duration and frequency of hydrology on each of the east/west ditches at the site and shall provide a reconsidered jurisdictional determination based upon its additional analysis.

Discussion: The appellant alleges that the district's decision did not follow applicable laws and policy because it did not provide sufficient data to support its determination that the east/west ditches are subject to jurisdiction under Section 404 of the Clean Water Act.

The appellant states in its RFA that the ditches flow only in response to precipitation, do not have seasonal or relatively permanent flow and do not exhibit characteristics of an ordinary high water mark (no natural lines impressed on the banks, shelving, natural litter and debris, disturbed leaf litter, bed and banks and depressions). While the appellant makes these allegations in its RFA, there is no specific data provided by the appellant to rebut the district's findings in the AR.

The appellant states that over numerous meetings the district never identified the east/west ditches to be subject to jurisdiction. The appellant states in its RFA that the district's determination that the east/west ditches are jurisdictional is not supported in the administrative record by field data and that the district's findings are contradicted by data provided to the Corps by the appellant. Although the AR has no specific data provided by the appellant to support these allegations, the district's findings are not clearly supported in the AR.

The appellant states that the district did not properly document the flow characteristics of the east/west ditches. The appellant contends that the ditches are not navigable and do not contain permanent or seasonal flow. The district states in the AJD² that its findings that the tributaries are relatively permanent waters (RPW's) is based on visual

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observation of flow on multiple site visits throughout multiple years and the observed presence of ordinary high water mark indicators. The appellant states that there is no data demonstrating multiple observed flow events in the east/west ditches and that observations of water in ditches on an inconsistent basis during site visits over a period of several years does not support a determination that the ditches are RPW's.

The AJD form at Section III.B.1.ii.b, discusses the general tributary characteristics of the site.³ A hand written note in this section states that the description pertains to Speights Run only. Upon clarification, the district explained that this section is also intended to address the east/west ditches. This section lacks clarity in detailing the specific waterways that it is addressing.

In accordance with the Rapanos memo,⁴ the agencies will assert jurisdiction over non-navigable tributaries of traditional navigable waters (TNW's) that are relatively permanent where the tributaries typically flow year round or have continuous flow at least seasonally (e.g., typically 3 months). The jurisdictional form instructional guidebook requires district's to document site conditions and support flow determinations in the AJD form, specifically, Section III.D.2 for RPW's.⁵ The district will include any available information that documents the existence of a significant nexus between a non perennial RPW and a TNW even though a significant nexus determination is not required as a matter of law.⁶

The district checked the box in Section III.D.2 that says the waters are tributaries of a TNW where the tributaries have continuous flow "seasonally" and are jurisdictional. The district had the following deficiencies in supporting its decision in the AR:

1. There is a section at the end of III.D.2 for the district to provide their rationale indicating that the tributary flows seasonally; this section of the AJD form is blank.
2. Section III.D.2 of the AJD form contains a statement that refers back to Section III.B where additional data supporting the district's determination can be found. Section III.B provides some generic site specific information but does not provide specific details to support the district's findings that **each** of the east/west ditches are RPW's.
3. It is not clear if the AJD form is referring to the east/west ditches, Speights Run or other onsite waters.

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⁴ 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".

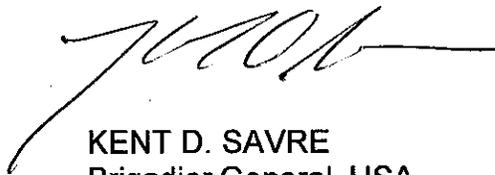
⁵ U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook. 30 May 2007. 60 Pages.

⁶ USACE JD Guidebook, 52

4. It is not clear what specific information the district relied upon in its determination to support that each of the east/west ditches have a volume, duration or frequency of flow sufficient enough to support seasonal or relatively permanent flow.
5. The AJD form provides pictures and documentation supporting that *some* of the east/west tributaries have an ordinary high water mark and that water was observed in *some* of the east/west ditches during *some* of the site visits.⁷ The information provided is only relative to an unidentified select few of the east/west ditches.
6. The administrative record contains a significant amount of information on the sites hydrology (historic use, soils, rainfall, aeriels) relative to the onsite wetlands but there is no correlation between the hydrologic data and the district's determination that the east/west tributaries have 11-20 flow events per year.⁸

OVERALL CONCLUSION:

The appellant's request for appeal has merit. The AR does not contain sufficient evidence to support the district's decision that the east/west ditches are subject to Federal jurisdiction and regulation as waters of the United States under Section 404 of the Clean Water Act. I am remanding the AJD back to the district for reconsideration in light of this decision. Upon completion, the district shall complete these tasks and provide the division office and appellant with its decision document and final JD.



KENT D. SAVRE
Brigadier General, USA
Commanding

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⁷ AR - 17, 19, 47, 72, 175, 224, 225, 230, 231, 237, 246, 431, 432

⁸ AR - 3, 16, 17, 47