

**ADMINISTRATIVE APPEAL DECISION
CLEAN WATER ACT
HUGHES INVESTMENTS PROPERTY
HUGHES INVESTMENTS
Summit County, Utah
SACRAMENTO DISTRICT
FILE NUMBER 200550559**

DATE: February 10, 2009

Review Officer: Thomas J. Cavanaugh, U.S. Army Corps of Engineers (Corps), South Pacific Division, San Francisco, California

Appellant: Brad Cahoon, Snell & Wilmer, attorney representing Hughes Investments (Appellant)

District Representative: Hollis Jencks, Army Corps of Engineers, Sacramento District (District)

Authority: Clean Water Act (33 USC 1344)

Receipt of Request for Appeal: 9 September 2008

Appeal Meeting and Site Visit Date: 29 October 2008

Summary of Decision: This CWA jurisdictional determination is remanded to the District for further evaluation and consideration of information provided by the Appellant. The District must further evaluate its determination that the drainage to which the wetlands on the Hughes Investment property (Property) are adjacent is a relatively permanent water (RPW) and whether a significant nexus determination is required for the Hughes Investment wetlands (Wetlands). The District must document that its conclusion as to whether the drainage is an RPW has been evaluated under the "significant nexus standard". The District must also, prior to making its final determination, evaluate and document the effect that new information provided by the Appellant concerning the placement of a pipe and fill material into the ditch immediately off of the Property would have on its determination.

Background Information: The Property is an approximately 8 acre site and consists of lots 3 through 8, Block 8, Silver Creek Estates, Unit I, located in Park City, Summit County, Utah. The Property is located northeast of the intersection of Interstate 80 and Silver Creek Road, in Section 16, Township 1 South, Range 4 East, SLB&M, Latitude 40 44' 3.50" North, Longitude 111 29' 41.1" West. The Property is vacant and does not appear to be subject to ongoing human activity. The topography of the site is gently rolling. There is a gas station/truck stop immediately to the west of the site, recently constructed commercial buildings north of the Property on the opposite side of Division Street. To the east is a small residence.

For purposes of evaluation during the CWA jurisdictional determination, the Appellant's consultant delineated the site using the 1987 *Wetland Delineation Manual* (1987 WDM). The Appellant's consultant concluded that there are 1.02 acres of wetland on the Property, as had been delineated in 2005, and that these areas meet the three criteria to be considered wetlands. The consultant, however, further asserted that "under current guidance, these Wetlands are considered isolated and not currently regulated based upon effective loss of connectivity and inability to show/satisfy the Supreme Court's "significant nexus" standard".

The District reviewed the Appellant's October 17, 2007 proposed CWA jurisdictional determination map. On July 31, 2008, the District issued its CWA jurisdictional determination for the Property. The District concluded that the site contained 1.02 acres of wetlands within CWA jurisdiction. The Appellant disagreed and appealed citing the reasons for appeal addressed in this appeal decision.

Appeal Evaluation, Findings and Instructions to the District Engineer (DE):

REASON 1: The Wetlands are not adjacent (abutting) a relatively permanent body of water.

FINDING: This reason for appeal has merit.

ACTION: The District must further document its determination that the drainage to which the Wetlands on the Property are adjacent is a relatively permanent water (RPW) and that the conclusion that it is an RPW has been evaluated under the "significant nexus standard".

Additionally, the District must also consider whether its final determination as to the jurisdictional nature of the channel has an effect on its conclusion as to its role in providing a significant nexus to a traditional navigable water for the Wetlands on the Property.

DISCUSSION: In the data sheet supporting its July 31, 2008, verification letter, the District indicated that the flow was seasonal and that there was consistent flow from April 3rd to at least June 5th. The District has therefore documented 63 days of continuous flow. The District's conclusion is that the channel is RPW largely based upon observation of flow. In its July 31, 2008 jurisdictional determination verification letter the District concluded that the 1.02 acres of "waters are regulated under Section 404 of the Clean Water Act, since they are directly abutting a seasonal relative waterway tributary to East Canyon Reservoir, a traditional navigable waterway".

The Appellant has asserted that the District incorrectly identified a collection of drainage swales, wetlands, and ephemeral streams between the Property and East Canyon Creek to be an RPW. Further the Appellant asserted that the finding is not supported by substantial evidence in the record, and the District's reliance on assumptions of permanence and connectivity in the face of contrary evidence is arbitrary and capricious. The Appellant asserts that Corps guidance sets a standard for permanence, suggesting that a stream which flows at least 90 days could be considered a seasonal RPW.

The joint Corps/EPA guidance, dated June 5, 2007, indicates that RPWs are jurisdictional under the CWA. It further states that, as a matter of policy, field staff will include in the record any available information that documents the existence of a significant nexus between a TNW and an RPW that is not perennial. The reference to "typically three months" in the joint guidance is an example. It does not set a standard as suggested by the Appellant.

The revised joint Corps/EPA guidance, dated December 2, 2008, restated that guidance to indicate that RPWs typically flow year-round or have continuous flow at least seasonally. That guidance further indicates that CWA jurisdiction over these waters will be evaluated under the significant nexus standard. The guidance states that 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 revised December 2, 2008, guidance indicates that 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 revised guidance noted that the plurality opinion and the dissent in Rapanos v. United States and Carabell v. United States, 126 S. Ct. 2208 (2006) (Rapanos) agreed that such wetlands were jurisdictional. The December 2008, guidance further indicates that the Rapanos plurality opinion found that a "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).

Therefore, the District should consider what additional data may be available which would document a significant nexus between the seasonal RPW and East Canyon Reservoir in order to insure compliance with this guidance.

REASON 2: East Canyon Reservoir is neither a traditional navigable water nor a navigable-in-fact water.

FINDING: This reason for appeal does not have merit

ACTION: No action is required.

DISCUSSION: The District has appropriately applied the standard for determining a water to be a “traditional navigable water”.

APPENDIX D, “Legal Definition of “Traditional Navigable Waters”, of the May 30, 2007, “U.S. ARMY CORPS OF ENGINEERS JURISDICTIONAL DETERMINATION FORM INSTRUCTIONAL GUIDEBOOK”, states that:

“The Environmental Protection Agency (EPA) and United States Army Corps of Engineers (Corps) “Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in Rapanos v. United States and Carabell v. United States” guidance (Rapanos guidance) affirms that EPA and the Corps will continue to assert jurisdiction over “[a]ll waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide.” 33 C.F.R. 328.3(a)(1); 40 C.F.R. 230.3(s)(1). The guidance also states that, for purposes of the guidance, these “(a)(1) waters” are the “traditional navigable waters.” These (a)(1) waters include all of the “navigable waters of the United States,” defined in 33 C.F.R. Part 329 and by numerous decisions of the federal courts, plus all other waters that are navigable-in-fact (e.g., the Great Salt Lake, UT and Lake Minnetonka, MN).”;

“If the federal courts have determined that a water body is navigable-in-fact under federal law for any purpose, that water body qualifies as a “traditional navigable water” subject to CWA jurisdiction under 33 C.F.R. 328.3(a)(1) and 40 C.F.R. 230.3(s)(1). Corps districts and EPA regions should be guided by the relevant opinions of the federal courts in determining whether waterbodies are “currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce” (33 C.F.R. 328.3(a)(1); 40 C.F.R. 230.3(s)(1)) or “navigable-in-fact.””, and:

“In summary, when determining whether a water body qualifies as a “traditional navigable water” (i.e., an (a)(1) water), relevant considerations include whether a Corps District has determined that the water body is a navigable water of the United States pursuant to 33 C.F.R 329.14, or the water body qualifies as a navigable water of the United States under any of the tests set forth in 33 C.F.R. 329, or a federal court has determined that the water body is navigable-in-fact

under federal law for any purpose, or the water body is “navigable-in-fact” under the standards that have been used by the federal courts.”

In its June 16, 2008, “Navigable-In-Fact Determination for East Canyon Reservoir (SPK-2008-00529)”, the District documented current and historic navigation as well as the interstate commerce associated with marketing of recreational opportunities at East Canyon Reservoir.

Corps and EPA headquarters have made it clear through this guidance that “traditional navigable water” include waters that are “navigable-in-fact”. While the Appellant cites “the continued highway” requirement from “The Daniel Ball, 77 U.S. (10 Wall.) 557 (1879)”, this does not represent the standard by which Corps Districts have been directed to evaluate “traditional navigable waters”. 33 C.F.R. Part 329 did not adopt the referenced standard from The Daniel Ball as a limitation on the scope of jurisdiction for Sections 9 and 10 of the Rivers and Harbors Act of 1899. Consequently, application of Appendix D regarding Clean Water Act jurisdiction is that TNW’s include some isolated lakes that do not constitute part of a continuous highway for the transportation by water of interstate water borne commerce

I have, therefore, determined that the District has sufficiently documented that East Canyon Reservoir is a “traditional navigable water”.

REASON 3: The Wetlands have no continuous surface connection to any traditional interstate navigable water.

FINDING: This reason for appeal has merit.

ACTION: The District must further evaluate whether data provided by the Appellant concerning its dye test would lead to a different conclusion as to a hydrological connection with points downstream of the Wetlands. The District should further document its conclusion that there is a hydrologic connection between the Wetlands and East Canyon Creek

DISCUSSION: In its data sheet, the District described the flow route from the Property to the TNW as initially flowing “through a culvert under Division Road to the north onto the Radiator Shop property. Then through a ditch that empties into a detention basin. The outfall of this basin drains into the stormdrain of the adjacent development which empties in that developments detention basin. The stream then flows west through a culvert under Silver Creek Road and daylight west of the road. At that point there is a jurisdictional wetland swale that flows to the west into Basin Canyon Creek. Basin Canyon Creek flows into East Canyon Creek, which is a tributary of the East Canyon Reservoir.” In that analysis, the District concluded that there was connectivity between Greenfield Drive (the most downstream location where connectivity was measured) and East Canyon Creek “since the stream profile, meander, and gradient are similar”.

As stated above, the Appellant has asserted that the District incorrectly identified a collection of drainage swales, wetlands, and ephemeral streams between the Property and East Canyon Creek to be an RPW. Additionally, the Appellant suggested that the District relied on assumptions of connectivity and that the conclusion is unsupported by substantial evidence in the record.

While the District conducted dye tests of its own on April 3, 2008 and May 9, 2008, and has described the hydrologic connection between the Wetlands and East Canyon Reservoir, the Appellant has provided data from its own tests on May 30, 2008, with a sample collection date of June 5, 2008, that suggest a different conclusion. For proper record, documentation of a consideration and evaluation of the Appellant's dye tests must be completed before the District makes its final determination.

REASON 4: The Wetlands do not [have a] significant nexus to any navigable water. They do not significantly affect the chemical, physical, and biological integrity of any water.

FINDING: This reason for appeal may have merit.

ACTION: The District must, once it has reevaluated its determination that the drainage to which the Wetlands on the Property are adjacent is an RPW as required above under reason 1, consider whether, as a result of that reevaluation, there is a need to separately complete a significant nexus determination for the Wetlands on the Property.

DISCUSSION: The Appellant correctly points out that the District may not assume jurisdiction over a wetland adjacent to a non-RPW unless there exists a significant nexus between the wetland and the nearest TNW. While the District has determined that the drainage downstream of the Wetlands on the Property is an RPW, it must reevaluate that determination as described above. In the event that the District concludes that the drainage is not an RPW, the District would then be required to separately complete a significant nexus determination for the Wetlands on the Property.

Information Received and its Disposition during the Appeal Review: The administrative appeal was evaluated based on the District's administrative record, the Appellant's Request for Appeal, discussions at the appeal meeting, and the Appellant's written responses to questions provided with the agenda and discussed at the appeal conference. The Appellant provided new information concerning the placement of a pipe and fill into the ditch just off the Property. While not considered in the appeal review, the District is instructed to consider that information prior to making its final determination.

Conclusion: I conclude the District must further document its determination that the drainage to which the Wetlands on the Property are adjacent is an RPW and that the conclusion that it is an RPW has been evaluated under the “significant nexus standard”. Additionally, the District should further evaluate whether data provided by the Appellant concerning its dye test would lead to a different conclusion as to a hydrological connection with points downstream of the Wetlands. The District should further document its conclusion that there is a hydrologic connection between the Wetlands and East Canyon Creek. Finally, the District must, once it has reevaluated its determination that the drainage to which the Wetlands on the Property are adjacent is an RPW as required above under reason 1, consider whether, as a result of that reevaluation, there is a need to separately complete a significant nexus determination for the Wetlands on the Property.

ORIGINAL SIGNED

Janice L. Dombi
Colonel, U.S. Army
Commanding