

**ADMINISTRATIVE APPEAL DECISION  
CLEAN WATER ACT (CWA)**

SEECO, Inc.

**Bee Branch, Arkansas**

Little Rock District Approved Jurisdictional Determination

File Number SWL-2008-00444

**22 June 2009**

**Review Officer:** John Davidson, U.S. Army Corps of Engineers (Corps), Southwestern Division, Dallas, Texas

**Appellant Representatives:** Mike Bengé – SEECO, Inc.

Danny Coffman – SEECO, Inc.

Michael Thorvilson – SEECO, Inc.

Misty Sutton – SEECO, Inc.

Joel Ward – SEECO, Inc.'s Consultant

Bill Henson – SEECO, Inc.'s Consultant

**District Representatives:** Marc Fossett - Regulatory Project Manager

Kyle Clark – Regulatory Compliance Chief

Tim Scott – Regulatory Project Manager

**Authority:** Clean Water Act (33 USC 1344)

**Receipt of Request for Appeal:** 16 January 2009

**Appeal Meeting and Site Visit Date:** 20 March 2009

**Summary of Decision:** This request for appeal of the approved jurisdictional determination is remanded to the District for further review. In particular, the District must further evaluate and document its decision that the unnamed tributary to Ward Creek is a relatively permanent water (RPW) whose waters flow directly or indirectly into a traditional navigable water (TNW), particularly, whether the unnamed tributary has relatively permanent seasonal or perennial flow. Relatively permanent waters are waters of the United States subject to Section 404 of the Clean Water Act (CWA). Should the District determine that the unnamed tributary to Ward Creek is a non-navigable, not relatively permanent tributary, the District must evaluate whether the tributary and its adjacent wetlands have a significant nexus to a TNW. If the District finds that there is a significant nexus, the tributary and its adjacent wetlands would be waters of the United States subject to Section 404 of the CWA. Conversely, if the District finds that there is not a significant nexus, the tributary and its adjacent wetlands would not be waters of the United States and would not be subject to Section 404 of the CWA.

**Background Information:** The unnamed tributary to Ward Creek is located in Section 32, Township 10 North, Range 13 West, Bee Branch, Van Buren County, Arkansas. The unnamed tributary is also located east of U.S. Highway 65, approximately 3,600 feet northwest of the U.S. Highway 65 and State Highway 92 intersection, near Bee Branch, Arkansas. The unnamed tributary flows into Ward Creek, which flows into Pine Mountain Creek, which flows into Cove Creek, which flows into Cadron Creek, which flows into the Arkansas River. Both Cadron Creek and the Arkansas River are TNWs. The landscape is hilly and drainage is adequate in the area.

The appellant constructed a pond, which was discovered by the Little Rock District Regulatory staff on 26 September 2008. The Little Rock District exercised discretionary authority and determined that the discharge of fill material into the unnamed tributary to Ward Creek to construct the pond, which meets the requirements outlined in Nationwide Permit 18, should be elevated to an individual permit review process. The Little Rock District issued an approved jurisdictional determination stating that the unnamed tributary to Ward Creek is a water of the United States on 19 November 2008. SEECO, Inc., submitted a request for appeal dated 22 December 2008, that the Southwestern Division received on 16 January 2009, appealing the approved jurisdictional determination citing the following reasons for appeal:

**Appeal Evaluation, Findings and Instructions to the Little Rock District Engineer (DE):**

**REASON FOR APPEAL 1:** An ordinary high water mark was not found within the project area; therefore, the area is not a water of the United States. The approved jurisdictional determination does not identify an ordinary high water mark as a characteristic of the area.

**FINDING:** This reason for appeal has merit.

**ACTION:** The Little Rock District must include data to support its conclusion in the approved jurisdictional determination (AJD) form.

**DISCUSSION:** The Corps' regulations define "waters of the United States" in 33 CFR 328.3(a)(5) as "tributaries of waters (a)(1-4) of this section." Waters listed in 33 CFR 328.3(a)(1-4) include (1) all waters currently used, used in the past, or susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide, (2) interstate waters including interstate wetlands, (3) all other waters such as intrastate lakes, rivers, streams, mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use degradation or destruction of which could affect interstate or foreign commerce, and (4) all impoundments of waters otherwise defined as waters of the United States under this definition. Current Corps/Environmental Protection Agency (EPA) joint guidance, titled *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States* (5 June 2007, revised 2 December 2008) (hereafter referenced as the "2 December 2008 Memorandum") identifies relatively permanent non-navigable tributaries of TNWs and wetlands with a continuous surface connection with such tributaries as waters of the United States. The 2 December 2008 Memorandum further states that a non-navigable tributary of a TNW is a non-navigable water body whose waters flow into a



TNW either directly or indirectly by means of other tributaries. It also states that both the plurality opinion and the dissent in the Supreme Court decision would uphold CWA jurisdiction over non-navigable tributaries that are “relatively permanent” – waters that typically flow year-round or waters that have continuous flow at least seasonally (e.g. typically three months). Furthermore, the 2 December 2008 Memorandum states that “relatively permanent” waters do not include ephemeral tributaries which flow only in response to precipitation and intermittent streams which do not typically flow year-round or have continuous flow at least seasonally. The 2 December 2008 Memorandum states that the agencies will assert jurisdiction over relatively permanent non-navigable tributaries of TNWs without a legal obligation to make a significant nexus finding. It also states that CWA jurisdiction over non-navigable, not relatively permanent tributaries and their adjacent wetlands will be evaluated under the significant nexus standard to determine if such waters have a significant nexus to a TNW. If a significant nexus exists between the non-navigable, not relatively permanent tributaries and their adjacent wetlands and a TNW, the non-navigable, not relatively permanent tributaries and their adjacent wetlands are waters of the United States subject to the CWA.

The Little Rock District stated that the unnamed tributary to Ward Creek was a water of the United States based on the facts that the unnamed tributary has relatively permanent flow and an ordinary high water mark. The approved jurisdictional determination form completed by the Little Rock District stated that the unnamed tributary to Ward Creek is a RPW that flows directly or indirectly into a TNW (Cadron Creek). The form further indicates that the unnamed tributary flows seasonally, however, the data supporting this conclusion that should be provided in Section III.B is missing.

**REASON FOR APPEAL 2:** The site does not have a RPW as identified in Section III.B.1.a [*sic* Section II.B.1.a] and Section III.D.2 of the Little Rock District AJD, because it does not provide a viable justification for this determination. The only justification provided was that the ‘creek was flowing’ on the day of the inspection. This statement provides no evidence to support the conclusion that the tributary has perennial or continuous flow seasonally.

**FINDING:** This reason for appeal has merit.

**ACTION:** The Little Rock District must properly include data to document its conclusion that the unnamed tributary is a RPW.

**DISCUSSION:** Based on the approved jurisdictional determination form, the Little Rock District determined that the unnamed tributary to Ward Creek was a RPW because the unnamed tributary was flowing on the day of the inspection and the area had only 0.27-inch of rain during the week prior to the inspection. The data form did not indicate whether the rain fell 7 days prior to the site visit or the day before the site visit, which could influence the relatively permanent determination. During the site visit for the administrative appeal, the unnamed tributary to Ward Creek had flowing water both downstream of the dam and upstream of the pond.

**REASON FOR APPEAL 3:** Even if the site is found to contain a RPW or a non-RPW, the site is not a jurisdictional water of the United States because it does not significantly affect the

chemical, physical, and biological integrity of Cadron Creek, the TNW downstream of the site. In other words, it does not have a significant nexus to a TNW.

**FINDING:** This reason for appeal does not have merit.

**ACTION:** No action is required.

**DISCUSSION:** As discussed previously, the 2 December 2008 Memorandum guidance states that the agencies will assert jurisdiction over relatively permanent non-navigable tributaries of TNWs without a legal obligation to make a significant nexus finding. Therefore, should the District sufficiently document their determination that the unnamed tributary to Ward Creek is a RPW, no significant nexus evaluation is required to establish jurisdiction under the CWA. Should the District determine that the unnamed tributary to Ward Creek is a non-navigable, not relatively permanent water, the unnamed tributary and its adjacent wetlands will be evaluated under the significant nexus standard to determine if such waters have a significant nexus to a TNW. If a significant nexus exists between the non-navigable, not relatively permanent tributaries and their adjacent wetlands and a TNW, the non-navigable, not relatively permanent tributaries and their adjacent wetlands are subject to the CWA. Since the District determined that the unnamed tributary is a relatively permanent water, no significant nexus determination was required.

**Information Received During the Appeal Review and Its Disposition:** The administrative appeal was evaluated based on the District's administrative record, the Appellant's Request for Appeal, and discussions at the appeal conference. Information which was received during and after the appeal conference was considered to the extent it clarified information in the existing administrative record. New information was not considered in the appeal.

**Conclusion:** I conclude that the District must further evaluate and document its decision that the unnamed tributary to Ward Creek is a RPW whose waters flow directly or indirectly into a TNW, particularly, that the unnamed tributary has relatively permanent seasonal or perennial flow. The final Corps decision is the district commander's decision made pursuant to my remand of the appealed jurisdictional determination. This concludes the Administrative Appeal Process.



Kendall P. Cox  
Brigadier General, US Army  
Commanding