

**ADMINISTRATIVE APPEAL DECISION
DOUBLE EAGLE ESTATES, LLC.
APPROVED JURISDICTIONAL DETERMINATION
TULSA DISTRICT
FILE NO. SWT-2014-00303**

28 APR 2015

Review Officer: Elliott N. Carman, U.S. Army Corps of Engineers (USACE), Southwestern Division

Appellant/Applicant: Double Eagle Estates, LLC.

Regulatory Authority: Section 404 of the Clean Water Act (CWA) (33 U.S.C §1344)

Date Acceptable Request for Appeal Received: 5 September 2014

Appeal Meeting: 6 November 2014

Summary of Appeal Decision: Double Eagle Estates, LLC. (Appellant) is appealing a USACE Tulsa District (District) approved jurisdictional determination (AJD) associated with property in Broken Arrow, Tulsa County, Oklahoma. The Appellant asserted that the District incorrectly applied law, regulation, or officially promulgated policy when it determined that the aquatic features on the Appellant's property had a significant nexus with the nearest downstream traditional navigable water (TNW) and were therefore waters of the United States (U.S.). For reasons detailed in this document, this reason for appeal has merit. The AJD is remanded to the District for reconsideration.

Background Information: The Appellant's property is an approximately 80 acre tract located southeast of the intersection of East 121st Street South and South 129th East Avenue in Broken Arrow, Tulsa County, Oklahoma. In response to the Appellant's request, the District provided an AJD for the tract on 8 July 2014, which concluded that an unnamed tributary, two ponds, and an adjacent wetland were waters of the U.S. subject to Section 404 of the Clean Water Act (CWA).¹ The Appellant submitted a complete Request for Appeal (RFA), which was received by the Southwestern Division (Division) office on 5 September 2014. The Appellant was informed by letter dated 10 September 2014, that their RFA was accepted.

Information Received and its Disposition During the Appeal

Title 33 Code of Federal Regulations (CFR) § 331.3(a)(2) states that, upon appeal of the District Engineer's decision, the Division Engineer or his Review Officer (RO) conducts an independent review of the District's administrative record (AR) to examine the reasons for appeal cited by the Appellant. The District's AR is limited to information contained in the record as of the date of the Notification of Administrative Appeal Options and Process (NAO/NAP) form. Pursuant to

¹ Administrative Record (AR) page 25.

33 CFR § 331.2, no new information may be submitted on appeal. Neither the Appellant nor the District may present new information to the Division. To assist the Division Engineer in making a decision on the merits of the appeal, the RO may allow the parties to interpret, clarify, or explain issues and information already contained in the District's 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 permit. However, in accordance with 33 CFR § 331.7(f), the Division Engineer may use such interpretation, clarification, or explanation in determining whether the District's AR provides an adequate and reasonable basis to support the District Engineer's decision. The information received during this appeal process and its disposition is as follows:

- A. The District provided a copy of the AR to the RO and the Appellant. The AR is limited to information contained in the record by the date of the NAO/NAP form. In this case, that date is 8 July 2014.²
- B. An appeal meeting was held on 6 November 2014. The meeting followed the agenda provided to the District and the Appellant by the RO via email on 30 October 2014. During the appeal meeting, the District and the Appellant provided multiple documents to the appeal meeting participants. These documents are as follows:
 - i. The District provided copies of four AJD forms to the RO and the Appellant. The copies were provided as replacement pages as they were more legible than those originally included in the District's AR. The page numbers of the replacement pages differed from the original pages due to formatting differences. The pages from the District's AR and their replacement pages were as follows:
 - 1) AR pages 7-10 became AR pages 7-10, 10a, 10b, and 10c.
 - 2) AR pages 11-14 became AR pages 11-14, 14a, 14b, and 14c.
 - 3) AR pages 16-19 became AR pages 16-19, 19a, 19b, and 19c.
 - 4) AR pages 20-23 became AR pages 20-23, 23a, and 23b.

These four AJD forms were not considered new information as they were merely better visual quality copies of information already present within the District's AR prior to their decision. Therefore, these AJD forms were considered as part of the evaluation of this RFA.

- ii. The Appellant provided a copy of a figure titled "Diagram 1" to the RO and the District. "Diagram 1" was referenced in the Appellant's RFA, but not included in the copy received by the RO due to an unknown reason. The figure, which utilized the same aerial photograph as that found on AR page 68, served as a visual depiction of the discussion found in the Appellant's RFA. Therefore, this figure was considered to clarify the reason for appeal contained in the Appellant's RFA.

² It should be noted that the District incorrectly dated the NAO/NAP form as 6 September 2014. The District's AJD transmittal letter dated 8 July 2014, indicated 6 September 2014 represented the deadline for receipt of the RFA in this case. However, as instructed by Regulatory Guidance Letter 06-01, the date on the NAO/NAP form should have been the same as the District's decision date of 8 July 2014. Therefore, the District's AR should be limited to information contained in the record by 8 July 2014.

- iii. The Appellant provided a copy of an email, dated 6 November 2014, to the RO and the District. The email, which was between members of the Appellant's legal counsel, stated that a 2004 aerial photograph included in the email illustrated the removal of sandy soils from the Appellant's property. The email was not present in the District's AR prior to their decision. Therefore, it was considered new information and was not considered as part of the evaluation of this RFA.
- iv. The District provided a handout that included three figures which illustrated the relevant reach associated with, and the flow path from the Appellant's property. These figures, which were provided to the RO and the Appellant in response to a question by the RO, were not present in the District's AR prior to their decision. Therefore, they were considered as new information and were not considered as part of the evaluation of this RFA.
- v. The Appellant provided a handout to the RO and the District that included a table comparing "jurisdictional area to watersheds" as well as two figures illustrating the "watershed reference" and "watershed remoteness." The Appellant provided an updated copy of this same handout to the RO and the District via email dated 21 November 2014. This handout was not present in the District's AR prior to their decision. Therefore, it was considered new information and was not considered as part of the evaluation of this RFA.
- vi. The Appellant provided the RO and the District copies of two court decisions, "*Brewer-Elliott Oil & Gas Co. v United States*" and "*Choctaw Nation v Oklahoma*." Neither of these opinions was present in the District's AR prior to their decision; however, the latter was referenced in the Appellant's RFA in support of their reason for appeal. Therefore, the opinions were considered new information and were not considered as part of the evaluation of this RFA, but the "*Choctaw Nation v Oklahoma*" opinion was considered to clarify the reason for appeal contained in the Appellant's RFA.

C. On 2 March 2015, the RO forwarded, via email, a draft memorandum for record (MFR) summarizing the appeal meeting topics to the Appellant and the District for review and comment. In an email dated 2 March 2015, the District provided comments regarding section 4.n. of the draft MFR. In an email dated 9 March 2015, the Appellant provided comments regarding sections 4.a., 4.b., 4.h., 4.m., and 4.p. of the draft MFR. Both the District's and the Appellant's comments were incorporated into the final MFR which was provided to the Appellant and the District by the RO on 18 March 2015.

Evaluation of the Appellant's Reason for Appeal

APPELLANT'S REASON FOR APPEAL: The District incorrectly applied law, regulation, or officially promulgated policy when it determined that the aquatic features on the Appellant's property had a significant nexus with the nearest downstream traditionally navigable water and were therefore waters of the U.S.

FINDING: This reason for appeal has merit.

DISCUSSION: In the RFA, the Appellant stated that the property formerly contained, "...a contiguous geographical [aquatic] feature [that bisected] the Property from north to south..." The Appellant further stated that this feature was dammed at two points "many years ago" creating a north pond and a south pond.³ The Appellant's RFA implied that the damming of this contiguous feature resulted in the creation of seven independent, but closely related, aquatic features within the property (identified by the Appellant from north to south within the property as dry channel, ephemeral ditch, north pond, low area, south pond, wetland, and south channel).

According to the Appellant, the dry channel originated at the north property boundary and was at the former location of the contiguous aquatic feature. The ephemeral ditch also originated at the north property boundary and paralleled the dry channel to its west while carrying flow southward into the north pond. The low area was described as the "middle portion of the stream" located between the north and south ponds. The south channel, located south of the south pond, carried flows southward off the property. Finally, the wetland was described as being west of the south pond.⁴

The Appellant provided separate discussions within their RFA for each of these individual features, and how each feature specifically lacked sufficient volume or frequency of flow to independently support a significant nexus with the downstream TNW. The Appellant also added in the discussion for the low area that the District did not support their conclusion that it was a water of the U.S, referring to a report prepared by their consultant that stated it had been filled⁵ and adding that it was, "...nothing more than a low open field..." with at most irregular flow that could not support a significant nexus with the downstream TNW.⁶ The Appellant also added in the discussion regarding the south channel that the District did not support its conclusion that the feature had sufficient flow to be considered a relatively permanent water (RPW) as well as to support a significant nexus to the downstream TNW.⁷ Finally, the Appellant added in the discussion regarding the wetland that they did not believe there was an observable hydrologic connection between the wetland and the south pond and that the District did not support or explain their conclusion that a hydrologic connection was present and substantial enough to support a significant nexus to the downstream TNW.⁸ Therefore, based on the above discussion, the Appellant believes that each of these seven features lack a significant nexus with the downstream TNW and should not be considered waters of the U.S.⁹

Like the Appellant, the District also recognized in their AR that the Appellant's property contained a single tributary that was later "man-altered."¹⁰ While the District recognized that the tributary was a continuous feature, it described the on-site aquatic features in five segments in the AR. The District concluded in its 8 July 2014, AJD transmittal letter, as well as within its AJD forms, that the Appellant's property contained an intermittent stream, an ephemeral stream, two ponds, and an adjacent wetland.¹¹ The District stated during the appeal meeting that they did

³ Appellant's RFA dated 4 September 2014 (Appellant's RFA), page 2 of 10.

⁴ Appellant's RFA, page 2 of 10 and Diagram 1.

⁵ AR page 60.

⁶ Appellant's RFA, page 3 of 10.

⁷ Appellant's RFA, page 4 of 10.

⁸ Appellant's RFA, pages 4-5 of 10.

⁹ Appellant's RFA, pages 1-5 of 10.

¹⁰ AR, paged 49-50.

¹¹ AR pages 7-10c, 11-14c, 16-19c, 20-23b, and 25.

not describe the tributary as a single feature, but chose to use the same terminology in their AJD as that found in the report provided by the Appellant's consultant (dated 18 April 2014 and beginning on AR page 54) in an effort to make it more clear to the consultant.

The District stated in a MFR that the ephemeral stream became an intermittent stream south of the south pond.¹² Based on this statement, the ephemeral portion of the stream extended from the north property boundary to the southern end of the south pond and would include the portion referred to by the Appellant in their RFA as the low area (the area between the two ponds). The intermittent portion of the stream extended from the downstream end of the south pond off the property. Referring to the low area portion of the ephemeral stream, the District stated in their AJD transmittal letter that they had, "...sufficient evidence to conclude that there is a jurisdictional ephemeral stream that connects the ponds..."¹³ and in a MFR that, "A clear channel connected these two ponds due to the ponds being on the same water way."¹⁴ The District listed two ordinary high water mark indicators in their AJD form for the ephemeral stream, but the AR is not clear if these indicators represent the "sufficient evidence" referenced in the AJD transmittal letter. Additionally, the AR did not explain how the District concluded that a clear channel connected the two ponds simply because it was situated on the same water, nor did it address how the District reached a contrary conclusion for this segment than that presented in the consultant's report.

In the AR, the District classified the entire tributary (including both the ephemeral and intermittent segments) as a non-RPW that flowed directly or indirectly into TNWs¹⁵ and having 11-20 flow events per year.¹⁶ The District stated that the intermittent stream provided for intermittent, but not seasonal flow, but did not provide any supporting discussion on how or why the District classified one section of the stream as ephemeral and the other as intermittent. The District also did not provide any supporting discussion on how it concluded that the entire tributary was a non-RPW, nor did it explain how it determined that the entire tributary (including both the ephemeral and intermittent segments) had 11-20 flow events per year. During the appeal meeting, the District stated they routinely use publicly available information to help them determine flow frequency. In this case, they stated that the region receives 40-47 inches of rain per year and they believed it was reasonable to conclude that the region would receive an average of one rain event per month, or twelve events per year placing them in the selected range of 11-20 flow events per year. The District did note that they often do not include discussions like this in their AR, as was the case for this action. The District also stated during the appeal meeting that they classified the segments of the same stream as ephemeral and intermittent to maintain consistency with the consultant's report.

Regarding the wetland, the District stated in a field report that the wetland was adjacent to, and abutting the south pond.¹⁷ While noting that it was adjacent to the south pond, the District chose to describe the wetland on the AJD form associated with the ephemeral stream and not the south pond. In this AJD form, the District stated that the wetland was adjacent to, but not abutting the

¹² AR page 50.

¹³ AR page 25.

¹⁴ AR page 50.

¹⁵ AR pages 7 and 20.

¹⁶ AR pages 9 and 22.

¹⁷ AR page 50.

south pond via a discrete hydrologic connection.¹⁸ The District also referenced this hydrologic connection between the wetland and the south pond in its AJD transmittal letter; however, the District did not describe this connection in any detail in its AR. During the appeal meeting, the District stated that their original statement that the wetland abutted the south pond was an error and that the hydrologic connection was established by a small channel that flowed around a high area and into the south side of the south pond. Again, the District did not include this detail, nor any other supporting information regarding the hydrologic connection in the AR.

The District stated in the AR that flow traveled from the site through two, unnamed tributaries before reaching the Arkansas River, then an additional 37 miles downriver to where it reached the portion of the river designated as a TNW.¹⁹ However, the District did not identify the relevant reach (the tributary and all its adjacent wetlands, discussed further below) in the AR, but did provide a figure at the appeal meeting that illustrated it. But again, this information was not included in the District's AR.

The District prepared four AJD forms to assess each of the five aquatic features identified within the property, with one form addressing both the adjacent wetland and the ephemeral stream. Each AJD form included a significant nexus analysis; however, the analysis was not specific to the feature(s) associated with the form, but included discussion of the other aquatic features within the site. For example, the District stated in the significant nexus analysis within the AJD form specific to the ephemeral stream and adjacent wetland that, "...this stream segment, along with two [manmade] jurisdictional ponds within this stream channel, collects and transports water and sediments, and provides nutrient cycling...all of which improves water quality of the TNW."²⁰ The District stated in the significant nexus analysis within the AJD form specific to the north pond that, "this stream channel and its ponds within the stream channel function to absorb water from storm events and slow the delivery of runoff water to downstream waters."²¹ Furthermore, the significant nexus analysis in the AJD form specific to the south pond included discussion related to the north pond.²² It should be noted that none of the significant nexus analyses within any of the AJD forms, including the form specific to the adjacent wetland and ephemeral stream, included any sort of discussion relative to the adjacent wetland and how it, along with the tributary to which it is adjacent, had an effect that was more than speculative or insubstantial on the chemical, physical, and biological integrity of the downstream TNW.

Considering regulation, guidance, and policy related to this reason for appeal, as a result of the U.S. Supreme Court *Rapanos* decision,²³ the Environmental Protection Agency (EPA) and the USACE, in coordination with the Office of Management and Budget and the President's Council on Environmental Quality, issued a guidance memorandum (*Rapanos* guidance) in 2007 to ensure that jurisdictional determinations, permitting actions, and other relevant actions are consistent with a district's decision and supported by the AR. The two agencies issued joint

¹⁸ AR pages 9 and 10.

¹⁹ AR pages 8, 12, 17, and 21.

²⁰ AR page 10a.

²¹ AR page 14a.

²² AR page 19a.

²³ Combined cases of *Rapanos v. United States* and *Carabell v. United States*. 126 S. Ct. 2208 (2006).

revised *Rapanos* guidance on 2 December 2008, in response to public comments received and the agencies' experience in implementing the *Rapanos* decision.²⁴

The *Rapanos* guidance requires the application of two new standards to support an agency AJD for certain water bodies. The first standard, based on the plurality opinion in the *Rapanos* decision, recognizes regulatory jurisdiction over TNWs and their adjacent wetlands, as well as a water body that is not a TNW, if that water body is "relatively permanent" (i.e., it flows year-round, or at least "seasonally") and over wetlands adjacent to such water bodies if the wetlands directly abut the water body. In accordance with this standard, the USACE and EPA may assert jurisdiction over the following categories of water bodies: (1) TNWs, (2) all wetlands adjacent to TNWs, (3) relatively permanent non-navigable tributaries (with at least seasonal flow) of TNWs, and (4) wetlands that directly abut relatively permanent, non-navigable tributaries of TNWs.

The second standard, for tributaries that are not relatively permanent, is based on the concurring opinion of Justice Kennedy and requires a case-by-case "significant nexus" analysis to determine whether waters and their adjacent wetlands are jurisdictional. 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. Consequently, the agencies may assert jurisdiction over every water body that is not a RPW if that water body is determined (on the basis of a fact-specific analysis) to have a significant nexus with a TNW. The classes of water bodies that are subject to CWA jurisdiction, if such a significant nexus is demonstrated, 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 a relatively permanent, non-navigable tributary.

Implementation of the *Rapanos* decision requires the USACE to strive for more thoroughness and consistency in the documentation of an AJD. To meet this requirement, the USACE now uses a standardized AJD form. The *U.S. Army Corps of Engineers Jurisdictional Form Instructional Guidebook* (Guidebook) establishes standard operating procedures for conducting, and documentation practices to support an AJD as well as provides instructions for completing the AJD form, clarifies terms commonly used in the form, presents an overview on jurisdictional practices, and supplements the AJD form instructions.²⁵

As part of an AJD, a District should determine whether the feature in question is a TNW, RPW, or non-RPW, and provide data and rationale to support their conclusion in the appropriate sections of the AJD form. If the feature in question is a wetland, the District should determine if it is isolated or adjacent and provide data and rationale to support the conclusion in the appropriate sections of the AJD form. If a significant nexus analysis is required in accordance with the second *Rapanos* standard previously discussed, the Guidebook indicates the District

²⁴ Grumbles, Benjamin H. and John Paul Woodley, Jr. 2007, 2008. Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* and *Carabell v. United States*. Original guidance released June 5, 2007; revised guidance released December 2, 2008 (heretofore referred to as revised *Rapanos* guidance).

²⁵ *U.S. Army Corps of Engineers Jurisdictional Form Instructional Guidebook (Guidebook)*. June 1, 2007. The Guidebook is found at <http://www.usace.army.mil/Missions/CivilWorks/RegulatoryProgramandPermits/RelatedResources/CWAGuidance.aspx>.

should identify the relevant reach, defined as the tributary itself and all the wetlands adjacent to that tributary.²⁶

The *Rapanos* guidance and the Guidebook define a tributary as a, "...natural, man-altered, or man-made water body that carries flow directly or indirectly into a TNW," and includes, "...the entire reach of the stream that is of the same order..."²⁷ A wetland meets the definition of adjacency if it is "...bordering, contiguous, or neighboring," another water of the U.S. such as a tributary or impoundment of a tributary.²⁸ The *Rapanos* guidance further clarifies that wetlands are adjacent if: (1) there is an unbroken surface or shallow subsurface connection to jurisdictional waters; (2) they are physically separated from jurisdictional waters by man-made dikes or barriers, natural river berms, beach dunes, and the like; or (3) their proximity to a jurisdictional water is reasonably close, supporting the science-based inference that such wetlands have an ecological interconnection with jurisdictional waters.²⁹

A significant nexus analysis is a fact specific analysis that assesses flow characteristics and functions of the tributary and any adjacent wetlands (collectively referred to as the relevant reach) to determine if they have an effect that is more than speculative or insubstantial on the chemical, physical, and biological integrity of the downstream TNW. A significant nexus analysis includes consideration of various hydrologic and ecologic factors such as proximity to the TNW, size of the watershed, potential of the tributary to carry pollutants and flood waters to the TNW, or provision of aquatic habitat that supports the TNW.³⁰ Finally, the District should document the significant nexus analysis as well as any supporting information in the appropriate sections of the AJD form.

In this case, the District recognized that the Appellant's property contained a continuous aquatic feature (a tributary with two on-channel ponds) and an adjacent wetland, but incorrectly treated them as separate in order to, as they stated, maintain consistency with the consultant's report. The District classified different segments of the tributary as ephemeral and intermittent and the entire tributary as a non-RPW, but did not support these classifications in their AR as required by the Guidebook, especially where they contradicted the consultant's report. The District also did not adequately document that the wetland was adjacent to the south pond as the AR included contradictory information regarding whether the wetland was adjacent to and abutting, or not abutting the south pond. Additionally, the AR lacked support for a hydrologic connection between the wetland and the south pond (the basis of the wetland's adjacency). Finally, the District did not describe the relevant reach, the foundation of a significant nexus analysis, as required by the Guidebook.

Because the District concluded that the on-site stream was a non-RPW, it conducted a significant nexus analysis as required by the second standard associated with the *Rapanos* guidance. However, because the District did not adequately support its conclusion that the different segments of the tributary were ephemeral and intermittent and that the entire tributary was a non-

²⁶ Guidebook, page 43.

²⁷ Revised *Rapanos* guidance, page 10; Guidebook, page 40.

²⁸ 33 CFR § 328.3(c).

²⁹ Revised *Rapanos* guidance, pages 5-6.

³⁰ Revised *Rapanos* guidance, pages 1, 8-11.

RPW, use of the second *Rapanos* guidance standard to conduct a significant nexus analysis was premature.

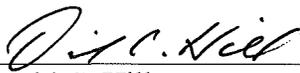
The District also confused the AR by splitting up the significant analyses they did conduct among four AJD forms for this continuous feature. Additionally, the conclusion of the significant analysis conducted is without sufficient basis as the District did not define the relevant reach consistent with the instructions provided in the Guidebook. Furthermore, the District's significant nexus analysis was incomplete as did not include any reference to the wetland the District believed to be adjacent, and only described a number of general characteristics associated with the stream and on-channel ponds. Furthermore, the District's discussion did not contain a fact-specific analysis of how these factors constituted more than a speculative or insubstantial effect on the chemical, physical, and/or biological integrity of the TNW. Therefore, based on the above, the District did not correctly apply law, regulation, guidance, and policy when it determined that the aquatic features on the Appellant's property had a significant nexus with the nearest downstream traditionally navigable water and were therefore waters of the U.S. Consequently, this reason for appeal has merit.

ACTION: The District shall reconsider its AJD by utilizing existing applicable regulation, guidance, and policy (including those referenced in the discussion above) to determine whether there exists a significant nexus that has more than a speculative or insubstantial effect on the chemical, physical, and/or biological integrity of the TNW. As part of this reconsideration, the District should first clearly identify the aquatic features within the Appellant's property and provide the appropriate information to support the classification of these features in the appropriate sections of the AJD form. The District should then identify the relevant reach associated with these features. Once identified, the District should include in the AR a fact specific analysis of the functions that the tributary and its adjacent wetland(s), if any, within the relevant reach provide, and elaborate on why the nexus between the tributary and its adjacent wetland(s) and the TNW is or is not significant, as well as why it is or is not more than speculative or insubstantial. The analysis should focus on how the functions performed by the tributary and its adjacent wetland(s) effects the physical, chemical and/or biological integrity of the TNW. The AR should be supplemented accordingly to document and reflect the additional factual data considered in this analysis. This documentation should include a revised AJD form that captures the rationale of the District's reconsidered decision.

Conclusion: For the reasons stated above, I have determined that the reason for appeal has merit. The AJD is remanded to the Tulsa District for reconsideration consistent with the discussion detailed above. The final USACE decision on jurisdiction in this case will be the Tulsa District Engineer's decision made pursuant to this remand.

28 APR 2015

Date



David C. Hill
Brigadier General, U.S. Army
Commanding