

**ADMINISTRATIVE APPEAL DECISION
CLEAN WATER ACT
PATEY PROPERTY
WASATCH COUNTY, UTAH
SACRAMENTO DISTRICT
FILE NUMBER SPK-1999-50107**

DATE: May 17, 2013

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

Appellant: Kenneth Patey (Appellant)

District Representative: Hollis Jenks, U.S. Army Corps of Engineers, Sacramento District (District)

Authority: Clean Water Act (33 U.S.C. 1344)

Receipt of Request for Appeal: September 14, 2012

Appeal Meeting and Site Visit Date: November 15, 2012

Summary of Decision: This Clean Water Act (CWA) jurisdictional determination is remanded to the District for further evaluation and consideration of information provided by the Appellant. The District must further evaluate and consider its decision.

The District must document its evaluation of the effect of the dams, bypass structures, head gates, and other structures that direct and control the flow of water between the ponds and wetlands on the Patey Property and Snake Creek. In documenting the effects of these structures, the District must support its conclusions as to whether these structures effectively keep Snake Creek separate from the ponds and wetlands on the property, as asserted by the Appellant, and thus preclude the conclusion that there is a continuous surface connection between Snake Creek and the ponds and wetlands on the Patey Property, or whether a continuous surface connection remains in spite of these structures.

The District must also document its consideration of whether the ponds on the Patey Property were created by excavating and/or diking dry land or in previously existing waters of the United States. If, after evaluation, the District concludes that the ponds on the Property were excavated in uplands, it must document its consideration of whether there is a case-by-case basis for determining that the ponds on the Patey Property are waters of the United States.

Background Information: The Patey Property (Property) is an approximately 61.46-acre property, located along Snake Creek, on Pine Creek Road, in Wasatch County, Utah,

at Latitude 40.53 North, Longitude -111.49 West, within Section 27, Township 3 South, Range 4 East, Salt Lake Meridian.

For purposes of evaluation during the CWA jurisdictional determination, the District evaluated the site using the wetland map, which was the basis of the District's November 2, 2004, jurisdictional determination for the property; the 1987 Wetland Delineation Manual; the Code of Federal Regulations (CFR) definitions of jurisdictional waters; and supporting guidance documents.

On March 27, 2012, the Appellant's attorney submitted a request for a jurisdictional determination for the Property. The District's review included a field visit on May 15, 2012. On July 19, 2012, the District issued its CWA jurisdictional determination for the Property. The District concluded that the site contained 30.97 acres of waters of the United States, including wetlands, within CWA jurisdiction. The Appellant submitted a Request for Appeal (RFA) on September 14, 2012. The Appellant disagreed with the District's determination that the waters on the Property are jurisdictional and appealed that determination, citing the reasons for appeal addressed in this appeal decision.

Approved Jurisdictional Determination (AJD): The District completed one AJD Form for the waters on the Property. The AJD form covered Snake Creek, two ponds, and adjacent wetlands.

In Section I.C of the AJD, the District identified the Utah Lake as the nearest downstream Traditionally Navigable Water (TNW) and indicates that Snake Creek is the nearest waterway. Section II.B.1.a of the AJD indicates that the review area contains relatively permanent waters (RPWs) that flow directly or indirectly into TNWs, wetlands directly abutting RPWs that flow directly or indirectly into TNWs, and impoundments of jurisdictional waters. Section II.B.1.b indicates that there are 2200 linear feet of non-wetland waters (Snake Creek), 1.2 acres of ponds, and 29.4 acres of wetlands in the review area.

Section III.D.2 indicates that the conclusion that Snake Creek is a tributary of a TNW that flows perennially is supported by its identification as a perennial stream on USGS maps, by aerial photos, and observations of flow during four site visits at different times of the year. That section also indicates that Snake Creek flows into the Provo River near Deer Creek Reservoir (approximately 3.6 aerial miles from the site). The Provo River continues to Utah Lake (approximately 16 miles from Deer Creek Reservoir), a navigable in fact waterway.

Section III.D.4 indicates that the wetlands on the Property directly abut an RPW that flow directly or indirectly into TNWs and thus are jurisdictional as adjacent wetlands. That section documents that all of the wetlands within the site have a direct hydrological connection with Snake Creek. Wetland area 4, as identified on the 2003 wetland map, is connected to the second pond by a ditch that flows to the southeast into the wetland. This section concludes by indicating that it is unclear whether recent site work has severed this connection.

Section IV.B indicates that the two ponds on the sites are fed by hot springs and that the ponds have been in place prior to 1993 and are considered the normal circumstances. These ponds have control structures and outlets and flow through a series of smaller channels into Snake Creek, the RPW. Further, it is indicated that the wetlands abutting Snake Creek are bisected by channels that flow into the Provo River near Deer Creek Reservoir and into Utah Lake, a navigable in fact waterway.

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

INFORMATION RECEIVED AND ITS DISPOSAL DURING THE APPEAL

REVIEW: The administrative appeal was evaluated based on the District's AR, the Appellant's Request for Appeal, and discussions at the appeal meeting with the Appellant and the District.

REASON 1: The ponds, the bypass structure, dikes and dams for the two ponds are manmade structures and have been on the Property since before December 1966. There is no continuous surface connection between Snake Creek, the 2 ponds, and the 6.7 acres to the east of the 2 ponds, as Snake Creek is separated from the 2 ponds and the wetlands to the east by manmade dikes and dams. The 2 ponds are part of the Heber Valley Storm Water Management Plan, and are serviceable structures for sediment and erosion control within the Heber Valley, which include dikes and dams as part of their structures, which keeps Snake Creek separate from the 2 ponds and the property to the east of the 2 ponds.

FINDING: This reason for appeal has merit.

ACTION: The District must further evaluate and consider its decision. In its final decision, the District must document its evaluation of the effect of the dams, bypass structures, head gates, and other structures that direct and control the flow of water between the ponds and wetlands on the Property and Snake Creek. In documenting the effects of these structures, the District must support its conclusions as to whether these structures effectively keep Snake Creek separate from the ponds and wetlands on the Property, as asserted by the Appellant, and thus preclude the conclusion that there is a continuous surface connection between Snake Creek and the ponds and wetlands on the Property, or whether a continuous surface connection remains in spite of these structures.

DISCUSSION: In the RFA, the Appellant asserted that there is no continuous surface connection between Snake Creek, the 2 ponds, and the 6.7 acres to the east of the 2 ponds, as Snake Creek is separated from the 2 ponds and the wetlands to the east by manmade dikes and dams. The 2 ponds are part of the Heber Valley Storm Water Management Plan, and are serviceable structures for sediment and erosion control within the Heber Valley, which include dikes and dams as part of their structures, which keep Snake Creek separate from the 2 ponds and the property to the east of the 2 ponds. During the appeal meeting, the Appellant described the ponds as isolated structures with head gates that can be used to control the flow to and from Snake Creek to and from the two ponds, as well as the flow from the hot springs to the ponds. The Appellant asserted that flow to the ponds from both Snake Creek and the hot springs can be shut off using

these head gates. The Appellant stated that ditches connecting Snake Creek and the hot springs to the ponds were excavated in the 1940s and that work on the ponds was completed by 1948. The Appellant asserted that the ponds have been in continuous use ever since for fish culture, bathing, and agriculture, including providing water for livestock.

The December 2, 2008, “Revised Guidance on Clean Water Act Jurisdiction Following the Supreme Court Decision in *Rapanos v. U.S.* and *Carabell v. U.S.*” (Revised Rapanos Guidance) requires that Corps districts and EPA regions demonstrate and document in the record that a particular water either fits within a class, which it identifies as not requiring a significant nexus determination, or that the water has a significant nexus with a TNW.

The Revised Rapanos Guidance directs the agencies to assert jurisdiction over relatively permanent non-navigable tributaries of TNWs without a legal obligation to make a significant nexus finding. The Revised Rapanos Guidance also directs the agencies to 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 Rapanos Guidance directs the agencies to consider adjacent those wetlands where there is an unbroken surface or shallow sub-surface connection to jurisdictional waters. The Revised Rapanos Guidance further indicates that this hydrologic connection may be intermittent. Additionally, Corps regulations define "adjacent" as “bordering, contiguous, or neighboring.” 33 C.F.R. § 328.3(c).

The District concluded that the drainages on the Property are wetlands directly abutting a RPW. The District is not required by the Revised Rapanos Guidance to complete a significant nexus evaluation for wetlands that are directly abutting a perennial RPW. The Revised Rapanos Guidance also does not require the District to demonstrate that these wetlands have a significant nexus with a TNW.

While the District has described all of the waters on the Property as having a direct hydrologic connection to Snake Creek, the District did not consider the potential for the waters on the Property to be effectively isolated from Snake Creek by the dams, bypass structures, head gates, and other structures which the Appellant believes to have effectively isolated the ponds and wetlands from Snake Creek and precluded the conclusion that the ponds and wetlands on the Property have a continuous surface connection with a relatively permanent, non-navigable tributary. The District must, therefore, consider and document its consideration of the possibility that these structures effectively isolate waters on the Property from Snake Creek and preclude a determination that the pond and wetlands on the Property are waters of the United States.

REASON 2: There is substantial evidence that has been uncovered by the Pateys in current litigation with Hidden Springs LLC (Fourth District Court of Utah, Case 110500424) that there were multiple pipes and serviceable structures placed in the ponds and drainage ditches since 1966. Due to intentional or negligent behavior, the pipes, serviceable structures, and drainage ditches were not maintained and, at times, vandalized, which caused the two sediment control ponds to fail and discharge water to

the east of the 2 ponds. Manmade settlement ponds, ditches, pipes, and serviceable structures, which were created by excavating and/or diking dry land to collect and retain water for stock watering, irrigation, settling basins, or rice growing, are not within the jurisdiction of the Clean Water Act. Furthermore, the maintenance, repair, and reconstruction of such serviceable structures are not subject to regulation under the clean Water Act.

FINDING: This reason for appeal has merit.

ACTION: The District must evaluate and document its evaluation and conclusions as to whether the ponds on the Property were created by excavating and/or diking dry land and, therefore, fall into the category of waters generally considered not to be waters of the United States as described in the preamble of the 1986 regulations. The District must also document its consideration of whether the ponds on the Property were excavated in existing wetlands or other waters. Should the District conclude that the ponds were excavated in uplands, it must evaluate and document the evaluation of whether the ponds on the Property have been abandoned, or there is, otherwise, reason for a case-specific finding of jurisdiction as described in the 1986 preamble.

DISCUSSION: In the RFA, the Appellant asserted that the ponds on the Property fall into the category of manmade ponds created by excavating and/or diking dry land to collect and retain water for stock watering, irrigation, settling basins, or rice growing and, as such, are not within the jurisdiction of the Clean Water Act. Secondly, the Appellant asserted that that there were multiple pipes and structures in the ponds and drainage ditches, , the maintenance, repair, and reconstruction of which is not subject to regulation under the clean Water Act.

The preamble to the 1986 regulations (51 FR 41206, 41217) includes “artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing” as among those waters which the Corps does not generally consider to be “Waters of the United States.” However, the preamble also indicates that “the Corps reserves the right on a case-by-case basis to determine that a particular waterbody within these categories of waters is a water of the United States.” Further, “EPA also has the right to determine on a case-by-case basis if any of these waters are ‘waters of the United States.’”

While the District has described all of the waters on the Property as having a direct hydrologic connection to Snake Creek, the District did not document a consideration of whether the ponds on the Property were manmade ponds, created by excavating and/or diking dry land to collect and retain water for stock watering, irrigation, settling basins, or rice growing, as asserted by the Appellant. Therefore the District must document its consideration of whether the ponds on the Property were constructed in uplands or in previously existing waters of the United States. If, after evaluation, the District concludes that the ponds on the Property were excavated in uplands, it must document its consideration of whether there is a case-by-case basis for determining that the ponds on the Property are waters of the United States.

The appeal regulations at 33 CFR § 331.1, establish policies and procedures for the administrative appeal of approved jurisdictional determinations, permit applications denied with prejudice, and declined permits. There is no provision in the appeal regulations to appeal a determination by a District that a particular activity requires a permit before it can proceed. A decision that a particular activity is exempt from regulation, can be authorized to use an existing general permit, or must be evaluated using the standard permit process is at the District's discretion and is not subject to appeal. Therefore, the Appellant's assertion that the maintenance, repair, and reconstruction of the dams, bypass structures, head gates, and other structures are not subject to regulation under the Clean Water Act cannot be reviewed as part of this appeal.

REASON 3: The wetlands to the east of the 2 ponds are at a lower elevation than the 2 ponds, and such wetlands to the east of the 2 ponds have no significant effect on any navigable water downstream.

FINDING: This reason for appeal does not have merit.

ACTION: No action is required

DISCUSSION: As described above, in the Discussion for Reason 1, the District documented in the administrative record its conclusion that the wetlands on the Property directly abut an RPW that flows directly or indirectly into TNWs, and thus are jurisdictional as adjacent wetlands, which do not require a significant nexus determination. As the Revised Rapanos Guidance directs the Corps of Engineers to 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 District was not required to complete a significant nexus determination. Finally, there is nothing in Corps regulation or guidance that would lead the District to conclude that a directly-abutting adjacent wetland would not be jurisdictional as a result of a lower elevation, relative to nearby waterbodies. However, should the District conclude, following the analysis required in response to Reason 1, that waters on the Property have been effectively isolated by the dams, bypass structures, head gates, and other structures in those waters, a significant nexus analysis might then be required.

REASON 4: The Supreme Court has repudiated the expansive assertion of jurisdiction in cases such as this as found in *Rapanos v. United States*, 547 US 715 (2006).

FINDING: This reason for appeal does not have merit.

ACTION: No action is required.

DISCUSSION: As documented in the administrative record, the District followed the applicable statutes, regulations, and guidance in making its jurisdictional determination. Corps jurisdiction exists over waters of the United States (as defined by regulation), regardless of property ownership, where those waters are situated. Corps jurisdiction

does not grant or revoke property rights, although administration of the Clean Water Act and Rivers and Harbors Act of 1899 may incidentally affect the use of property. The appeal regulations do not specifically provide for appeals of whether District decisions are consistent with court decisions, including those of the Supreme Court. However, in properly applying regulations and applicable guidance, including the Revised Rapanos Guidance, the District has complied with requirements developed by Corps and EPA headquarters to comply with decisions of the Supreme Court. Therefore, this reason for appeal does not have merit.

CONCLUSION: I conclude the District must further evaluate and consider its decision.

The District must document its evaluation of the effect of the dams, bypass structures, head gates, and other structures that direct and control the flow of water between the ponds and wetlands on the Property and Snake Creek. In documenting the effects of these structures, the District must support its conclusions as to whether these structures effectively keep Snake Creek separate from the ponds and wetlands on the Property, as asserted by the Appellant, and thus preclude the conclusion that there is a continuous surface connection between Snake Creek and the ponds and wetlands on the Property, or whether a continuous surface connection remains in spite of these structures.

The District must also document its consideration of whether the ponds on the Property were created by excavating and/or diking dry land or in previously existing waters of the United States. If, after evaluation, the District concludes that the ponds on the Property were excavated in uplands, it must document its consideration of whether there is a case-by-case basis for determining that the ponds on the Property are waters of the United States.

The District's determination was not otherwise arbitrary, capricious or an abuse of discretion, and was not plainly contrary to applicable law or policy. This concludes the Administrative Appeal Process. The District shall, upon completion of these tasks, provide its final decision to the Division Engineer and Appellant.

ORIGINAL SIGNED

Thomas J. Cavanaugh
Administrative Appeal Review Officer