



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

Program Support Division

JUN 09 2008

Mr. Douglas Shepherd
Shepherd, Abbott & Carter
1616 Cornwall Avenue
Suite 100
Bellingham, WA 98225

Dear Mr. Shepherd:

I have completed my review of the Request for Appeal, submitted on behalf of Mr. Lyle Rader, regarding the approved jurisdictional determination (JD) made by the Seattle District for the Rader property, located on Halverstick Road near Lynden, Whatcom County, Washington, File #NWS-200600553.

After evaluating the information provided in the Request for Appeal, the District's administrative record, and the information obtained during the appeal meeting and site visit, I have determined that the appeal does not have merit. Enclosed is a copy of the Administrative Appeal Decision document, which provides the details of my findings for the appeal.

A copy will be 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,

A handwritten signature in black ink, appearing to read "Paul R. Wemhoener".

Paul R. Wemhoener
Chief, Program Support Division

Encl

ADMINISTRATIVE APPEAL DECISION
FILE NO. NWS-200600553 (Rader Farms, Inc)
SEATTLE DISTRICT

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

Appellant: Rader Farms, Inc.

Appellant's Representative: Doug Shepherd, attorney

Receipt of Request For Appeal (RFA): February 15, 2008

Appeal Conference/Site Visit Date: April 18, 2008

Background Information:

The appellant requested an appeal of an Approved Jurisdiction Determination (JD) involving a 10 acre area that has been cleared and graded, as part of an effort to convert the area to agricultural production, and abutting ditches. The site was a forested wetland or a combination of forested and scrub/shrub wetland at the time of the clearing. At present, the area is in the process of natural revegetation. It does not appear that the unauthorized activities have had the effect of converting the area to non-wetland. The clearing/grading was not previously authorized and the Seattle District, U.S. Army Corps of Engineers is treating the unauthorized activities as a violation of the Clean Water Act (CWA).

File History:

According to the Administrative Record (AR) provided by the Seattle District, the Rader property was inspected on May 9, 2006 and June 15, 2007 as part of the District's evaluation of what it termed the Clean Water Act violation for the redeposit of dredge material associated with the mechanized land clearing of approximately 10 acres of wetlands (AR pages 71-74).

May 9, 2006 -- A Routine Wetland Delineation was completed by Joe Brock, NWS (AR pages 5-16).

March 12, 2007 letter -- Wetland Resources, Inc. evaluated the site on behalf of the appellant and concluded, 1) "the investigation area meets the definition of wetland as described in the 1987 Corps manual...", and 2) the excavated drainage ditches along the western and southern property boundary convey natural stream water through historic wetland areas and are therefore classified as stream." (AR page 25)

March 14, 2007 – A Joint Aquatic Resources Permit Application Form (JARPA) was signed by the Appellant for submission to the District. This is a form required to apply for the appropriate local, state, and/or Federal authorizations, including authorization under Section 404 of the Clean Water Act (CWA). A jurisdiction determination was requested in Section 7b; authorization for the discharge(s) was not requested (AR pages 20-24).

December 14, 2007--An Approved Jurisdiction Determination (JD) was completed by the District. The Determination consisted of the following 2 parts:

1. An approved JD Form addressing the Sumas River from the confluence of Johnson Creek downstream to the U.S. – Canada border. The determination concluded the investigated area is a Traditionally Navigable Water (TNW). (AR pages 57-63).

2. An Approved JD Form addressing the portion of Rader Farms, Inc property that has been cleared and ditched (the area in question). The form identified these areas as being Waters of the United States, specifically Relatively Permanent Waters (RPW) that flow directly or indirectly into TNW's and wetlands directly abutting RPW's that flow directly or indirectly into TNW's (AR pages 64-70). The form includes a statement "The ditch to the west has perennial flow (Rader, personal communication, June 15, 2007), which flows into the ditch to the south." (Part III.D.2.).

December 17, 2007 – Seattle District provides Lyle Rader an Approved JD and letter stating that the 10-acre cleared wetland site and ditches that border the east, west and south sides of the wetland are waters of the U.S and subject to regulation under the CWA (AR pages 71-76). That letter was accompanied by a Notification of Administrative Appeal Options and Process and Request for Appeal (RFA) form.

February 15, 2008 – Request for Appeal received by Northwestern Division.

Appeal Evaluation, Findings and Instructions to the Seattle District Engineer (DE):

Reason 1: The appellant objects to the Corps findings that the subject lands are Relatively Permanent Waters that flow directly or indirectly into Traditional Navigable Waters.

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 Environmental Protection Agency (EPA) and Army Corps of Engineers Guidance Regarding Clean Water Act (CWA) Jurisdiction after *Rapanos* issued June 5, 2007 (Rapanos Guidance) followed the U.S. Supreme Court's decision in the consolidated cases Rapanos v. United States and Carrabell v. United States ("Rapanos"). The agencies issued the guidance

to ensure that jurisdictional determinations, administrative enforcement actions, and other relevant agency actions being conducted under the CWA are consistent with the Rapanos decision and provide effective protection for public health and the environment.

The Rapanos Guidance, specifically Appendix D which deals with interpretation of the term Traditionally Navigable Waters ((TNW) as used in the Court's decision), affirms that the Corps should continue to assert jurisdiction over "all waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce...". The District prepared an evaluation whether the Sumas River met the standards for consideration as a TNW at the point at which the continuous surface tributary system that include the subject site, flows into the Sumas River. In doing so, their analysis included the identification of seven documents and/or websites containing historical information about navigation through this waterway. The AR references range from general, indicating the early role of water for travel in the region, to the specific citing use of the river as a highway of foreign commerce. The District has met the standard for documenting the Sumas River as a TNW based on its use in the past.

The District's AR includes a Routine Wetland Determination Data Form documenting that the Corps definition of wetland as described in the 1987 Corps Manual has been met. Additionally, the record contains a letter dated March 12, 2007 from Wetlands Resources, Inc., provided on behalf of the appellant, that states, "the entire investigation area meets the definition of wetland as described in the 1987 Corps Manual" and "the excavated drainage ditches along the western and southern property boundary convey natural water through historic wetland areas and are therefore classified as a stream". In accordance with the Rapanos guidance, the District properly documented the presence of Relatively Permanent Waters (RPWs) and their abutting wetlands in their Approved Jurisdictional Determination (JD).

Additional details were provided in the District's AR and JD form which support the existence of Corps CWA jurisdiction, including an explanation and photo documentation that the ditches abutting the impacted wetland are part of a tributary system that eventually flows into the Sumas River. During the appeals site visit, the Review Officer (RO) confirmed the continuity of the tributary system.

The JD Form includes the observation these wetlands abut the ditches by virtue of there being no separation or break between the wetlands and ditches at III.D.4. The appeals site visit confirmed the lack of a separation.

The District cited "Rader, pers. Comm., 15 Jun 2007" as the rationale for their determination the ditch to the west has perennial flow. The west ditch flows into a second ditch (to the south) that also abuts the wetland.

Reason 2: The subject land is not subject to the Clean Water Act because there is no contiguous surface water connection to bodies of water that are Waters of the United States.

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: As discussed in Reason 1 above and as documented in the district's Administrative record, a continuous surface water connection to a TNW exists through RPWs and abutting wetlands.

Reason 3: Man-made ditches are not waters of the United States.

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: Headquarters Regulatory Guidance Letter Number (RGL) 07-02 reiterates that Corps and EPA guidance on the extent of CWA geographic jurisdiction define certain categories of "upland ditches" and "upland swales" that generally are not subject to CWA jurisdiction. In the preamble to the Corps' current regulations for the execution the Regulatory program (33 CFR Part 328.3, November 13, 1986 (Definitions)) it states: "For clarification it should be noted that we generally do not consider the following waters to be Waters of the United State. ... (a) Non tidal drainage and irrigation ditches excavated on dry land. (Emphasis added)".

The AR indicates that at least two of the ditches in the review area are RPWs with abutting wetlands. These ditches were constructed within wetlands, not uplands and the record indicates they convey a relatively permanent flow. The District's conclusion that at least two of the ditches in the review area are Waters of the United States is supported by the administrative record and by regulation.

Reason 4: The appellant objects to the Corps findings that the applicable portion of the Sumas River or any other waters involved are or have been Traditional Navigable Waters.

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: As discussed above and as documented in the District's AR, the Sumas River has been determined to be a TNW. The Rapanos Guidance, specifically Appendix D, affirms that the Corps should continue to assert jurisdiction over "all waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce...". The District prepared an evaluation whether the Sumas River met the standards for consideration as a TNW at the point at which the continuous surface

tributary system, including the Rader site, flows into the Sumas River. In doing so, their analysis included the identification of seven documents and/or websites containing historical information about navigation through this waterway. The AR references range from general (indicating the early role of water for travel in the region) to specific (citing use of the river as a highway of foreign commerce) The District has met the standard for documenting the Sumas River as a TNW based on its use in the past.

Overall Conclusion: After reviewing and evaluating information provided by the appellant, the District's Administrative Record, and the information obtained during the appeal site visit, I conclude that this appeal does not have merit for the reasons stated above.

FOR THE COMMANDER:



PAUL R. WEMHOENER
Chief, Program Support Division