

**ADMINISTRATIVE APPEAL DECISION
CLEAN WATER ACT
STRAIT PROPERTY
SUMMIT COUNTY, UTAH
SACRAMENTO DISTRICT
FILE NUMBER 200450167**

DATE: 15 JUL 2009

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

Appellant: Kevin Strait (Appellant)

District Representative: Jason Gipson/Richard Gebhart, Army Corps of Engineers, Sacramento District (District)

Authority: Clean Water Act (33 USC 1344 et seq.)

Receipt of Request for Appeal: 02 November 2008

Appeal Meeting and Site Visit Date: 29 April 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 document its determination that the drainage to which the Wetlands on the Property are adjacent is a perennial Relatively Permanent Water (RPW). If the District concludes that the drainage is either a seasonal RPW or non-RPW, document that the drainage has been evaluated under the "significant nexus standard". The District must further document its conclusion that there is a hydrologic connection between the wetlands on the property and the tributary on the opposite side of 300 West. The District must, once it has reevaluated its determination that the drainage to which the wetlands on the property are adjacent is a perennial RPW, 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. Finally, the District must evaluate the extent of wetlands on the property and determine whether wetland boundaries on the property have changed since its June 2, 2004, jurisdictional determination.

Background Information: The Property is an approximate 4.65 acre site, located in Snyderville, Summit County, Utah. The Property is located southeast of the intersection of Interstate 80 and Olympic Parkway, in Section 29, Township 1 South, Range 4 East,

SLB&M, Latitude .70964 North, Longitude 111.515611 West. The topography of the site is relatively flat. The property is located near a number of private residences on large rural lots.

For purposes of evaluation during the CWA jurisdictional determination, the prior property owner's consultant delineated the site using the 1987 *Wetland Delineation Manual* (1987 WDM). In May 2004, that consultant had concluded that there are 0.95 acres of waters on the Property. The District verified that delineation on June 2, 2004, and concluded that there were 0.95 acres of waters of the United States on the property.

On June 11, 2007, the Appellant provided the District with a letter that indicated that "in light of the recent Supreme Court decisions in the case of *Rapanos v. United States & Carabell v. United States*", and further taking into consideration the June 5, 2007 memorandum of guidance issued jointly by the EPA's Assistant Administrator for Water and the Assistant Secretary of the Army" he wished to request a reexamination of the wetland delineation to "ascertain whether they now fall outside the Clean Water Act's jurisdiction, as espoused by the plurality's "surface connection" and Justice Kennedy's "significant nexus" standard."

On September 30, 2008, the District issued its CWA jurisdictional determination for the Property. The District again concluded that the site contained 0.95 acres of wetlands within CWA jurisdiction and re-verified the May 2004 delineation. 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 1: The District was required to conduct a significant nexus analysis and document that there is a significant nexus to the nearest Traditionally Navigable Water (TNW) prior to asserting jurisdiction over wetlands on the property.

FINDING: This reason for appeal has merit.

ACTION: The District must further evaluate wetlands on the property and the tributary to which it has determined them to be adjacent. If, as a result of that evaluation, the District concludes that a significant nexus determination is required, it must complete and document any required significant nexus evaluation.

DISCUSSION:

The Appellant has asserted that wetlands on the property fail to meet the plurality's test of "a continuous surface connection to a traditionally navigable water or relatively permanent tributary" and that "regulatory jurisdiction under the CWA by the Army Corps would clearly require Justice Kennedy's "significant nexus determination".

During the appeal conference, the Appellant indicated that there was no data to support the determination that the tributary was an RPW. Additionally, the Appellant indicated that since there were three separate wetlands delineated on the property, the District was obligated to conduct a separate significant nexus determination for each of the three wetlands. The Appellant indicated that the two smaller wetlands do not abut the tributary.

The District indicated, at the appeal conference, that observation of flowing water in the tributary in August 2008 lead them to presume that the tributary was perennial. The District indicated that wetlands, which the Appellant suggested did not abut the tributary, were connected to larger wetlands offsite and were not isolated as the Appellant suggested.

In the data sheet, supporting its September 30, 2008 verification letter, the District indicated that the review area contained RPWs that flow directly into TNWs and wetlands directly abutting such RPWs. The data sheet further states that direct observation shows that the tributary onsite is perennial and that the high ground water table continually provides incremental flows. In its September 30, 2008, jurisdictional determination verification letter the District concluded that the 0.95 acres of "waters are regulated under Section 404 of the Clean Water Act, since the wetlands are adjacent to an unnamed tributary to East Canyon Reservoir, a Traditional Navigable Waterway".

The June 5, 2007, "Joint U.S. Environmental Protection Agency and Army Corps of Engineers Guidance Regarding Clean Water Act Jurisdiction after Rapanos" (June 5, 2007 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 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) 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 December 2, 2008 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 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 revised 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).

Therefore, the District must further evaluate whether the tributary to which it has determined wetlands on the property to be adjacent is a perennial RPW. If the District determines that the tributary is a seasonal RPW or non-RPW, it must evaluate the tributary under the significant nexus standard. Once the District has concluded its evaluation of the tributary, it must include in its final decision its consideration of whether, as a result of its evaluation of the tributary and the potential non-abutting status of any of the three wetlands on the property, a separate significant nexus evaluation is required for any or all of the wetlands on the property.

REASON 2: A dirt road (300 West) prevents a direct surface connection to the relatively permanent tributary to East Canyon Reservoir.

FINDING: This reason for appeal has merit.

ACTION: The District must evaluate the Appellant's assertion that the road (300 West) eliminates a direct surface connection between wetlands on the property and the tributary to East Canyon Reservoir. That evaluation must be documented in the District's final decision.

DISCUSSION: In its data sheet, the District described the flow route from the unnamed tributary to Kimball Creek and then to East Canyon Creek, which has been determined by the District to be a Traditional Navigable Water. The District's data sheet further indicated that, from East Canyon Reservoir, East Canyon Creek flows downstream to the Weber River and then to the Great Salt Lake. The District's data sheet does not, however, document that there is flow from wetlands on the site to the unnamed tributary on the opposite side of 300 West. The District must document in its final decision the relationship of the wetlands on the property and the tributary on the opposite side of 300 West.

REASON 3: Restoration and harvesting activities over the past five years have allowed upland species to spread into wetlands and may have reduced the extent of wetlands on the property.

FINDING: This reason for appeal has merit.

ACTION: The District must reevaluate wetlands on the property to determine if changes in vegetation that have occurred since the 2004 delineation have resulted in a change in the extent or configuration of wetlands on the property.

DISCUSSION: The Appellant indicated, in the RFA, that upon his purchase of the property in 2004, grazing of horses was immediately halted. He further indicated that upland plants were established on the property and, from that point, he began to farm the property and cut hay. The Appellant indicated that as a result of restoration and careful harvesting over the subsequent 5 years that upland species have spread into wetland areas, resulting in significant changes in vegetation in the areas delineated as wetlands.

The District indicated in response to questions at the appeal conference that it did not reevaluate the delineation or confirm the wetland boundaries in response to the Appellant's request, but relied on the wetland map that was verified in 2004. The evaluation of the property was limited to an offsite visual inspection prior to the District sending its September 30, 2008, verification letter.

The District must, therefore, evaluate the current extent of wetlands on the property and document that evaluation in its final decision.

REASON 4: Construction activities on adjacent properties including construction of homes, waterlines, and sewer lines have altered the hydrology of wetlands on the property and may have reduced the extent of wetlands on the property.

FINDING: This reason for appeal has merit.

ACTION: The District must reevaluate wetlands on the property to determine if construction activities on adjacent properties that have occurred since the 2004 delineation have resulted in a change in the extent or configuration of wetlands on the property.


DISCUSSION: The Appellant indicated in the RFA that three houses were built on the opposite side of 300 West in 2007 and that the building of these three houses necessitated a waterline. The Appellant asserts that the installation of the waterline and laterals to serve new homes has dramatically changed the movement of subsurface water beneath the property and has contributed to a reduction in the extent of wetlands on the property. The Appellant restated these views in response to questions asked during the appeal conference.

As the District did not perform an onsite evaluation of the extent of wetlands prior to sending its September 30, 2008, verification letter, it must now reevaluate and document the extent of wetlands on the property prior to making its final decision.

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

CONCLUSION: I conclude that the District must further document its determination that the drainage to which the wetlands on the property are adjacent is a perennial RPW. If the District concludes that the drainage is either a seasonal RPW or non-RPW, the District must then document that the drainage has been evaluated under the “significant nexus standard”. The District must further document its conclusion that there is a hydrologic connection between the wetlands on the property and the tributary on the opposite side of 300 West. The District must, once it has reevaluated its determination that the drainage to which the wetlands on the property are adjacent is a perennial RPW, 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. Finally, the District must evaluate the extent of wetlands on the property and determine whether wetland boundaries on the property have changed since its June 2, 2004 jurisdictional determination.


JANICE L. DOMBI
Colonel, EN
Commanding