

ADMINISTRATIVE APPEAL DECISION

**ALBUQUERQUE METROPOLITAN ARROYO FLOOD CONTROL AUTHORITY
FILE NO. SPA-2011-386**

ALBUQUERQUE DISTRICT

8 November 2012

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

Appellant: Albuquerque Metropolitan Arroyo Flood Control Authority (AMAFCA)

Date of Receipt of Request for Appeal: 20 January 2012

Date of Acceptance of Request for Appeal: 2 February 2012

Appeal Meeting Date: 3 May 2012

ACCEPTED REASON FOR APPEAL:

The South Pacific Division office accepted the following reason for appeal as detailed in the Request for Appeal by AMAFCA dated 20 January 2012:

The appellant alleges that the Albuquerque District (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.

SUMMARY OF DECISION:

The appellant’s request for appeal (RFA) has partial merit. This finding does not affect the district’s jurisdictional determination since the district’s decision is supported by the Administrative Record (AR) on other grounds. However, the approved jurisdictional determination (AJD) is being remanded to the district to address errors contained in the AR. The district did not clearly describe the chemical characteristics of the Calabacillas Arroyo throughout the AR.

BACKGROUND INFORMATION:

The appellant, AMAFCA, is appealing a jurisdictional determination issued by the Albuquerque District, U.S. Army Corps of Engineers on 20 January 2012 stating that the Calabacillas Arroyo is subject to jurisdiction under Section 404 of the Clean Water Act. AMAFCA was created in 1963 by the New Mexico Legislature with specific responsibility for flooding problems in the greater Albuquerque area.

AMAFCA’s purpose is to prevent injury or loss of life, and to eliminate or minimize property damage. AMAFCA does this by building and maintaining flood control structures which help alleviate flooding. The Calabacillas Arroyo is an ephemeral stream that flows infrequently in direct response to precipitation events. AMAFCA has been conducting work to stabilize the Calabacillas arroyo for prevention of property loss and to minimize downstream sedimentation.

Previously completed projects in the arroyo have qualified for Nationwide permits. A larger bank stabilization project that did not qualify for NWP's was submitted to the district for review and resulted in the issuance of the AJD that is the subject of this appeal.

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 request for appeal.
- 2) With the request for appeal and at the appeal meeting, 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 REASON FOR APPEAL/APPEAL DECISION FINDINGS:

The appellant alleges that the criteria used by the district in forming the basis of the AJD is improper and that 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. Following are several specific reasons for appeal identified by the appellant relating to the district's determination.

Appeal Reason 1: Flow, including sediment flow from the Calabacillas Arroyo into the Rio Grande River does not have a substantial effect on the physical, chemical and/or biological integrity of the river.

Finding: This reason for appeal does not have merit.

Action: No Action Required.

Discussion: The appellant states in its RFA that the arroyo no longer carries significant sediment loads to the Rio Grande River, which is a Traditionally Navigable Water (TNW) that the Calabacillas Arroyo flows directly into. The appellant states that the information used by the district does not take into consideration improvements made by AMAFCA to the arroyo to reduce erosion and downstream sedimentation in recent years.

The district supported its decision with information provided in a 2005 report prepared by the Bureau of Reclamation¹ (AR 57-95). The report discusses the impacts that sediment from the arroyo has had on the Rio Grande River. The report states that the arroyo carries large quantities of mixed coarse sediment to the Rio Grande, which the river does not readily transport downstream. The report goes on to say that as these deposits grow, they can influence the Rio Grande's location as well as channel profile. The appellant believes that the report does not account for improvements made by AMAFCA since the report was released which have lessened the impacts of the arroyo's sediment load on the Rio Grande River. The appellant states that the district did not draw the correct conclusions from its review of the evidence. The administrative record does not provide significant evidence from the appellant to support their statements that

¹ U.S. Department of the Interior, Bureau of Reclamation, Environment Division – Albuquerque Area Office; Reclamation Managing Water in the West, Current Fluvial Conditions, Rio Grande – Corrales Reach; Final Report, 2005, 30 pages.

sediment transport in the Calabacillas Arroyo has been reduced to such an insignificant amount that it no longer has an effect on the Rio Grande River.

It is documented in a report on fish community and monitoring contained within the AR² that the Rio Grande Silvery Minnow is present in the area where the Calabacillas Arroyo enters the Rio Grande River. Information provided by the BOR also supports the presence of the Rio Grande Silvery minnow at the confluence of the Calabacillas Arroyo and the Rio Grande River (AR 48-53, 57). Sediment from the arroyo creates backwater habitat suitable for the minnow which has been documented in this area (AR-25). The district states that the area is designated as critical habitat along this reach for the federally endangered fish.

Information provided by the appellant consists mainly of a letter and an AJD form they filled out based on their own findings (AR 104-116). There is no information in the AR that demonstrates any support of the appellant's findings contrary to those provided by the district on the AJD form (AR 18-31).

Based on the published report on the fluvial conditions in the Rio Grande River and information supporting the habitat and presence of the federally endangered Rio Grande Silvery Minnow, the district has adequately documented its findings that the sediment load of the Calabacillas Arroyo provides more than a speculative or insubstantial effect on the physical and biological integrity of the Rio Grande River. See discussion below regarding the districts findings on the chemical effects of the arroyo on the Rio Grande River.

Appeal Reason 2: The chemical characterizations used to determine if a significant nexus exists between the arroyo and the river are insubstantial and speculative in nature.

Finding: This reason for appeal has merit.

Action: The district shall revise its analysis of the chemical characteristics of the Calabacillas Arroyo to more precisely state the basis for its conclusions. The AJD shall be reconsidered in accordance with the revised AR and reissued.

Discussion:

The district concludes that tributary flows are highly turbid, that residential development adjacent to the arroyo conveys drainage to the arroyo that is likely to contain fertilizers, insecticides and herbicides and that road runoff conveyed to the arroyo is untreated and may contain petrochemicals (AR 35). The district also states that it would be reasonable to anticipate some level of contaminants conveyed through the system as a result of storm water runoff (AR 36). These statements are unsupported. Based on the 2 December 2008 joint agency guidance memo³ (Rapanos memo):

² U.S. Bureau of Reclamation, Albuquerque Area Office, Task 4 Draft Report prepared by SWCA Environmental Consultants, Fish Community Monitoring and Sampling Methodology Evaluation, September 2011.

³ 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".

Corps districts and EPA regions shall document in the administrative record the available information regarding whether a tributary and its adjacent wetlands have a significant nexus with a traditional navigable water, including the physical indicators of flow in a particular case and available information regarding the functions of the tributary and any adjacent wetlands. The agencies will explain their basis for concluding whether or not the tributary and its adjacent wetlands, when considered together, have a more than speculative or insubstantial effect on the chemical, physical, and biological integrity of traditional navigable water.

The information on the chemical characteristics of the Calabacillas Arroyo provided in the AR are unsupported. The district uses imprecise language such as “reasonable to anticipate”, “may” and “likely” in its clarifying information supporting the chemical characteristics that exist within the arroyo. The district did support that there is a physical and biological connection between the arroyo and the Rio Grande River based on information provided in the AR. However, the significant nexus language used in the AR does not support that the effects of the arroyo on the chemical integrity of the Rio Grande River are more than speculative or insubstantial.

Appeal Reason 3: Information exists and was provided which was not properly considered in determining jurisdiction over the Calabacillas Arroyo.

Finding: This reason for appeal does not have merit.

Action: No Action Required.

Discussion:

The appellant provided a letter dated 14 October 2011 to the district that detailed its position that the arroyo should not be jurisdictional (AR 104-107). Attached to the letter was an AJD form completed by the appellant (AR 108-116). It was clarified at the appeal meeting that this was the information the appellant provided that was, in their view, not properly considered by the district in determining that the Calabacillas Arroyo is a jurisdictional water under Section 404 of the Clean Water Act (CWA)⁴.

Information provided by the appellant in their letter and the supporting AJD form is primarily the opinion of the appellant. Their version of the AJD form is unsupported by background information such as third party reports or findings of studies that are contrary to those used by the district in reaching its determination on the jurisdiction of the Calabacillas Arroyo.

The appellant says the Calabacillas Arroyo has the ability to carry pollutants, but pollutant controls have been installed on storm drains that enter the arroyo to reduce the number of pollutants reaching the arroyo. While the appellant offers a contradictory statement on the ability of pollutants in the Calabacillas Arroyo to have an effect on the chemical integrity of the Rio Grande River, they also do not provide more than speculative information to support their findings. As discussed in Appeal Reason 2, the analysis of the chemical connection between the

⁴ 33 U.S. Code 1344

arroyo and the Rio Grande River provided by the district is not well supported. The AJD has is being remanded to the district to revise and reconsider with regard to the basis used to support that a chemical nexus exists between the arroyo and the Rio Grande River.

The appellant discusses the frequency and duration of flow stating that stormwater from the arroyo only reaches the Rio Grande River during a limited number of flow events per year. Based on the limited amount of flow events, the appellant states that the arroyo is unable to have more than a speculative or insubstantial effect on the physical, chemical and biological integrity of the Rio Grande River (AR 106 & 110). The appellant states that because of the limited hydrologic contribution from the arroyo, that it does not provide habitat and lifecycle support functions for fish and other species, transfer nutrients and organic carbon and support downstream food webs or affect the physical, chemical or biological integrity of the Rio Grande River. The district provided specific information documenting that when the arroyo does carry flows, it carries sediment to the Rio Grande River that have an impact on the channel forming ability of the Rio Grande River as well as the habitat of the federally endangered Rio Grande silvery minnow. There is no specific information in the AR provided by the appellant that supports its findings that are contrary to those provided and supported by the district.

The appellant states that there is no ordinary high water (OHW) mark in the Calabacillas Arroyo (AR 106). The district supports in section III.B.1(c) of the AJD form (AR 22) that the arroyo contains bed and banks with an OHWM with a clear natural line impressed on the bank, shelving, sediment deposition and sediment sorting. These findings are in accordance with Regulatory Guidance Letter 05-5⁵ and are supported by pictures in the AR showing these features (AR 98, 99, 101). There is no specific information in the AR provided by the appellant that supports its findings that are contrary to those provided and supported by the district.

The district's decision appropriately considered the information in the AR provided by the appellant in determining that the Calabacillas Arroyo is jurisdictional under Section 404 of the CWA.

Appeal Reason 4: The information forming the basis of the AJD for the Calabacillas Arroyo is not representative of the conditions of the site as it currently exists.

Finding: This reason for appeal does not have merit.

Action: No Action Required.

Discussion: As discussed above, the administrative record does not contain any supporting documentation that otherwise supports the appellants allegations. It appears the district made its decision upon the most up to date and relevant information available. Information supporting that a significant nexus exists were based upon reports and correspondence that were recently completed (2005 to 2011). There is no specific information in the AR to support the appellant's allegations that the information used by the district to support its findings on the AJD are not representative of the conditions and functions that currently exist in the arroyo.

⁵ Regulatory Guidance Letter No. 05-05, Subject: Ordinary High Water Mark, 7 December 2005.

Appeal Reason 5: The criteria forming the basis of the approved jurisdiction is improper.

Finding: This reason for appeal has merit insofar as it relates to Appeal Reason 2 discussed in this decision.

Action: No additional action is required beyond that specified in response to Appeal Reason 2.

Discussion: The criteria forming the basis of the approved jurisdictional determination is discussed throughout this decision. As noted above, the second reason for appeal has merit and the AJD is being remanded to the district to address errors contained in the AR related to chemical characterizations of the Calabacillas Arroyo. As explained in the remainder of the decision, the district otherwise correctly applied the appropriate criteria forming the basis of the approved JD.

OVERALL CONCLUSION:

In discussing the significant nexus standard in the Rapanos memo, Justice Kennedy stated: "The required nexus must be assessed in terms of the statute's goals and purposes. Congress enacted the Clean Water Act (CWA) to 'restore and maintain the chemical, physical, and biological integrity of the Nation's waters' . . ." ⁶. Consistent with Justice Kennedy's instruction, EPA and the Corps will apply the significant nexus standard in a manner that restores and maintains any of these three attributes of traditional navigable waters. While the district did not clearly support all three of these attributes, they did clearly support that the Calabacillas Arroyo does provide more than a speculative or insubstantial effect on the physical and biological integrity of the Rio Grande River. Therefore, while the district's decision is being remanded so that a more detailed explanation and a well-supported conclusion regarding the chemical characteristics that the Calabacillas Arroyo provides to the Rio Grande River, they have sufficiently supported that a significant nexus (physical and biological) exists between the two.

For the reasons stated above, I find that the appellant's RFA has partial merit. This finding does not affect the district's jurisdictional determination since the district's decision is supported by the AR on other grounds. However, the AJD is being remanded for the district to provide a more precise basis for its conclusions regarding the chemical characteristics of the Calabacillas Arroyo. The AJD shall be reconsidered in accordance with the revised AR and reissued. 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 JD.

ORIGINAL SIGNED

Thomas J. Cavanaugh
Administrative Appeal Review Officer

⁶ Rapanos v. United States, 126 S. Ct. 2248 (2006).