

**ADMINISTRATIVE APPEAL DECISION
CLEAN WATER ACT
SOUTHERN PARKWAY, SEGMENT 3A-2 PROPERTY
WASHINGTON COUNTY, UTAH SACRAMENTO DISTRICT
FILE NUMBER SPK-2000-50443**

DATE: April 14, 2011

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

Appellant: Brandon Weston – Utah Department of Transportation (UDOT), Central Environmental (Appellant)

District Representative: Karen Clementsen, Regulatory Project Manager, U.S. Army Corps of Engineers, Sacramento District (District)

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

Receipt of Request for Appeal: December 29, 2010

Appeal Meeting and Site Visit Date: February 22, 2011

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. In its final decision, the District must evaluate whether there is a significant nexus between the non-relatively permanent waters (RPW) on the property and the nearest downstream traditional navigable water (TNW). In doing so, the District must document its consideration of the distance between the non-RPWs on the property and the nearest downstream TNW, as opposed to the distance to the nearest downstream interstate water, on which it previously relied. The District must document its consideration of information provided by the Appellant and other data and observations that support its conclusions as required by 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) in its analysis of whether the non-RPWs on the property have more than a speculative or insubstantial effect on the chemical, physical, and or biological integrity of the nearest downstream TNW.

Background Information: The Southern Parkway, Segment 3A-2 property is an approximately 245-acre site, located near Fort Pierce Wash, in Sections 12 and 13, Township 43 South, Range 15 West, S.L.B.& M., on the Washington Dome U.S.G.S.

7.5" quadrangle, St. George, Washington County, Utah, at Latitude 37.0486 North, Longitude -113.4853 West.

For purposes of evaluating CWA jurisdictional determination, the Appellant's consultant mapped ephemeral washes using the Code of Federal Regulations (CFR) definitions of jurisdictional waters and supporting guidance documents. In its May 21, 2010 submittal, the Appellant's consultant concluded that one ephemeral wash and its associated tributaries were recorded as potentially jurisdictional. The District's review of the Appellant's May 21, 2010 submittal included a field visit on September 2, 2010.

On September 29, 2010, the Appellant's consultant provided the District with its September 27, 2010 "Delineation of Waters of the U.S., Southern Parkway – Segment 3A", which incorporated the District's requested changes, following the site visit. In its September 29, 2010 submittal, the Appellant's consultant concluded that none of the ephemeral washes mapped within the approximately 245 acre site should be considered jurisdictional.

On October 29, 2010, the District issued its CWA jurisdictional determination for the Property. The District concluded that the approximately 2954 linear foot drainage identified as "M", and the 1548 linear foot drainage identified as "N", are waters of the United States subject to CWA jurisdiction. The Appellant disagreed and appealed, citing the reasons for appeal addressed in this appeal decision.

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 (RFA), and discussions at the appeal meeting and site visit with the Appellant and the District.

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

REASON: The Sacramento District's decision that Washes M and N are jurisdictional is not supported by the information contained in the September 27, 2010, delineation report submitted for UDOT by Horrock Engineers, nor by the information contained in the approved jurisdictional determination (AJD) Form used by the District.

FINDING: This reason for appeal has merit.

ACTION: The District must further evaluate and consider its decision. In its final decision, the District must evaluate whether there is a significant nexus between the non-RPWs on the property and the nearest downstream TNW. In doing so, the District must document its consideration of the distance between the non-RPWs on the property and the nearest downstream TNW, as opposed to the distance to the nearest downstream interstate water on which it previously relied. As required by the Revised Rapanos Guidance, the District must document its consideration of information provided by the Appellant and other data and observations that support its conclusions. It must analyze whether the non-RPWs on the property have more than a speculative or insubstantial

effect on the chemical, physical, and or biological integrity of the nearest downstream TNW.

DISCUSSION: In the RFA, the Appellant asserted that the District's conclusions as entered on the AJD form are not supported by the administrative record.

The Appellant asserted that the District based its conclusion on a nexus between Washes M and N and the Virgin River, a non-navigable interstate river. The Appellant asserted that the Rapanos decision requires demonstration of that significant nexus to a TNW. The Appellant further asserted that it is not sufficient for the District to base a jurisdictional determination on an alleged significant nexus between an ephemeral, non-navigable wash and an interstate non-navigable river. The Appellant asserted that the District must show a significant nexus to a TNW, and since it did not do so, it has not complied with the Rapanos decision or with the Revised Rapanos Guidance on application of the significant nexus test.

The Appellant stated that the District concluded that sediment from Washes M and N could reach the nearest interstate water, the Virgin River. The Appellant asserted that the District provided no explanation of whether and how the nexus it invoked (sediment reaching the Virgin River) met a threshold of significance. The Appellant asserted that not all transport or deposition of sediment would be significant. The Appellant indicated that the Corps' post-Rapanos guidance, relying on the concurring opinion in Rapanos v. U.S., 126 S. Ct. 2208 (2006) cites that a significant nexus must be more than speculative or insubstantial. The Appellant asserted that the District is obligated to explain how a theoretically possible though miniscule quantity of sediment could be significant or provide a significant nexus to the chemical condition of a TNW.

The Appellant asserted that the information it submitted shows that sediment from Washes M and N could not reach the nearest TNW. The Appellant indicated Washes M and N comprise of 0.03% of the Fort Pierce Wash watershed and 0.0003% of the Lake Mead watershed. The Appellant further stated that, based on the District's estimate that there are two to five flow events in the review area per year, it is unlikely that Washes M and N generate enough flow to reach the Fort Pierce Wash and transport sediment that could have more than a speculative or insubstantial effect on the chemical, physical, and or biological integrity of Lake Mead.

The Appellant asserted that, to the extent that the significant nexus test considered sediment, the District must also consider whether the sediment will settle or leach before reaching a TNW. The Appellant contended that the District did not consider, relative to establishing jurisdiction, the fact that, from the pipe outlet, there are approximately 87 river miles for sediments to settle out before reaching Lake Mead, the nearest TNW. That is, such Wash M or N sediment might reach the Fort Pearce Wash, but may not reach Lake Mead.

The Appellant indicated that the District was presented information on other ephemeral washes (Washes A-L and O-Q) in Segment 3.A of the Project, and concluded that those

washes were non-jurisdictional. The Appellant asserted that there is no meaningful difference in character, including the ability to transport sediment (the only grounds used by the Corps for jurisdiction), between Washes M and N and the washes which the District determined were non-jurisdictional.

The District completed two AJD Forms for the waters on the property. One was done for washes K, L, O, P, and Q. The second was done for washes A through J, M and N (second AJD form).

In Section III.B.1(ii) of the second AJD form, the District indicated that Wash M flows into Wash N, which flows to the Warner Draw Disposal System. The AJD form indicates that the Warner Draw Disposal System directs storm water from the Stucki, Warner Valley, and Gypsum Debris Basins into approximately 4 miles of underground piping which out flows to the St. George/Washington Canal. The AJD form further indicates that the canal flows approximately 2200 feet before entering the Fort Pierce Wash (an intermittent, intrastate RPW). The District concluded that, at about 84 miles downstream from the Fort Pearce Wash/Virgin River Confluence, surface flows enter Lake Mead (TNW, Section 10 RHA).

In Section III.B.1(iii) of the second AJD form, the District indicated that when water is present in Wash M and N, it carries a significant sediment load to the St. George /Washington Canal and the Fort Pearce Wash (intermittent intrastate RPW).

In Section IV.B (penultimate and last paragraph) of the second AJD form, the District stated that Wash M and its associated tributaries originate on the Warner Ridge and are primarily south of Warner Valley Road. The District further indicated that Wash M crosses below the road in a culvert prior to joining Wash N, the outflow from Warner Valley Debris Basin, and that as it travels west other smaller washes converge into Wash N. In the second AJD form the District stated that, prior to reaching Washington Fields Road, Wash N flows into a 24" concrete pipe which is part of the Warner Draw Disposal System. The District stated that hydraulic analysis shows that 12.7 cfs of water flow from Wash N to the Warner Draw Disposal System during a 2-year, 24-hour storm event. The District indicated that the flows are contained for approximately 4 miles in the Warner Draw Disposal System piping, which outflows to the St. George/Washington Canal. The District further indicated that this canal flows approximately 2,200 feet before entering Fort Pearce Wash, and that between Wash N and the Fort Pearce Wash infiltration and evaporation of surface flows are minimal. The District thereby concluded that sediment from Wash M and N have a significant effect on the chemical, physical, and biological integrity of St George/Washington Canal, Fort Pearce Wash (intermittent intrastate RPW), the Virgin River (a perennial interstate RPW), and Lake Mead (TNW, Section 10 RHA).

The District, in the second AJD form, concluded that Wash M and N are jurisdictional because they are intrastate, non-navigable waters that have a significant nexus to St George/Washington Canal, Fort Pearce Wash (an intermittent intrastate RPW), the Virgin River (a perennial interstate RPW), or Lake Mead (TNW, Section 10 RHA).

In response to questions at the appeal conference, the Appellant indicated that the District had not included information in the administrative record to support its conclusion that the Fort Pearce Wash is an RPW. The Appellant asserted that the Revised Rapanos Guidance requires an analysis of the effects on the nearest downstream TNW. The Appellant asserted that the District did not include information in the administrative record to support its conclusions relative to the movement of sediment. Further, the Appellant stated that the administrative record did not indicate that the District considered the potential for sediments to settle or leach along the 87 miles between the site and Lake Mead.

In response to questions asked at the appeal conference, the District indicated that Washes M and N are non-RPWs. The District stated that these non-RPWs are jurisdictional, based on the District's determination that Washes M and N have a significant nexus to the Virgin River, an interstate water. That determination was based on the ability of sediment to travel from Washes M and N during the 2-year, 24-hour storm event through a pipe to a ditch, then to the Fort Pearce Wash, which the District has characterized as an RPW, and then to the Virgin River, an interstate water. The District indicated that the nearest downstream TNW is Lake Mead. The District indicated that the decision to use a significant nexus between Washes M and N and the nearest downstream interstate water was based on an email from Corps headquarters, provided in response to questions on a different project, which indicated that jurisdiction over interstate waters had not been affected by the Rapanos decision or by subsequent guidance, and that interstate waters could be used in the same way as a TNW to reach the conclusion that an upstream water is jurisdictional, based on a significant nexus between it and an interstate water. That email was not included in or referenced in the administrative record, nor was it subsequently provided.

The 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 further states that the agencies will assert jurisdiction over the following types of waters when they have a significant nexus with a TNW: (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.g., separated from it by uplands, a berm, dike or similar feature).

The Revised Rapanos Guidance requires that, in considering how to apply the significant nexus standard, the agencies must focus 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 TNWs. The ecological relationship between tributaries and their adjacent wetlands is well documented in 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 indicates that ephemeral waters, in the arid West in particular, are jurisdictional if they are tributaries and have a significant nexus to a downstream TNW. For example, in some cases these ephemeral tributaries may serve as a transitional area between the upland environment and the TNWs. During and following precipitation events, ephemeral tributaries collect and transport water (and sometimes sediment) from the upper reaches of the landscape downstream to the TNWs. These ephemeral tributaries may provide habitat for wildlife and aquatic organisms in downstream TNWs. These biological and physical processes may further support nutrient cycling, sediment retention and transport, pollutant trapping and filtration, and improvement of water quality, functions that may significantly affect the chemical, physical, and biological integrity of downstream TNWs.

The District concluded that the drainages on the property are non-RPWs. The District is required by the Revised Rapanos Guidance to complete a significant nexus evaluation for non-RPWs. The District is also required by the Revised Rapanos Guidance to demonstrate that these non-RPWs have a significant nexus with a TNW. There is no provision in the Revised Rapanos Guidance or in other current regulation, policy, or guidance that would support the District's conclusion that non-RPWs would be jurisdictional based on a determination that the non-RPWs have a significant nexus with the nearest downstream interstate water. Finally, while the District has focused on the transport of sediment from the non-RPWs on the property, the Revised Rapanos Guidance suggests the significant nexus evaluation should consider not just the degree to which waters on the property function in transporting sediment to the nearest downstream TNW, but the degree to which biological and physical processes support nutrient cycling, sediment retention, pollutant trapping and filtration, and improvement of water quality, as these functions may significantly affect the chemical, physical, and biological integrity of downstream TNWs.

CONCLUSION: The District must, therefore, further evaluate and consider its decision. In its final decision, the District must evaluate whether a significant nexus exists between the non-RPWs on the property and the nearest downstream TNW. As required by the Revised Rapanos Guidance, the District must document its consideration of information provided by the Appellant and other data and observations that support its conclusions. The District must analyze whether the non-RPWs on the property have more than a

speculative or insubstantial effect on the chemical, physical, and/or biological integrity of the nearest downstream TNW. The District's determination was not otherwise arbitrary, capricious or an abuse of discretion. This concludes the administrative appeal process. The District shall complete these tasks and should provide its final decision to the Division Engineer and Appellant within 60 days of the date of this decision.

A handwritten signature in black ink, appearing to read 'Thomas J. Cavanaugh', written in a cursive style.

Thomas J. Cavanaugh
Administrative Appeal Review Officer