ADMINISTRATIVE APPEAL DECISION
CLEAN WATER ACT
GRAND VIEW TERRACE PROPERTY
SAN MATEO COUNTY, CALIFORNIA
SAN FRANCISCO DISTRICT
FILE NUMBER 2007-00560

DATE: 21 OCT 2009

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

Appellant: Leonard Beuth (Appellant)

District Representative: Paula Gill, Army Corps of Engineers, San Francisco District (District)

Authority: Clean Water Act (33 USC 1344)

Receipt of Request for Appeal: 28 August 2008

Appeal Meeting and Site Visit Date: April 9, 2009

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 its determination that the drainage, to which the wetlands on the property are adjacent, is a relatively permanent water (RPW) and whether a significant nexus determination is required for the wetlands. The District must document that its conclusion as to whether the drainage is an RPW has been evaluated under the "significant nexus standard".

Background Information: The Grand View Terrace property is an approximately 12-acre property, located south of the City of Half Moon Bay, San Mateo County, California. The property is located just north of the more developed downtown area, at the eastern terminus of Grand View Boulevard, approximately 0.25 miles northeast of its intersection with U.S. Highway 1, at the base of the foothills on the west side of the Santa Cruz Mountains. The site can be found on the Half Moon Bay U.S.G.S. 7.5" quadrangle, Section 20, Township 5 South , Range 5 West, and Latitude 37.47825695 North, Longitude -122.43558047 West.

The 12-acre property is split between 18 individual owners and is divided into 46 proposed residential lots. The streets accessing the parcels were rough graded and named in the 1960s and dedicated to the City when the subdivision map was approved. The City dug the drainage ditch that traverses the property in the 1960s and 1970s. The entire property is comprised of undeveloped residential lots. In the past, the City maintained the lots via mowing and discing until the City prohibited discing. The cessation of discing resulted in the development of more natural habitat on the site. Dense woody vegetation, predominantly willows (Salix lasiolepsis) has become established across much of the property. Absent maintenance of the excavated ditch and graded roadways by the City, seasonal wetlands have become established in the rough graded streets and wetland vegetation is dominant within the drainage ditch.

For purposes of evaluation during the CWA jurisdictional determination, the Appellant's consultant evaluated the site using the 1987 *Wetland Delineation Manual*, the Code of Federal Regulations (CFR) definitions of jurisdictional waters, and supporting guidance documents. In its June 12, 2007 submittal, the Appellant's consultant concluded that there are 1.25 acres of potentially jurisdictional waters within the 12 acre property.

The District reviewed the Appellant's June 12, 2007 proposed CWA jurisdictional determination map. The review included a field visit on August 1, 2007.

On June 16, 2008, the Appellant's consultant provided the District with its revised June, 10, 2008, revised delineation report, incorporating the District's requested changes, following the site visit. The June 10, 2008, submittal, concluded that there are 2.13 acres of potentially jurisdictional waters within the 12 acre property.

On July 21, 2008, the District issued its CWA jurisdictional determination for the Property. The District concluded that the site contained 2.05 acres of waters of the United States, including 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 1A: Based upon the findings in the report and investigation, there is no basis after Rapanos for the Corps of Engineers to assert jurisdiction over any part of the property.

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 (TNW) for the wetlands on the property.

DISCUSSION:

In the RFA, the Appellant asserted that, the phrase "water of the United States" includes only those relatively permanent, standing or continuously flowing bodies of water forming geographic features that are described in ordinary parlance as "streams", "oceans, rivers, [and] lakes" and does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall. The Appellant further asserted that Corps' expansive interpretation of that phrase is thus not "based on a permissible construction of the statute". Additionally the Appellant asserted that a wetland may not be considered "adjacent to" remote "waters of the United States" based on a mere hydrologic connection.

The Appellant indicated that there was no evidence of continuous or permanent water flow, the man-made ditches were dry evidencing cracked soil conditions from the lack of water, that there is no continuous surface connection to jurisdictional waters, the ditches are man-made and not natural or geographical features, and insists that there is no basis for asserting jurisdiction based on a "mere hydrologic connection" and that assertion of jurisdiction is unconstitutional, not authorized by either the statutes or the constitution of the United States.

The District's July 21, 2008, Approved Jurisdictional Determination Form indicates, in Section III.D.2, that drainage is a RPW, with continuous flow seasonally that flows directly or indirectly into a TNW. The District's overall rationale for this conclusion is that "the overall California Climate is characterized as Mediterranean, with the majority of precipitation occurring as rain in the winter months, and generally mild temperatures year round". The District's conclusion is that, given the limited amount of rainfall restricted to winter months, presence of an Ordinary High Water Mark (OHWM) is indicative of continuous seasonal flow within the channel. The form indicates that data supporting the conclusion of seasonality is found in Section III.B.

Subsequently, in Section III D 4, the District indicated that the wetlands on the property directly abut an RPW that flows seasonally and thus are jurisdictional as adjacent wetlands. The District supports this conclusion by indicating that, "the seasonal wetlands 1, 2, 3, and 4 all directly abut the larger arroyo willow swale, which is directly connected to the drainage ditch at the northwestern terminus. Seasonal wetlands 5 and 6 are both directly connected to drainage #7. All of these wetlands are directly connected physically and hydrologically (i.e., there is no upland between the wetland and the drainage ditch).

In section III.B, the District provides information on the size of the watershed, drainage area, and average annual rainfall. Further, it indicates that the drainage to which wetlands on the site abut flow directly into the TNW. It is also indicated that the ditch

flows off the site at the southwest corner. It continues to traverse the southern edge of the existing residential development immediately adjacent to the site. The ditch eventually drains through a culvert under Highway 1 and into what appears to have been the historic natural channel to the northwest of the site. Part "c" of that section indicates that there are 11-20 flow events per year, supporting seasonal flow. The District further describes the flow regime by indicating that, "this drainage traps overland sheet flow, precipitation, and storm water." and that, "this drainage likely flows consistently during the winter wet months". The District did not include data or indications of observations in support of this conclusion.

The June 5, 2007, "Joint U.S. Environmental Protection Agency and Army Corps of Engineers Guidance Regarding Clean Water Act Jurisdiction after Rapanos" (Rapanos Guidance), 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 and does not set a standard.

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), 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 Rapanos 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 Rapanos 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).

The Revised Rapanos Guidance further indicates that the regulations define "adjacent" as follows: "The term adjacent means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands'". Under this definition, the agencies consider wetlands adjacent if one of following three criteria is satisfied. First, there is an unbroken surface or shallow sub-surface connection to jurisdictional waters. This hydrologic connection may be intermittent. Second, they are physically separated

from jurisdictional waters by man-made dikes or barriers, natural river berms, beach dunes, and the like. Or third, their proximity to a jurisdictional water is reasonably close, supporting the science-based inference that such wetlands have an ecological interconnection with jurisdictional waters. Due to the scientific basis for this inference, determining whether a wetland is reasonably close to a jurisdictional water does not generally require a case specific demonstration of an ecologic interconnection. In the case of a jurisdictional water and a reasonably close wetland, such implied ecological interconnectivity is neither speculative nor insubstantial. For example, species, such as amphibians or anadramous and catadramous fish, move between such waters for spawning and their life stage requirements. Migratory species, however, shall not be used to support an ecologic interconnection. In assessing whether a wetland is reasonably close to a jurisdictional water, the proximity of the wetland (including all parts of a single wetland that has been divided by road crossings, ditches, berms, etc.) in question will be evaluated and shall not be evaluated together with other wetlands in the area.

The Revised Rapanos Guidance further states that the agencies will assert jurisdiction over the following types of waters when they have a significant nexus with a traditional navigable water: (1) non-navigable tributaries that are not relatively permanent, (2) wetlands adjacent to non-navigable tributaries that are not relatively permanent, and (3) wetlands adjacent to, but not directly abutting, a relatively permanent tributary (e. a., separated from it by uplands, a berm, dike or similar feature).

Additionally the Revised Rapanos Guidance states that, in considering how to apply the significant nexus standard, the agencies have focused on the integral relationship between the ecological characteristics of tributaries and those of their adjacent wetlands, which determines in part their contribution to restoring and maintaining the chemical, physical and biological integrity of the Nation's traditional navigable waters. The ecological relationship between tributaries and their adjacent wetlands is well documented in the scientific literature and reflects their physical proximity as well as shared hydrological and biological characteristics. The flow parameters and ecological functions that Justice Kennedy describes as most relevant to an evaluation of significant nexus result from the ecological inter-relationship between tributaries and their adjacent wetlands. For example, the duration, frequency, and volume of flow in a tributary, and subsequently the flow in downstream navigable waters, is directly affected by the presence of adjacent wetlands that hold floodwaters, intercept sheet flow from uplands, and then release waters to tributaries in a more even and constant manner. Wetlands may also help to maintain more consistent water temperature in tributaries, which is important for some aquatic species. Adjacent wetlands trap and hold pollutants that may otherwise reach tributaries (and downstream navigable waters) including sediments, chemicals, and other pollutants.

The Revised Rapanos Guidance also indicates that Corps districts and EPA regions will demonstrate and document in the record that a particular water either fits within a class identified above as not requiring a significant nexus determination, or that the water has a significant nexus with a traditional navigable water. As a matter of policy, Corps and

EPA regions will include in the record any available information that documents the existence of a significant nexus between a relatively permanent tributary that is not perennial (and its adjacent wetlands if any) and a traditional navigable water, even though a significant nexus finding is not required as a matter of law.

In response to questions at the appeal conference, the Appellant indicated that they believed that the wetlands on the property are not jurisdictional because they are drained by a non-RPW and there is no significant nexus between the on-site wetlands and a TNW. Additionally, the entire project site consists of land disturbed as part of a residential development that began decades ago. The Appellant asserted that all on-site wetlands features that have been claimed as waters of the United States are artificial, man induced, and thereby should be evaluated with the history of the property weighing heavy in the decision as to whether or not any on-site feature meets the definition of waters of the United States. The Appellant asserted that, prior to the 1960s, the property consisted primarily, if not entirely, of upland habitat. The Appellant further asserted that wetlands on the property developed after lots and streets were rough graded on the property and a ditch was constructed to drain the property. The Appellant indicated that the property had been maintained through mowing and discing until the City prohibited discing and more natural habitat developed. They further asserted that failure by the City to maintain the graded streets and drainage ditch contributed to the development of this habitat. The Appellant indicated that they believe the aquatic features on-site are ephemeral and do not carry water throughout the entire rainy season. The Appellant indicated that on April 9, 2009, two days after a rain storm, that all onsite features, including the drainage ditch were completely dry. The Appellant also indicated that they did not believe that there is actual data supporting a determination that the drainage and wetlands on the property have a significant nexus with the nearest downstream TNW. The appellant asserts that the biological functions the District references are only minimally accomplished by features on the property and that the notion that the man-made wetlands found on the property measurably affect water quality within the Pacific Ocean, or even locally, is highly questionable.

In response to questions at the appeal conference, the District indicated that the regulations define an OHWM as a line on the shore established by fluctuations of water and indicated by such characteristics as a clear, natural line impressed on the bank or destruction of terrestrial vegetation. Given the overall California climate as Mediterranean, with the majority of precipitation occurring as rain in the winter months, the District believes that the presence of an OHWM is indicative of continuous seasonal flow within the channel for purposes of significant nexus determination.

Additionally the District indicated that vegetation documented in the channel by the Appellant's consultant is indicative of long duration hydrology. The District indicated that they believe the administrative record documents that there are many biological, chemical, and physical functions being performed within wetlands and drainage ditches on the property, including biogeochemical cycling, flood desynchronization, intercepting surface runoff and removing or retaining inorganic nutrients, providing diverse habitat types, processing organic wastes, reducing suspended sediments delivered to downstream

waterways, and ground water replenishment. The District asserted that, given water quality functions of the wetlands and the long duration flow in the ditch, that it is reasonable to conclude that there are significant impacts on downstream water quality, and therefore a significant nexus. The District asserted that this is especially true since Pilarcitos Creek has impaired water quality and provides habitat for federally listed species.

The District has indicated that "the overall California Climate is characterized as Mediterranean, with the majority of precipitation occurring as rain in the winter months, and generally mild temperatures year round". The District has concluded that the drainage on the property is a seasonal RPW based on its rationale that, given the limited amount of rainfall restricted to winter months, presence of an OHWM is indicative of continuous seasonal flow. The District has not, however, included data or records of observations in the administrative record that would support either the conclusion that presence of an OHWM is indicative of continuous seasonal flow or that the drainage on the property is a seasonal RPW. Additionally, while the District has summarized a number of biological, chemical, and physical functions that are likely being performed by wetlands on the property, the District, indicates, in the same paragraph that no specific studies have been completed on the project site to determine the magnitude at which the above functions are being performed. The District also indicates that the seasonal wetland on site likely functions to retain stormwater from the residential area and is therefore likely important to this watershed. The District further indicates that, for these reasons, it is likely that value is provided for the larger watershed. The District has not included data which support this conclusion. The District must, therefore, reconsider its decision that the drainage on the property is a seasonal RPW. The District's final decision must be based on observations or other data which support its conclusion. In order to comply with policy requirements of the Rapanos Guidance and Revised Rapanos Guidance, the District must complete a significant nexus evaluation for that drainage. If the District's final conclusion is that the drainage is a non-RPW, the District is also required to complete a significant nexus evaluation for the adjacent wetlands on the property, which abut the drainage. A separate significant nexus evaluation is not required for those adjacent wetlands if, after further evaluation, the District's final decision is that the drainage is a seasonal RPW.

REASON 2: Under California law, the owners have standing for the Corps to determine the lack of jurisdiction concerning streets dedicated by map to the City of Half Moon Bay.

REASON 3: The Denial of any beneficial use of by any governmental agency of any legal parcel is conditioned upon the agency's payment of just compensation for the property so restricted.

FINDING: Reasons 2 and 3 for appeal do not have merit.

ACTION: No action is required.

DISCUSSION: A determination by the District that there are waters of the United States on the property subject to jurisdiction is not a denial of property or access rights or a taking of those property rights. Should the District continue to assert jurisdiction over waters on the property following its reconsideration, the Appellant could then apply for a Department of the Army permit to proceed with any proposed project on the property. To date, the appellant has not applied for nor been denied a permit for his project.

INFORMATION RECEIVED AND ITS DISPOSAL 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 written responses to questions provided with the agenda and discussed at the appeal conference from the Appellant and the District. The District provided a memorandum for record, dated September 19, 2008, which was intended to clarify part B of the District's July 21, 2008, "Approved Jurisdictional Determination Form". The memorandum also included a "supplementary significant-nexus finding", which was not considered in the review of this appeal.

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". 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. 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.

for Janice Kemble Donahue, COL, EN, Deputy Commander

Scott F. "Rock" Donahue, P.E.
Colonel (P), Corps of Engineers
Commanding