



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

April 27, 2010

Mr. Robert Brenner
Port of Tacoma
Post Office Box 1837
Tacoma, Washington 98401-1837

Dear Mr. Brenner:

This is in response to your December 18, 2009 Request for Appeal of Seattle District's approved jurisdictional determination (JD) for properties at 1451 Thorne Road, 1721 Thorne Road, and 1702 Port of Tacoma Road at Tacoma, Washington.

After evaluating the Request for Appeal and the District's Administrative Record, I have determined that the Record does not contain sufficient documentation/analysis to support a finding of Clean Water Act jurisdiction. The decision is being remanded to the District for further consideration. A copy of the decision is enclosed.

The Division has the authority to determine the merits of appeals under 33 C.F.R. § 331.3(a)(2). However, the Division does not have authority under the appeal process to make a final decision regarding JDs, as that authority remains with the District Engineer. Please contact Michele Walker, Seattle District, at (206) 764-6915 with any questions regarding the reevaluation of their JD.

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

Sincerely,

A handwritten signature in black ink that reads "Richard Carlton".

for LORELYNN M. RUX
Chief, Program Support Division
Northwestern Division

Enclosure



DEPARTMENT OF THE ARMY
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CENWD-PDS

27 Apr 2010

MEMORANDUM FOR COMMANDER, SEATTLE DISTRICT (CENWS-DE)

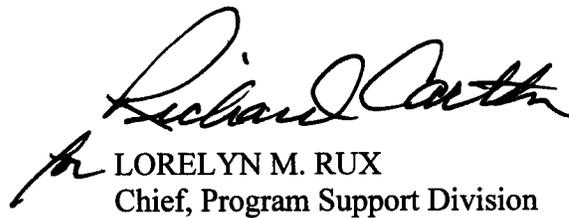
SUBJECT: Decision on Appeal of an Approved Jurisdiction Determination for the Port of Tacoma (NWS-2008-38WRD)

1. Enclosed is a copy of my Administrative Appeal Decision for an Approved Jurisdiction Determination (JD) by your District for the Port of Tacoma, in Tacoma, Washington. I have determined there is insufficient documentation/analysis in the record to support the District's finding that the waters in question are subject to regulation under the Clean Water Act. The JD is hereby remanded for reconsideration.

2. I encourage you to complete your review in an expeditious manner that satisfies the interests of the applicant and upholds our Regulatory responsibility to protect the public interest. Please provide me a copy of your final decision within 30 days.

4. Questions regarding this matter may be directed to Mr. David Gesl, NWD Appeals Review Officer at (503) 808-3825. NWD regulatory and legal staffs are available for any assistance or further clarification that you may require.

Encl


LORELYN M. RUX
Chief, Program Support Division

**ADMINISTRATIVE APPEAL DECISION
FILE NWS 2008-38-WRD (Port of Tacoma)
SEATTLE ENGINEER DISTRICT (NWS)
SECTION 404 AUTHORITY**

DATE: APR 27 2010

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

Appellant: Port of Tacoma (Appellant).

Receipt of Request For Appeal (RFA): The RFA was received via electronic mail on December 18, 2009. The Appellant requested an appeal of an Approved Jurisdictional Determination (JD) by the Seattle Engineer District (District).

Site Visit: A site visit was held on March 2, 2010. Attendees included Robert Brenner, representing the Port of Tacoma, Olivia Romano, the District's project manager, and the NWD RO. The visit consisted of a tour of the sites to inspect the general character of the area, and to informally discuss the appeal. The observations/results of that site visit are incorporated in this document.

Summary of Appeal Decision: The Appellant is challenging the District's JD which concluded that the U.S. Army Corps of Engineers (Corps) has Clean Water Act (CWA) jurisdiction over three wetlands located in Tacoma, Washington. The jurisdictional determination found the wetlands were adjacent to a Traditional Navigable Water (TNW). According to the JD, the wetlands are separated from the TNW by manmade berms 1200 feet or more wide. The RFA challenged the JD on a basis that the wetlands were not adjacent. After review of the Administrative Record (AR) and a site visit, it has been determined that the AR does not contain sufficient documentation to support a finding of CWA jurisdiction pursuant to Section 404. Due to the case specific characteristics of the areas in question, the District must address whether there is an ecological connection between the wetland and the TNW. The decision is being remanded to the District Engineer for further consideration and final action.

Reason(s) for Appeal: The Appellant's reason for appeal is that the areas in question do not meet the definition of waters of the United States at 33 C.F.R. § 328. The RFA contained an extensive list of reasons for appeal, however, the RFA was submitted prior to the Appellant having benefit of reviewing the Approved JD Form. Following the site visit, the reason(s) for appeal were refined and focused to four main considerations, 1) The wetlands in question are the result of the historical filling of former tide flats; the wetlands developed from a combination of differential settlement of dredged material fill and site grading for storm water management, 2) The wetlands are hydrologically isolated from TNWs and from tributaries to TNWs; they are not subject to Clean Water Act (CWA) jurisdiction per SWANCC, 3) The wetlands in question are not adjacent to the Blair Waterway, the nearest TNW, and 4) The wetlands are not subject to CWA

jurisdiction per *Rapanos* or *Healdsburg*. The RO coordinated the clarified reasons for appeal above with the Appellant and received concurrence. The overall reason for appeal is that the wetland areas are not adjacent to a TNW and therefore do not meet the definition of waters of the United States at 33 C.F.R. § 328.

Background Information:

Three wetland areas in the City of Tacoma in Pierce County, Washington, located north of Maxwell Way and south of the Port of Tacoma Road are in question. The wetlands are 0.18 acres, 1.55 acres, and 3.10 acres in size. There were indications the Appellant was preparing to propose clearing, filling, and grading of the wetlands to utilize them for automobile storage in 2007, when a jurisdictional determination was requested by the Appellant.

Grette Associates, LLC (Grette), acting on behalf of the Appellant, requested jurisdictional determinations for the three wetlands by letter dated December 17, 2007. That request contained a report prepared by Grette. The District field inspected the site(s) in question on February 1, 2008 and notified the Appellant of its finding that the three wetlands were waters of the U.S. by letter dated October 20, 2009. This finding was supported by an Approved Jurisdictional Determination Form dated October 16, 2009.

Copies of the Administrative Record were provided to the RO and the Appellant by letter dated December 22, 2009.

According to the December 2007 JD request, all three wetlands formed on “legal” fill and appear to be hydrologically isolated; the fill was placed on the site in the mid 1950’s from dredging activities at the port. Additionally, the request indicates the wetlands have been used as stormwater retention facilities, with no natural or artificial outlets. Further summary description of the wetlands in question is contained in the AR.¹ The JD request included Grette’s position that the wetlands were hydrologically isolated from TNW’s and from tributaries to TNW’s, and therefore are not subject to CWA authority.

It is not being disputed that the areas in question are wetlands. The issue at hand is whether those wetlands are adjacent to a TNW and thereby subject to CWA authority.

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

For purposes of evaluating this Appeal, the Appellant’s reasons for appeal, as stated in the RFA, have been consolidated and clarified, per communication with the appellant during the site visit and in subsequent e-mail correspondence.

Reason for Appeal: The wetlands in question do not meet the definition of waters of the United States at 33 C.F.R. § 328.

¹ AR at 12.

- 1) The wetlands in question are the result of the historical filling of former tide flats; the wetlands developed from a combination of differential settlement of dredged material fill and site grading for stormwater management.
- 2) The wetlands are hydrologically isolated from TNWs and from tributaries to TNWs; they are not subject to CWA jurisdiction per SWANCC,
- 3) The wetlands in question are not adjacent to the Blair Waterway, the nearest TNW, and
- 4) The wetlands are not subject to CWA jurisdiction per *Rapanos* or *Healdsburg*.

Finding: The reason for appeal has merit.

Action: The RFA is being remanded to the District for further consideration.

Discussion: According to the Approved Jurisdictional Determination Form, the District determined the wetlands in question are adjacent to a TNW.² In accordance with the Rapanos Guidance, agencies continue to assert jurisdiction over wetlands “adjacent” to traditional navigable water, as defined in the agencies regulations.³ Under the Rapanos Guidance, the District was not obligated to complete a significant nexus determination, based on their factual finding that those wetlands were adjacent to a TNW. Therefore, procedurally, the District met its obligations under the Rapanos Guidance.

During the site visit, the Appellant’s Representative clarified that their primary reason for appeal was their belief that the wetlands in question were not adjacent. Their basis is that there is no water connection between the wetlands and the TNW, and that the wetlands are located at least 1200 feet from the nearest TNW, separated from the TNW by road(s) and the Washington United Terminal. Additionally, the Appellant identified that the District failed to consider that the wetlands were not remnants of the former estuary that existed prior to fill activities which occurred before the enactment of the CWA.

Corps 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.”⁴

The Rapanos Guidance explains the Corps and the U.S. Environmental Protection Agency consider wetlands adjacent if one of following three criteria is satisfied. First,

² AR at 3.

³ 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 (hereafter “THE RAPANOS GUIDANCE”) p5.

⁴ 33 C.F.R. §328.3(c)

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.⁵ The Rapanos Guidance specifically says that because of 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 (emphasis added). As written in the Rapanos Guidance, in the case of a jurisdictional water and a reasonably close wetland, such implied ecological interconnectivity is neither speculative nor insubstantial.

The JD Form indicates “surface flow from Wetland C *may* overflow into a storm drain to the west and surface water from Wetland B *may* overflow into a catch basin to the north, which ultimately drains into Commencement Bay (emphasis added).”⁶ The storm drain and catch basin are identified on field notes from a site visit by the District.⁷ The District’s conclusion contradicts a consultant’s report contained in the AR⁸ without sufficient documentation/analysis. The District’s analysis with respect to connections to the TNW does not appear to be conclusive. However, the JD Form indicates the basis of the adjacency determination was that the wetlands were separated by manmade berms, not that there was a hydrologic connection. Although the AR could be considered speculative with respect to connection(s) to the TNW, remand based on this specific point is not warranted since connection to a TNW was not the District’s deciding factor.

The JD Form concludes “All wetlands are adjacent to the Blair Waterway because they are separated by manmade berms (roads, fill) from the TNW.”⁹ According to the AR, the three wetlands are separated from the TNW by a minimum of 1200 feet and as much as 1900 feet. That separation includes a paved/concrete road engineered for heavy trucks and a parking/staging area that is part of the port facility. The term man made berm is not defined in Corps regulations or implementing guidance; it is within the District Engineers discretion to determine if the 1200+ foot wide fill area can reasonably be considered a berm.

The AR does not indicate that the District determined adjacency based on the third or “neighboring” criteria. However, the discussion of adjacent based on proximity found in the Rapanos Guidance discusses a requirement that the proximity be “reasonably close, supporting the science-based inference that such wetlands have an ecological interconnection with jurisdictional waters.” Footnotes in the Rapanos Guidance cite Riverside Bayview Homes, Inc.¹⁰ in which it states, “...the Corps ecological judgment

⁵ See e.g., United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 134 (1985) (“... the Corps’ ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act.”).

⁶ AR at 4.

⁷ AR at 11.

⁸ AR at 12.

⁹ AR at 4.

¹⁰ United States V. Riverside Bayview Homes, Inc., 474 U.S. 121, 134 (1985).

about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act.” The Rapanos Guidance indicates that determining whether a wetland is reasonably close to a jurisdictional water does not *generally* require a case-specific demonstration of an ecological interconnection.

As discussed above, the District determined adjacency based on separation by a man made berm, not as a result of proximity. However, the existence of an ecological interconnection is still an underlying requirement for CWA jurisdiction. In this specific case, the feature(s) the District identifies as a man-made berm may be near the extreme range of what is typically considered a berm. Additionally, both the District and the Appellant agree that the wetlands in question are located where there was formerly estuary, but they are not a remnant of that estuary--they developed on fill which was placed prior to CWA enactment. If and how that fact has a bearing on the jurisdictional determination is at the discretion of the District, but it is a relatively unique aspect of this case and should be addressed. Although it is *generally* not required, the unique physical features of this area warrant that the jurisdictional finding be supported with an analysis of the ecological connection between the wetland and the TNW. Remand is warranted in this specific case.

The RFA suggests that *Northern California River Watch v. City of Healdsburg*, 457 F.3d 1023, 1027 (9th Cir. 2006) (“*Healdsburg*”) supports that the wetlands in question are not adjacent. In that case, the Ninth Circuit Court affirmed a ruling that a pond (containing wetlands) that is separated from a TNW by a levee that usually blocks a surface connection and prevents the pond from being inundated by high waters met the “significant nexus” standard established in Rapanos. The lack of a surface connection is common to both the *Healdsburg* wetlands and the wetlands in this Appeal, therefore, *Healdsburg* does not appear to be contrary to the District’s action. Although the facts in *Healdsburg* included relatively detailed, direct physical and chemical evidence (i.e. hydrological data and comparisons of chloride concentrations to support the determination), it does not establish that such a level evidence is a standard for determining adjacency. The District’s jurisdictional determination does not appear to be contrary to the *Healdsburg* decision.

In *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) (“*SWANCC*”), the Supreme Court held that the Corps had exceeded its authority in asserting CWA jurisdiction over isolated, intrastate, non-navigable waters. Corps authority regarding wetlands adjacent to traditional navigable waters clearly was not affected by *SWANCC* and the Supreme Court did not itself define the term adjacent. Therefore, *SWANCC* is not applicable in this case.

INFORMATION RECEIVED AND ITS DISPOSITION DURING THE APPEAL REVIEW:

The Division Engineer has the authority to consider appeal of this JD.¹¹ 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 delegate conducts an independent review of the AR to address the reasons for appeal cited by the Appellant. The AR 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. § 331.7(f), 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 AR. Such interpretation, clarification, or explanation does not become part of the District's AR, 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 AR provides an adequate and reasonable basis to support the District Engineer's decision.

The District provided a copy of the AR to the RO and the Appellant. There was also a site visit by the RO, accompanied by a representative of the Appellant as well as by a representative of the District. This information was used in the appeal decision process. There was no other information considered.

OVERALL CONCLUSION: After reviewing and evaluating the RFA, the District's AR, and the site visit, I find that the AR does not sufficiently support the District's JD's and the appeal has merit. I am remanding the appeal to the District.

FOR THE COMMANDER:


for **LORELYNN M. RUX**
Chief, Program Support Division

¹¹ 33 C.F.R. § 331.3(a)(2).