



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, NORTHWESTERN DIVISION
PO BOX 2870
PORTLAND OR 97208-2870

March 19, 2009

Program Support Division

Mr. Charles A. Klinge
Groen Stephens & Klinge LLP
11100 N.E. 8th Street, Suite 750
Bellevue, Washington 98804

Dear Mr. Klinge:

I have completed my review of your Request for Appeal regarding an Approved Jurisdiction Determination by the Seattle District involving the Fred Leenstra property in Pacific, Washington. The file number is NWS-2003-0878-NO.

After evaluating the information provided in the Request for Appeal (RFA) and the District's administrative record, I have determined that one of your stated reasons for appeal has merit. Enclosed is a copy of the Administrative Appeal Decision document, which provides the details of my findings for the appeal.

Copies of this document are being furnished to the Seattle District. If you have any questions about the appeal decision, you may contact my Administrative Appeal Review Officer, Mr. David Gesl, at (503) 808-3825.

Sincerely,

Lorelynn M. Rux
Chief, Program Support Division
Northwestern Division

Enclosure

**ADMINISTRATIVE APPEAL DECISION
FILE NWS-200300878 (Leenstra Property)
SEATTLE DISTRICT (NWS)
SECTION 404 AUTHORITY**

DATE: MAR 19 2009

Review Officer (RO): David W. Gesl, U.S. Army Corps of Engineers, Northwestern Division (NWD), Portland, Oregon.

Appellant: Alfred "Fred" Leenstra, represented by Groen, Stephens & Klinge, LLP, Bellevue, Washington. The Appellant requested Appeal of an Approved Jurisdiction Determination (JD).

Receipt of Request For Appeal (RFA): June 20, 2008. Note: The Appellant's Counsel also submitted a Supplemental Brief in Support of the Appeal dated October 2, 2008.

Site Visit: A site visit and/or appeal meeting was not required to clarify the administrative record. There is sufficient information in the administrative record to reach a determination with respect to the merits of the appeal.

Summary of Appeal Decision: The Appellant is challenging a Seattle District (District) Approved Jurisdictional Determination (JD) that the U.S. Army Corps of Engineers has Clean Water Act (CWA) jurisdiction over a property located at 515 West Valley Highway, Pacific, Washington. I find that one of the Appellant's reasons for appeal, that the property in question was outside Corps' Clean Water Act jurisdiction per the Supreme Court's decision in *Rapanos v. United States (Rapanos)*,¹ has merit and warrants remand to the District for further consideration. The JD's finding that a tributary associated with the site is Relatively Permanent Water is not adequately documented. The Appellant stated two other reasons for appeal that do not have merit.

Reasons for appeal (as stated verbatim from the Appellants RFA):

1. "The subject property is prior converted cropland exempt from regulation under the Clean Water Act per 33 C.F.R. § 328.3(a)(8)";
2. "Mr. Leenstra's request for a non-jurisdictional determination in 2003 predates the Corps' publication of the Joint Guidance document that the District contends "changed" a federal law, 33 C.F.R. § 328.3(a)(8), even though rulemaking has never occurred";
3. "Even if the property were not prior converted cropland, it lies outside the Corps' Clean Water Act jurisdiction per the Supreme Court's decision in *Rapanos v. United States*, 547 U.S. 715 (2006)".

¹ *Rapanos v. United States* and *Carabell v. United States*, 547 U.S. 715 (2006)

Background Information:

The Administrative Record (AR) was provided to NWD and the Appellant as part of the Appeal Review Process.

The property is located at 515 West Valley Highway, Pacific, Washington. The property abuts State Route 167, which links Tacoma to the greater Seattle area. The Appellant is proposing to convert the property from agricultural use to commercial development.

History:

According to the Appellant's submissions, the property has been the site of an operating farm for decades and is still being farmed. Evidence provided by the Appellant's counsel as part of the RFA includes: (1) aerial photos that he feels demonstrates that the property has been farmed with row crops since at least the mid-1930's; (2) a letter by an independent witness explaining that the site was a truck farm back to 1958; and, (3) a letter and sworn declaration from a former owner of the property explaining that he intensively farmed the property since 1982, and that the site was never inundated for any 14-day period during the growing season.

The Appellant first contacted the District to request "consideration to allow Prior Converted Wetland status to (his) property" by letter dated August 19, 2003. The Appellant indicated his intent to "fill the property to render it useful for commercial purposes" at that time. This was the initial jurisdiction determination request.

The District notified the Appellant that his application (jurisdiction determination request) was cancelled (withdrawn) on September 29, 2004. The withdrawal was due to a lack of response to the District's request for information it deemed necessary to determine Corps jurisdiction on the site.

The Appellant's counsel contacted the District by letter dated November 2, 2006 to request a "non-jurisdictional determination" for wetlands on the property that he asserted were "classic prior converted cropland". This was a second jurisdictional determination request.

The Appellant's counsel provided a Wetland Assessment prepared by Chad Armour, LLC, in support of the Appellant's request for a "non-jurisdictional determination" under cover of a letter dated April 3, 2008.

The District finalized the subject JD on April 16, 2008, and provided it to the Appellant under cover of a letter dated April 22, 2008.

Rapanos Background:

As a result of *Rapanos* Supreme Court decision, EPA and the Corps, in coordination with the Office of Management and Budget and the President's Council on Environmental Quality, developed the memorandum *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States* dated 5 June 2007, and amended 2 December 2008 (Memorandum). The Memorandum requires the application of new standards, as well as a greater level of documentation to support an agency JD for a particular waterbody. The Memorandum provides a methodology to ensure CWA jurisdictional determinations are consistent with the Supreme Court decision in *Rapanos*.

The Corps and EPA assert jurisdiction over traditional navigable waters (TNW) and all wetlands adjacent to TNWs. Based on the plurality opinion in *Rapanos*, CWA regulatory jurisdiction also includes relatively permanent waterbodies (RPW) that are not TNWs, if that waterbody flows year-round, or at least "seasonally", and wetland adjacent to such waterbodies, if the wetlands directly abut the waterbody.

In addition, the agencies may assert jurisdiction over a waterbody that is not an RPW if that waterbody is determined (on the basis of a fact-specific analysis) to have a significant nexus with a TNW. The classes of waterbody that are subject to CWA jurisdiction only if such a significant nexus is demonstrated (Kennedy test) are: (1) non-navigable tributaries that do not typically flow year-round or have continuous flow at least seasonally; (2) wetlands adjacent to such tributaries; and, (3) wetlands that are adjacent to but that do not directly abut an RPW. A significant nexus may be found where a tributary, including its adjacent wetlands, has more than a speculative or insubstantial effect on the chemical, physical and biological integrity of a TNW.

Factors considered in the significant nexus evaluation include flow characteristics and functions of the tributary itself in combination with the functions performed by any wetlands adjacent to the tributary to determine their effect on the chemical, physical and biological integrity of TNWs. Hydrologic factors considered include volume, duration, and frequency of flow, including consideration of certain physical characteristics of the tributary (proximity to the TNW, size of the watershed, average annual rainfall). Ecologic factors considered include the ability for tributaries to carry pollutants and flood waters to TNWs. Ecologic factors also include the ability of a tributary to provide aquatic habitat that supports a TNW, the ability of wetlands to trap and filter pollutants or store flood waters, and maintenance of water quality.

Implementation of the *Rapanos* decision requires EPA and the Corps to be more thorough and consistent in documenting jurisdictional determinations. To meet this requirement the Corps now uses a standardized JD form.

APPEAL EVALUATION, FINDINGS AND INSTRUCTIONS TO THE SEATTLE DISTRICT ENGINEER (DE):

REASON 1: As quoted verbatim from the RFA, “the subject property is prior converted cropland exempt from regulation under the Clean Water Act per 33 C.F.R. § 328.3(a)(8).”

Finding: This reason for appeal does not have merit for the reasons contained in the Discussion section below.

Action: No action is required by the District regarding this reason for appeal.

Discussion: Corps and EPA regulations at 33 CFR § 328.3 and 40 CFR § 230.3, respectively, state:

Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area’s status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

This provision was added by rulemaking in 1993² with the purpose of lending consistency to how different Federal agencies and programs address wetlands. However, the regulatory language was vague as to how to implement this provision.

While the 1993 regulations are clear that waters of the United States do not include Prior Converted Cropland (PCC), they are not clear about what constitutes PCC. Neither the Corps nor EPA regulations implementing the CWA define the term PCC, but there is reference to the Soil Conservation Service (now NRCS) program and state that the Corps will generally rely on determinations made by the Soil Conservation Service. PCC currently is defined in U.S. Department of Agriculture (USDA) regulations at 7 C.F.R. § 12.2 as wetlands that were dredged, drained, filled, leveled or otherwise manipulated for the purpose of producing an agricultural commodity. PCC areas are inundated less than 15 consecutive days during the growing season, or ten percent of the growing season, whichever is less, in most years.

Until 1996, the NRCS definition of PCC included a provision defining the circumstances under which PCC was viewed to be “abandoned” and thus no longer eligible for USDA programs under the Food Security Act. As a result of amendments to the Food Security Act in 1996, NRCS no longer had an interest in the PCC status of land being taken out of agricultural production and stopped making PCC determinations on land proposed for non-agricultural use. Following the 1996 amendments, NRCS revised the National Food Security Act Manual (NFSAM) to state that the PCC label only pertains to land in agricultural use.

The 1993 Corps and EPA rulemaking referenced SCS definitions and criteria, but failed to address how PCC would be viewed with respect to CWA jurisdiction when the NRCS no longer had a program interest in the land.

² Clean Water Act Regulatory Programs, 58 Fed. Reg. 45008 (Aug. 25, 1993) (Final Rule)

In 2005, the Corps and NRCS promulgated Joint Guidance (2005 Guidance),³ which outlined how the Corps would deal with PCC land that is taken out of agricultural use to address potential inconsistencies and to ensure the PCC certifications were applied in a manner that was consistent with NRCS programs. Under the 2005 Guidance, it is appropriate for Corps Districts to make new CWA jurisdictional determinations for land taken out of agricultural use or that is proposed for a non-agricultural use. The Appellant's intent is to convert the property from its historic agricultural use to commercial development; therefore, a CWA jurisdictional determination reflecting the current conditions of the property is appropriate.

Most prior converted cropland has been so extensively modified that it no longer exhibits wetland hydrology. Per long standing Corps policy and wetland delineation procedures, if the land has been manipulated to the extent that it is effectively drained under normal circumstances, the land is not jurisdictional under the CWA. Although it is reasonable to expect the majority of such land would fall into this category and not be subject to CWA regulation, there are areas where agriculture has not modified hydrology or other wetland characteristics.

Paragraph III.D.2. of the 2005 Guidance establishes that the Corps will use appropriate procedures in the current Corps or Federal wetland delineation manual applicable to the region, including current national guidance, to make wetland determinations. The District was correct in relying upon the 1987 Corps of Engineers Wetlands Delineation Manual (1987 Manual) criteria for wetlands in determining whether the subject property contained regulated wetlands.

Since 1977, the Corps and EPA have defined wetlands as: "areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions..." 33 C.F.R. § 328.3(b). "Normal circumstances" for PCC lands consist of the existing soils and hydrologic conditions, as modified by the agricultural activities, without regard to whether the vegetation has been removed or replaced with agricultural crops. PCC lands that have been so altered that wetland hydrology has been eliminated would not be wetlands under normal circumstances. The 1987 Manual is useful in determining whether the soils and hydrology have been sufficiently modified so that the area previously identified as PCC could not support a prevalence of hydrophytic vegetation, and no longer meets the criteria for wetlands. The District's AR indicates that their JD was based upon application of the 1987 Manual criteria.⁴

³ On February 25, 2005, the USDA Natural Resources Conservation Service and the United States Department of the Army issued a Memorandum to the Field titled *Guidance on Conducting Wetland Determinations for Food Security Act of 1985 and Section 404 of the Clean Water Act*.

⁴ AR at 12

The District acted within its discretion in relying upon the 2005 Guidance and 1987 Manual, the current wetland delineation manual applicable, in making the JD. Therefore, this reason for appeal does not have merit.

REASON 2: As quoted verbatim from the RFA, “Mr. Leenstra's request for a non-jurisdictional determination in 2003 predates the Corps' publication of the Joint Guidance document that the District contends "changed" a federal law, 33 C.F.R. § 328.3(a)(8), even though rulemaking has never occurred.”

Finding: This reason for appeal does not have merit for the reasons contained in the Discussion section below.

Action: No action is required by the District regarding this reason for appeal.

Discussion:

The Administrative Appeals Process, pursuant to 33 C.F.R. Part 331 addresses appeals from certain Corps decisions within its CWA authority. It is beyond the purview of the Process to determine whether officially promulgated policy and guidance requires rulemaking. This discussion of the stated reason for appeal is being narrowed to the RFA's assertion that standards and practices that were in effect prior to the 2005 Joint Memo should have been applied in the JD since there had been a pre-2005 JD request for this property.

The Appellant first contacted the District to request “consideration to allow Prior Converted Wetland status to (his) property” by letter dated August 19, 2003.⁵ The Appellant indicated his intent to “fill the property to render it useful for commercial purposes”.

The District notified the Appellant, by certified mail, that his application was cancelled on September 29, 2004.⁶ The Appellant's initial jurisdiction determination request did not contain sufficient information to make a determination, so after several attempts to obtain additional information, the District cancelled the appellant's jurisdiction request.⁷ The District acted within its discretion under Corps Regulations in withdrawing the action and adequately notified the Appellant.⁸

The Appellant's counsel contacted the District, over two years later, by letter dated November 2, 2006 to request a “non-jurisdictional determination” for areas on the property that he asserted were “classic prior converted cropland”.⁹ The 2005 Guidance was in effect at that time and it was appropriate to apply that guidance in conducting

⁵ AR at 79.

⁶ AR at 64

⁷ AR at 67 and 69

⁸ 33 C.F.R. § 325.2

⁹ AR at 58

wetland determinations on agricultural lands. The District was/is not bound to apply pre-existing guidance, policies, or practices that are not consistent with the 2005 Guidance, on the basis that there had been a prior request for a jurisdiction determination on the property that had been cancelled.

The District was correct in applying the guidance that was in effect at the time of the November 2, 2006 request. Therefore, this reason for appeal does not have merit.

REASON 3: As quoted verbatim from the RFA, “Even if the property weren't prior converted cropland, it lies outside the Corps' Clean Water Act jurisdiction per the Supreme Court's decision in *Rapanos v. United States*, 547 U.S. 715 (2006).”

Finding: This reason for appeal has merit for the reasons contained in the Discussion section below.

Action: Further action is required by the District regarding this reason for appeal.

Discussion:

The approved jurisdiction determination form prepared by the District concludes that the Appellant's property contains wetlands directly abutting an RPW that flows directly or indirectly into a TNW.¹⁰ A significant nexus determination is not required for this category of wetland under the Rapanos Guidance.¹¹ However, the JD must adequately document that the tributary is an RPW, which is defined as a tributary that is not a TNW and that typically flows year round or has continuous flow at least “seasonally” (e.g., typically 3 months).

The District appears to have relied heavily on the information contained in a wetland assessment provided on behalf of the Appellant by Chad Armour, LLC (Armour Assessment).¹² The District's JD form states “Per the data provided in the Chad Armour, LLC, Wetland Assessment, dated April 2, 2008, the subject property wetland is abutting a relatively permanent water (RPW).”¹³ However, the Armour Assessment reaches a contrary conclusion that the tributary is a non-RPW.¹⁴

The Assessment reports the tributary “was dry in September and flowing in late November 2007 and early April 2008.”¹⁵ The JD form cites the November 2007 and April 2008 flow observations as the rationale that the tributary flow is perennial,¹⁶ but

¹⁰ AR 12-14

¹¹ U.S. Environmental Protection Agency and U.S. Army Corps of Engineers, CLEAN WATER ACT JURISDICTION FOLLOWING THE U.S. SUPREME COURT'S DECISION IN RAPANOS V. UNITED STATES & CARABELL V. UNITED STATES (December 2, 2008), available at http://www.epa.gov/owow/wetlands/pdf/CWA_Jurisdiction_Following_Rapanos120208.pdf

¹² AR at 21

¹³ AR at 13

¹⁴ AR at 26

¹⁵ AR at 25

¹⁶ AR at 13

contains no mention or analysis of the Armour Assessment's contrary conclusion that the tributary was non-relatively permanent or of the observation that the tributary was non-flowing during a September (year unknown) observation. Although the JD form includes discussion of the impact of seasonal water table fluctuations on observations of soil saturation, there is no discussion or analysis of how the flow (or lack of flow) observations supported the District's RPW finding for the tributary. Therefore, the District's conclusion that the tributary is an RPW is not fully supported.

This reason for appeal has merit and further consideration/discussion of the flow regime of the tributary and categorization as RPW or non-RPW is warranted. Should it be determined that the tributary is non-RPW, a significant nexus determination would be necessary.

INFORMATION RECEIVED AND ITS DISPOSITION DURING THE APPEAL REVIEW:

The Division Engineer has the authority to hear the appeal of this JD.¹⁷ However, the Division Engineer does not have authority under the appeal process to make a final decision regarding JDs, as that authority remains with the District Engineer. Upon appeal of the District Engineer's decision, the Division Engineer or his RO conducts an independent review of the administrative record to address the reasons for appeal cited by the Appellant. The administrative record is limited to information contained in the record by the date of the Notification of Administrative Appeal Options and Process (NAP) form. Pursuant to 33 C.F.R. § 331.2, no new information may be submitted on appeal. Neither the Appellant nor the District may present new information. To assist the Division Engineer in making a decision on the appeal, the RO may allow the parties to interpret, clarify, or explain issues and information already contained in the administrative record. Such interpretation, clarification, or explanation does not become part of the District's administrative record, because the District Engineer did not consider it in making the decision on the JD. However, in accordance with 33 C.F.R. § 331.7(f), the Division Engineer may use such interpretation, clarification, or explanation in determining whether the administrative record provides an adequate and reasonable basis to support the District Engineer's decision.

NWS provided a copy of the Administrative Record to the RO and the Appellant. This information was used in the Appeal decision process.

The Appellant provided a *Supplemental Brief in Support of Appeal NWS-2003-0878-NO dated October 2, 2008*. To the extent that this document provided clarifying information, it was considered in the Appeal decision process.

OVERALL CONCLUSION: After reviewing and evaluating information provided by the Appellant and the District's Administrative Record, I find that one of the reasons for

¹⁷ 33 C.F.R. § 331.3(a)(2).

appeal put forth by the Appellant has merit. The JD is being remanded to the District per the discussion at Reason 3 above.

FOR THE COMMANDER:

A handwritten signature in black ink that reads "Richard Carton for". The signature is written in a cursive, flowing style.

LORELYN M. RUX
Chief, Program Support Division