ADMINISTRATIVE APPEAL DECISION
FILE POH-2009-00271 (Mana Irrigation Ditch)
HONOLULU ENGINEER DISTRICT (POH)
SECTION 404 AUTHORITY
DATE: 1 MAR 2010

Review Officer (RO): David W. Gesl, U.S. Army Corps of Engineers, Northwestern Division, Portland, Oregon, on behalf of the Pacific Ocean Division (POD).

Appellant: Bow Engineering & Development, Inc. (Appellant).

Receipt of Request For Appeal (RFA): The RFA was received on December 14, 2009. The Appellant requested an appeal of an Approved Jurisdictional Determination (JD) by the Honolulu Engineer District (District).

Site Visit: A site visit was held on February 10, 2010. Attendees included Kelie Feng and William Bow (Appellant), Dan Diamond (the on-site property manager), Bob Deroche representing the District, Thom Lichte and Kevin Finnigan representing POD, and the RO. The site visit consisted of a tour of the site to inspect the general character of the area, condition of the ditches, and tributary flow path(s). 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 Mana Ditch, an irrigation ditch located on the property of Kulana Agricultural Subdivision, Kapaa, Kauai, Hawai'i. The RFA challenged the JD on the basis that: (1) the water in question is an irrigation ditch that is not a Water of the United States (WOUS); (2) the proposed discharge could occur in-the-dry and impacts would be minimal; and (3) the ditch does not have a significant nexus to a Traditional Navigable Water (TNW). 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. Specifically, the AR does not sufficiently support the District's finding that Mana Ditch is a WOUS. The decision is being remanded to the District Engineer for further consideration and final action.

Reason(s) for Appeal: The Appellant challenged the JD on the following (as stated verbatim from the RFA):

a) "Mana Ditch is an irrigation ditch whose connection has been severed from three upstream ponds for over a year. Mana Ditch has no connection to Kainahola Stream."

b) Mana Ditch "is not a critical drainage channel but a controlled irrigation ditch."

c) "If any work is needed in Mana Ditch the water gate will insure that it is done in dry conditions."

d) "The combined capacity of the lengthy ditch and retention pond diminishes the potential impact to navigable waters."

e) "Mana Ditch is not a nexus to Kainahola Stream. It is an irrigation ditch that could be maintained without significantly affecting the chemical, physical, or biological integrity of downstream navigable waters."

Background Information:

The Appellant requested a determination of jurisdiction on September 2, 2009. The District notified the Appellant of its jurisdictional finding by letter dated October 20, 2009. The JD is an office determination; the District did not visit the site prior to determining jurisdiction.

The Appellant submitted a RFA to POD on December 8, 2009 (the RFA was received December 14, 2009). Copies of the Administrative Record were provided to the RO and the Appellant on December 16, 2009.

The Mana Irrigation Ditch (Mana Ditch) is located on Kulana Agricultural Subdivision, Kapa'a, Kaua'i, Hawai'i. The Appellant is representing an agricultural subdivision property owners association. The subdivision was formerly a sugar cane plantation that has been divided into parcels approximately 5 acres in size. There is a network of irrigation ditches on the properties, one of which is Mana Ditch. During the site visit the Appellant indicated the subdivision plan includes a proposed road crossing over Mana Ditch that may require a CWA permit.

The District's Approved Jurisdictional Determination Form (JD Form) contains the conclusion that Mana Ditch is a non-relatively permanent water (non-RPW) that flows directly or indirectly into a TNW. The flow route to a TNW identified by the District is from Mana Ditch into another irrigation ditch, then into Kainahola Stream, then into Waika'ea Canal, and then into the Pacific Ocean. The JD Form describes Mana Ditch as "a man-made ditch used to irrigate sugar fields". Currently, water is diverted upstream of Mana Ditch by means of a wooden slat gate. The source of flow at the diversion point is an irrigation channel that conveys water from three interconnected ponds. During the site visit, the uppermost pond contained no surface water. The two lower ponds contained water. Dan Diamond indicated the water source at the point where it is diverted was a combination of groundwater and surface runoff. The uppermost pond can be supplemented by means of a siphon system.

According to the JD Form, 1) Mana Ditch was "historically used for sugar cane irrigation and water is currently being diverted upstream by the water gate", 2) "(the) land was historically used to grow sugar and is currently zoned as agricultural land. It is reasonable that Mana Ditch would carry pollutants and other inputs used in the production of sugar or other products into the downstream environments."

The District also noted on the JD Form, "in the past year the water gates were opened only once to allow flow through the irrigation ditches. Presence of water lasted about 3 days. Once the area is developed it is anticipated that the irrigation ditches will be used as needed by the new ag. residents". The JD Form includes the following entry for flow duration and volume—"3 days per event. Flow velocity is approximately 1 foot per second. The irrigation ditch is currently dry as the water that would normally flow in the ditch is being diverted at a water gate located near the upstream ponds."

During the site visit, Mana Ditch was observed at several points. Where it is diverted, there was a small amount of standing water in Mana Ditch immediately below the diversion structure. Vegetation bordered Mana Ditch immediately below the diversion and vegetation upstream of the diversion was notably dense and dominated by guinea grass (*Panicum maximum*). In the vicinity of the diversion, Mana Ditch was excavated below natural grade, at what appeared to be the topographic low-point.

Mana Ditch was also viewed at the proposed crossing approximately 1700 feet downstream. At this point the ditch was completely dry. The ditch invert was covered with a substantial accumulation of dry vegetation and woody debris. The debris was randomly distributed, indicating an extended period without flowing water. There were no identifiable wrack lines or other physical indications of flowing water or of an Ordinary High Water Mark. Due to a difference in slope of Mana Ditch and the valley floor, Mana Ditch had been constructed along a hillside, well upslope of the toe of a moderately steep valley sideslope. There was a lack of guinea grass bordering the ditch and the overall vegetation density along the channel was distinctly less than that typically bordering ditches containing flowing water elsewhere on the property. Observations of the density and composition of the vegetation bordering Mana Ditch at this point seem to suggest a lack of consistent flowing or standing water as guinea grass grows rapidly with adequate water and grows especially well in shaded, damp areas.

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

For purposes of evaluating this Appeal, the Appellant's stated reasons for appeal have been consolidated into three reasons.

Reason for Appeal 1: Mana Ditch is an irrigation ditch that is not a Water of the United States.

- "Mana Ditch is an irrigation ditch whose connection has been severed from three upstream ponds for over a year. Mana Ditch has no connection to Kainahola Stream."

- Mana Ditch "is not a critical drainage channel but a controlled irrigation ditch.

Finding: This reason for appeal has merit.

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

Discussion: The preamble to the Final Rule for Regulatory Programs of the Corps of Engineers (1986) states the Corps "generally" does not view non-tidal drainage and irrigation ditches excavated on dry land to be waters of the United States.[1] The preamble also states the Corps reserves the right on a case-by-case basis to determine that a particular waterbody within that category of water is a water of the United States.

The Rapanos Guidance cites the 1986 preamble and indicates ditches excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water are geographic features that are generally not jurisdictional waters.[2] Additionally, the U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook contains the following reference regarding ditches:[3]

> Ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water generally are not jurisdictional under the CWA, because they are not tributaries or they do not have a significant nexus to TNWs. If a ditch has relatively permanent flow into waters of the U.S. or between two (or more) waters of the U.S., the ditch is jurisdictional under the CWA. Even when not themselves waters of the United States, ditches may still contribute to a surface hydrologic connection between an adjacent wetland and a TNW.

In a 2007 Regulatory Guidance Letter, the Corps defined irrigation ditches as a man-made feature and/or an upland swale that either convey water to an ultimate irrigation use or place of use, or that moves and/or conveys irrigation water (e.g., "run-off" from irrigation) away from irrigated lands[4]. That definition also includes that "where a natural or man-altered water body is used as part of an irrigation ditch system, such as where the water body is used to transport irrigation water between manmade ditches, that segment generally is not considered an irrigation ditch for purposes of that guidance, except where the Section 404(f)(1) exemption (maintenance of farm irrigation ditches or drainage ditches) has been determined to apply based on a case-by-case evaluation. Although this definition is specific in application to that Guidance Letter, it does provide insight as to how the Corps Regulatory Program defines an irrigation ditch and encourages consideration of case-by-case facts.

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[1] See 51 Fed,. Reg. 41206,41217 (Nov 13, 1986)

[2] 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") p8, 12.

[3] This document is intended to be used as the U.S. Army Corps of Engineers Regulatory National Standard Operating Procedures for conducting an approved jurisdictional determination (JD) and documenting practices to support an approved JD.

[4] U.S. ARMY CORPS OF ENGINEERS, REGULATORY GUIDANCE LETTER 07-02: SUBJECT: Exemptions for Construction or Maintenance of Irrigation Ditches and Maintenance of Drainage Ditches Under Section 404 of the Clean Water Act (2007), *available at* *http://www.usace.army.mil/cw/cecwo/reg/rglsindx.htm*

The AR indicates "Mana Ditch is a man-made ditch used to irrigate sugar fields" and "water is currently being diverted upstream by a water gate". It also indicates Mana Ditch is "dry and usage is fully controlled." The site visit confirmed that flow in the ditch appeared to be fully controlled (diverted), and also that there was a lack of evidence suggesting the dry ditch had other than a limited functional role in the broader aquatic ecosystem.

The AR is not sufficient to overcome the presumption that irrigation ditches generally are not waters of the United States subject to CWA authority. Therefore, this reason for appeal has merit and is remanded for further evaluation and consideration.

Reason for Appeal 2: Mana Ditch does not have a significant nexus to a Traditionally Navigable Water.

- "The combined capacity of the lengthy ditch and retention pond diminishes the potential impact to navigable waters."

- "Mana Ditch is not a nexus to Kainahola Stream. It is an irrigation ditch that could be maintained without significantly affecting the chemical, physical, or biological integrity of downstream navigable waters."

Finding: This reason for appeal has merit.

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

Discussion: As a result of the *Rapanos* Supreme Court decision, the U.S. Environmental Protection Agency 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 (Rapanos Guidance).[5] The Rapanos Guidance requires the application of new standards, as well as a greater level of documentation to support an agency JD for a particular waterbody. The Rapanos Guidance 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. 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 wetland directly abuts 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. Waterbodies that require a significant nexus determination include: (1) non-navigable tributaries that do not typically flow year-round

[5] THE RAPANOS GUIDANCE.

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.

Per the findings under Reason for Appeal 1 above, the AR does not support the Districts finding that Mana Ditch is a Water of the United States (WOUS), hence a significant nexus determination is not relevant. However, should the District find that Mana Ditch is a WOUS on remand, its significant nexus determination would have a bearing on the jurisdictional finding. Therefore, the significant nexus determination contained in the JD Form is being examined in this appeal.

The Districts significant nexus determination is:

> "The Mana irrigation ditch is a man-made ditch that drains three upstream ponds and their adjacent wetlands. The upstream ponds are manmade and are partially fed by groundwater and an upper mountain source. Mana irrigation ditch is serviced and maintained by the East Kauai Water Cooperative. Currently the Mana ditch is dry and usage is fully controlled. At full flow the water velocity is approximately 1 foot per second. The water outlets into the Kainahola Stream above a natural spring and then into the Pacific Ocean. Although Mana Irrigation Ditch experiences sporadic flow and is a non-relatively permanent water (non-RPW) it serves as a significant nexus between three upstream ponds and their adjacent wetlands and the perennial Kainahola Stream, which flows directly into the Pacific Ocean. Kulana Agriculture Subdivision is located within Waika'ea watershed. Rainfall varies by elevation in the watershed from 40-80 in/yr. The host geology is comprised of weathered igneous rock and is characterized as displaying a rapid runoff response. The higher elevations of the watershed are characterized by heavy vegetation. The lower Kainahola Stream basin is currently under development for low-density residential housing and has previously been used for sugar cultivation. Given the history of the Kulana Agriculture lot as sugar cultivation land and the nutrient inputs associated with such activities; the high annual rainfall; and the topographic and geologic characteristics of Waika' ea watershed, it is reasonable and feasible that the Mana Irrigation Ditch and the upstream ponds and its adjacent wetlands have the capacity to carry sediments, pollutants or flood waters to TNWs."

But for an analysis of the flow conditions in Mana Ditch, the District has identified a significant nexus related to the chemical integrity of a TNW. The District identified a potential source of pollutants (nutrients from historical agricultural use) as well as topographic and geographic features that contribute to a significant nexus with a TNW.

Per the Rapanos Guidance, principal considerations when evaluating significant nexus include the volume, duration, and frequency of flow in a tributary and the proximity of the tributary to a TNW.[6] The Rapanos Guidance recognizes that as the distance from the tributary to the navigable water increases, it will become increasingly important to document whether the tributary and its adjacent wetlands have a significant nexus rather than a speculative or insubstantial nexus with a TNW.[7] Likewise, it is increasingly important to document a significant nexus when the hydrologic connection is minimal or in question. The District's analysis of the hydrologic connection has not met the standard that the nexus not be speculative or insubstantial.

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[6] ID p10.
[7] ID p11.

This reason for appeal has merit and is remanded for further evaluation and consideration.

Reason for Appeal 3: As stated verbatim from the Appellants RFA, "If any work is needed in Mana Ditch the water gate will insure that it is done in dry conditions."

Finding: This reason for appeal does not have merit.

Action: No further action is required.

Discussion: The action under appeal at this point is the District's JD. This reason for appeal identifies a measure that might be used to minimize the impact of fill activities. The purpose of a JD is limited to determining whether the water in question is subject to CWA authority. The degree of impact, potential measures to minimize impacts, and the merits of permit issuance are evaluated during the permit decision; they do not have a direct bearing on the JD.

This reason for appeal does not have merit.

INFORMATION RECEIVED AND ITS DISPOSITION DURING THE APPEAL REVIEW:

The Division Engineer has the authority to consider appeal of this JD.[8] 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 and field conference by the RO and Division staff with the Appellant and District representatives present. This information was used in the appeal decision process. There was no other information considered.

[8] 33 C.F.R. § 331.3(a)(2).

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 and the appeal has merit. I am remanding the appeal to the District for further clarification and evaluation.

Mark W. Yenter
Brigadier General, US Army
Commanding