

**ADMINISTRATIVE APPEAL DECISION
CLEAN WATER ACT
SPANISH FORK-SPRINGVILLE AIRPORT PROPERTY
UTAH COUNTY, UTAH
SACRAMENTO DISTRICT
FILE NUMBER SPK-2005-50437**

DATE: 6 AUG 2009

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

Appellant: Cris Child, Airport Manager

District Representative: Tim Whitman, Army Corps of Engineers, Sacramento District (District)

Authority: Clean Water Act (33 USC 1344)

Receipt of Request for Appeal: 18 December 2008

Appeal Meeting and Site Visit Date: 30 April 2009

Summary of Decision: The District's decision was based on sufficient evidence in the administrative record from aerial photographs, geographic information, and maps. The District's decision was further supported by the District's significant nexus analysis on the data sheet for wetland 6, which supported its October 21, 2008 jurisdictional determination. The District's determination that the 1.31 acre portion of wetland 6, west of marker 13, is jurisdictional as a wetland adjacent to a Relatively Permanent Water (RPW) and subject to Corps regulation as a water of the United States was reasonable. The District's decision was consistent with the Corps current regulations and policies. The appeal does not have merit.

Background Information: The Spanish Fork-Springville Airport is an approximate 350 acre site, located in Sections 1, 2, 11, and 12, Township 8 South, Range 2 East, SLB&M, in the City of Spanish Fork, Utah County, Utah, Latitude 40.1437 North, Longitude - 111.6636 West.

For purposes of evaluation during the Clean Water Act (CWA) jurisdictional determination, the Appellant's consultant delineated the site using the 1987 *Wetland Delineation Manual* (1987 WDM).

On March 25, 2008, the Appellant's consultant provided a delineation report to the District and requested a site visit. On June 20, 2008, following the requested site visit, the Appellant's consultant submitted a revised delineation report and requested a jurisdictional determination from the District.

On June 20, 2008, the Appellant, separately, emailed the District elevation readings with a letter that asserted that in the 1.31 acre portion of wetland 6, west of marker 13, water collects at a low point and does not flow out, but simply evaporates.

Following a site visit, the District verified a modified delineation on October 21, 2008, and concluded that there were 11.602 acres of waters of the United States on the property. Additionally the letter indicated that two other wetland features, totaling 2.231 acres, were not jurisdictional, as they were isolated, intrastate waters with no apparent interstate or foreign commerce connections.

The Appellant disagreed with the determination that the 1.31 acre portion of wetland 6, west of marker 13, was subject to CWA jurisdiction 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 1.31 acre portion of wetland 6, west of marker 13, is not jurisdictional since it is isolated and does not have a significant nexus to a Traditional Navigable Waterway (TNW).

FINDING: The appeal does not have merit.

ACTION: No action is required.

DISCUSSION: According to the District's data sheet, the District determined that the wetlands were adjacent, but did not directly abut an RPW. Wetland 6 and wetland 7 are separated from the RPW by an upland berm. The District concluded that the approximately 20 foot wide berm was formed by material excavated from the ditches. At wetland 6, the berm acts as a dam, ponding storm water runoff. The District concluded that wetland 6 is a wetland that acts to reduce the amount of pollution that is coming from the airport runway and taxiway and attenuate flood flows to Dry Creek. Additionally, wetland 6, in combination with similarly situated wetlands, would attenuate flooding and potential downstream damage by reducing the force and intensity of potential flooding through the retention of flood waters, which would otherwise immediately enter the RPW and, ultimately, the TNW. The District's data sheet for wetlands 6 through 8 (pages 16 to 23 of the administrative record) further describes the importance of downstream wetlands protected by these functions as providing habitat for a variety of wildlife.

In response to questions at the appeal conference, the District indicated that during its May 22, 2008 site visit, water was flowing from the 1.31 acre portion of wetland 6, west of marker 13 to lower portions of wetland 6. The Appellant indicated that its elevation data for wetland 6 was developed after the May 22, 2008 site visit and that they believed that there was not flow from the upper to lower portion of wetland 6. The District indicated that the wetlands had a significant nexus, since they prevented pollutants from entering the RPW and ultimately the TNW and that additionally wetland 6 attenuates flood flows to the RPW and TNW. The Appellant indicated that they did not believe the 1.31 acre portion of wetland 6, west of marker 13, had a significant nexus to the TNW, as water in that portion of the wetland just sits and does not flow.

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 December 2, 2008 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 maybe 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 anadromous and catadromous 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 December 2, 2008 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 December 2, 2008 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 District's decision was consistent with the Corps current regulations and policies. Wetland 6 is separated from a jurisdictional RPW only by a man made berm. The proximity of wetland 6 to the jurisdictional RPW is reasonably close, which, according to the revised December 2, 2008 guidance supports the science-based inference that the wetland has an ecological interconnection with jurisdictional waters and is adjacent to the RPW. The revised December 2, 2008 guidance further states that the agencies will assert jurisdiction over wetlands adjacent to, but not directly abutting, a relatively permanent tributary. The District's significant nexus evaluation concludes that wetland 6 traps and holds pollutants that may otherwise reach the jurisdictional RPW and the downstream TNW. Evidence in the administrative record from aerial photographs, geographic information, and maps supports the District's conclusion that wetland 6 is jurisdictional as a wetland adjacent to an RPW and subject to Corps regulation as a water of the United States. The 1.31 acre portion of wetland 6, west of marker 13, is mapped as being contiguous with the lower portion of wetland 6. There is nothing in regulation or current guidance that would suggest that the presence of a high spot in center of a wetland, with areas of ponding to either side could lead to a conclusion that one portion of wetland 6 would be jurisdictional, while another would not.

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, and responses from the Appellant and the District to questions provided with the agenda and discussed at the appeal conference. The Appellant provided graphical depictions of the drainage ditch between the area the area in question and the roadside ditch at the appeal conference. This was not new information, but simply clarified and illustrated the assertions made by the Appellant prior to the District's jurisdictional determination.

CONCLUSION: I conclude that the District's decision was based on sufficient evidence in the administrative record from aerial photographs, geographic information, and maps and was supported by the District's significant nexus analysis on the data sheet for wetland 6, which supported its October 21, 2008 jurisdictional determination. The District's determination that the 1.31 acre portion of wetland 6, west of marker 13, is jurisdictional as a wetland adjacent to an RPW and subject to Corps regulation as a water of the United States was reasonable. The District's decision was consistent with the Corps current regulations and policies. The appeal does not have merit.

for Janice A. Donahue, COL, EN, Deputy Commander
Scott F. "Rock" Donahue, P.E.
Colonel, Corps of Engineers
Commanding