

**ADMINISTRATIVE APPEAL DECISION
CLEAN WATER ACT
SHOMAC PROPERTY
HOUSTON, HARRIS COUNTY, TEXAS
GALVESTON DISTRICT JURISDICTIONAL DETERMINATION
File Number SWG-2008-01144**

DATE: July 1, 2010

Review Officer: Thomas J. Cavanaugh, U.S. Army Corps of Engineers (Corps), South Pacific Division, San Francisco, California

Appellant: Ryan Schoff, Staffordshire Partners

District Representative: Arianne Logwood, Army Corps of Engineers, Galveston District

Authority: Clean Water Act (33 USC 1344)

Receipt of Request for Appeal: October 6, 2009

Appeal Meeting and Site Visit Date: January 27, 2010

Summary of Decision: This Clean Water Act (CWA) jurisdictional determination is remanded to the District for further evaluation and consideration of information provided by the Appellant. The District must document that it has evaluated the possibility that aquatic features on the project site fall into a category of waters that generally would not be considered waters of the United States and, if they do, whether there might be a case specific reason to assert jurisdiction. The District must also evaluate the source of hydrology for the three ponds and consider the potential that areas which have been determined to meet wetland criteria would revert to uplands if the application of municipal water were to cease. Finally, the District must document how its consideration of characteristics of wetlands on the property and Brays Bayou leads to its conclusion as to whether there is a significant nexus between the wetlands on the property and the nearest downstream (traditionally navigable water) TNW.

Background Information: The Shomac property is an approximately 3.63-acre property, located at 7000 Staffordshire Street, Houston, Harris County, Texas.

The site can be found on the Bellaire U.S.G.S. 7.5" quadrangle, 29.703672 North, - 95.393496 West (Tax Parcel #: 059-006-006-0006). The property is the site of an old

oxbow of Brays Bayou. Brays Bayou was channelized prior to 1944 and the abandoned portion of the bayou that remained on the project site was subsequently filled and developed. The property was a single family estate that is now proposed for redevelopment. There are currently two unoccupied residential structures, a swimming pool, a greenhouse, and a pump house on the property. The property is densely vegetated, with much of the vegetation consisting of unmaintained landscaping plants.

For purposes of evaluation during the CWA jurisdictional determination, the Appellant's consultant evaluated the site using the 1987 *Wetland Delineation Manual*, the Code of Federal Regulations (CFR) definitions of jurisdictional waters, and supporting guidance documents. In its November 20, 2008, submittal, the Appellant's consultant concluded that the wet areas on the property did not meet the definition of a wetland contained within Corps regulations and that the property did not contain wetlands, which are subject to Corps jurisdiction.

The District reviewed the Appellant's November 20, 2008, submittal. The review included a field visit on January 1, 2009. On September 9, 2009, the District issued its CWA jurisdictional determination for the Property. The District concluded that the site contained waters of the United States, specifically adjacent wetlands to Brays Bayou, subject to CWA jurisdiction.

The Appellant disagreed and appealed citing the reasons for appeal addressed in this appeal decision.

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

REASON 1: The areas mapped as wetlands do not meet the criteria to be mapped as wetlands under CWA protection.

FINDING: This reason for appeal has merit.

ACTION: To respond to this reason for appeal, the District must document that it has evaluated the possibility that aquatic features on the project site fall into a category of waters that generally would not be considered waters of the United States and, if they do, whether there might be a case specific reason to assert jurisdiction. The District must also evaluate the source of hydrology for the three ponds and consider the potential that areas which have been determined to meet wetland criteria would revert to uplands if the application of municipal water were to cease.

DISCUSSION: In the request for appeal (RFA), the Appellant asserted that soils tests conflict with soil tests conducted by the U.S. Department of Agriculture in 1922 and in 1972, hydrophytic vegetation documented by the Corps was imported by the previous owner for the purpose of creating the artificial ponds that the District determined to be jurisdictional, and the hydrology of the decorative ponds is delivered by an irrigation system. The Appellant further asserted that, as water is delivered from pumped city

water sources rather than ground water, the areas do not meet the definition of wetlands because they do not, under normal circumstances, support a prevalence of vegetation typically adapted for life in saturated soil conditions.

The District's June 5, 2009, Wetland Determination Data form, for data point 1, documents the presence of wetland hydrology, hydrophytic vegetation, and hydric soils and concludes that the point is in a wetland. The corresponding form, for data point 2, documents the presence of hydrophytic vegetation and wetland hydrology, but does not document the presence of hydric soils. The form, however, concludes that the data point is within a wetland. The form for the final data point, data point 3, documents the presence of hydrophytic vegetation and wetland hydrology, and also does not document the presence of hydric soils. The form, for data point 3, does not conclude that the data point is within a wetland. Documentation prepared by the District does not mention the source of hydrology to wetlands on the property. The District's documentation does refer to vegetation on the site as including landscaping plants.

The preamble to 33 CFR 328.3 provides a list of waters that are generally not considered to be waters of the United States. This list includes artificially irrigated areas which would revert to upland if the irrigation ceased. The list also includes artificial reflecting or swimming pools or other small ornamental bodies of water created by excavating and/or diking dry land to retain water for primarily aesthetic reasons. However the preamble also indicates that the Corps reserves the right on a case-by-case basis to determine that a particular waterbody within these categories of waters is a water of the United States. EPA also has the right to determine on a case-by-case basis if any of these waters are waters of the United States.

In response to questions asked at the appeal conference, the District asserted that wetlands exist on the project site and that they are part of the historic bayou and that there are areas on the site that meet the requirements of the (1987 wetland delineation manual) to be considered wetlands. The District stated that it had documented the existence of wetlands during visits to the site.

In response to questions asked at the appeal conference, the Appellant indicated that data which its consultant had gathered supported the conclusion that the three criteria for wetlands (predominance of hydrophytic vegetation, hydric soil, and hydrology) were not present in the three ponds on the site. The appellant further indicated that the soils series represented on the site is classified as Miller Urban, which is not listed by the Department of Agriculture as hydric. The Appellant asserted that hydrology to the site is supplied by a City potable water supply and that, when the water is turned off, the pond dries up. The Appellant further stated that natural conditions ceased to exist on the property approximately 60 years ago, when the Corps channelized Brays Bayou and the old oxbow was filled. The Appellant indicated that the three ponds on the site are decorative ponds, which were created by constructing one concrete and two earthen dams. The Appellant believes that the ponds should be considered to be artificial reflecting pools or small ornamental bodies of water created by excavating and/or diking dry land to retain water

for primarily aesthetic reasons, which are generally not considered to be waters of the United States.

The District has sufficiently documented that there are wetlands on the property. The wetlands documented by the District are located within the ponds on the property. While the Appellant has provided conflicting data sheets, the District has properly documented, on one data sheet and at one location, that soils, vegetation, and hydrology criteria, which must be present for an area to be classified as a wetland, are present. The District determined only that there are wetlands on the property. The District did not determine or map the total extent of wetlands on the property. The District has also not documented that it considered the possibility that the ponds on the property should be determined to be a type of water that would generally not be considered to be a water of the United States, and, if so, whether there is a case specific reason to assert jurisdiction over such a water. While it is not clear from the administrative record, that the ponds are currently being supplied with municipal water as asserted by the Appellant, the District has not documented that it evaluated the hydrology that supports wetlands on the property to determine whether wetland hydrology is supplied entirely by an artificial source.

Therefore, prior to making its final decision, the District must document that it has evaluated the possibility that aquatic features on the project site fall into a category of waters that generally would not be considered waters of the United States and, if they do, whether there might be a case specific reason to assert jurisdiction. The District must also evaluate the source of hydrology for the three ponds and consider the potential that areas which have been determined to meet wetland criteria would revert to uplands if the application of municipal water were to cease.

REASON 2: The areas mapped as wetlands on the Shomac property should not be mapped as adjacent wetlands.

FINDING: This reason for appeal does not have merit.

ACTION: No action is required.

DISCUSSION: In the RFA, the Appellant asserted that, in order for the wetlands to be adjacent under jurisdiction of USACE, they must be “adjacent wetlands”. The Appellant cited *Riverside Bayview Homes*, 474 U.S. 121, 106 S. Ct. 455, U.S. Mich., 1985, and asserted that the Supreme Court held that in order for the CWA to apply there must be some relationship between the alleged wetlands and the Brays Bayou.

The District’s August 5, 2009, Wetland Determination Data form and administrative record indicates that wetlands on the property are adjacent to, but not directly abutting, a relatively permanent water (RPW) that flows directly or indirectly into a TNW.

In section III.B, the District provides information on the size of the watershed and drainage area, along with channel characteristics of Brays Bayou. Further, it indicates

that Brays Bayou, the RPW to which wetlands on the site are adjacent, becomes a TNW further downstream, closer to Houston Ship Channel. Finally, it indicates that the wetlands are not directly abutting and that they are separated by a berm/barrier. Wetlands are indicated to be 75 feet from the top of bank and 179 feet from the center of Brays Bayou.

The December 2, 2008, "Revised Guidance on Clean Water Act Jurisdiction Following the Supreme Court Decision in Rapanos v. U.S. and Carabell v. U.S." (Revised Rapanos Guidance) indicates that the agencies will assert jurisdiction over those adjacent wetlands that have a continuous surface connection with a relatively permanent, non-navigable tributary, without the legal obligation to make a significant nexus finding. The Revised Rapanos Guidance noted that the plurality opinion and the dissent in Rapanos v. United States and Carabell v. United States, 126 S. Ct. 2208 (2006) (Rapanos) agreed that such wetlands were jurisdictional. The December 2008, guidance further indicates that the Rapanos plurality opinion found that a "continuous surface connection" is a physical connection requirement. Therefore, a continuous surface connection exists between a wetland and a relatively permanent tributary where the wetland directly abuts the tributary (e.g., they are not separated by uplands, a berm, dike, or similar feature).

The Revised Rapanos Guidance further indicates that the 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". Under this definition, the agencies consider wetlands adjacent if one of following three criteria is satisfied. First, 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. Due to 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. In the case of a jurisdictional water and a reasonably close wetland, such implied ecological interconnectivity is neither speculative nor insubstantial. For example, species, such as amphibians or anadromous and catadromous fish, move between such waters for spawning and their life stage requirements. Migratory species, however, shall not be used to support an ecologic interconnection. In assessing whether a wetland is reasonably close to a jurisdictional water, the proximity of the wetland (including all parts of a single wetland that has been divided by road crossings, ditches, berms, etc.) in question will be evaluated and shall not be evaluated together with other wetlands in the area.

In response to questions asked at the appeal conference, the District referenced the definition of adjacency from Corps regulations. The District indicated that the wetlands on the property were adjacent to a perennial RPW and that there is a direct connection through a culvert.

In response to questions asked at the appeal conference, the Appellant indicated that the ponds are approximately 60 feet above the ordinary high water mark of Brays Bayou and are separated from the bayou by a large and high earthen berm. The Appellant further indicated that there is no way for water from Brays Bayou to enter the ponds on the property, even during times of high flow. The Appellant stated that there is a manmade overflow pipe with a flap gate that prevents water, during times of tropical storms, hurricanes, etc., from flooding homes and other structures present on the property. These flows would otherwise overflow the ponds. The Appellant suggested that, as this occurs only during non-typical weather events, that the ponds would not be jurisdictional, since the Revised Rapanos Guidance indicates that the Corps will not generally assert jurisdiction over gullies, small washes, etc., characterized by low volume, infrequent, or short duration flows.

The District's administrative record documents that wetlands on the site are adjacent, but not abutting, as they are separated by a berm/barrier from the RPW, Brays Bayou. This is consistent with the Revised Rapanos Guidance and sufficient documentation that the wetlands on the property are adjacent. As the District mentioned in response to questions at the appeal conference, there is also a direct connection through a culvert between wetlands on the property and Brays Bayou. The flap gate on the Brays Bayou side of the culvert would not cause the wetlands on the property to cease being adjacent.

REASON 3: The areas mapped as wetlands on the Shomac property do not have a significant nexus to a traditionally navigable water.

FINDING: This reason for appeal has merit.

ACTION: The District must document how its consideration of characteristics of wetlands on the property and Brays Bayou leads to its conclusion as to whether there is a significant nexus between the wetlands on the property and the nearest downstream TNW.

DISCUSSION: In the RFA, the Appellant asserted that the Corps must prove a significant nexus exists and it did not. The Appellant asserted that there is no significant surface connection between Brays Bayou and the areas labeled as wetlands on the property, the concrete lining of Brays Bayou precludes water from the property from affecting navigable waters, and that there is no evidence of any past or present contamination of Brays Bayou attributable to the discharge of pollutants by the property into the waters or any evidence of any past or present discharge of pollutants from Brays Bayou onto the property.

In the District's August 5, 2009, Wetland Determination Data forms, in Section III.D.5., the District indicated that the wetlands on the property do not directly abut an RPW, but when considered in combination with the tributary to which they are adjacent and with similarly situated adjacent wetlands, have a significant nexus with a TNW and are

jurisdictional. The form indicates that data supporting this conclusion is found in Section III.C.

In Section III.C, the District indicated that wetlands on the property, which are adjacent to an RPW, but do not directly abut the RPW, are separated by a berm, roughly 75 to 120 feet from the top of bank and 174 to 200 feet from the Center of Brays Bayou. Brays Bayou is an RPW near the wetland location, but becomes a TNW approximately 3.5 aerial miles and 4.5 river miles downstream. Brays Bayou has been manipulated with the addition of a concrete lining with federal projects completed by the Corps and Harris County Flood Control District in 1968. Brays Bayou approximate dimensions, relative to the review, are an average width of 283 feet and an average depth of 30 feet, with a slope of 3:1. According to the historic USGS topographic maps, the wetlands under review are believed to be an abandoned channel of Brays Bayou. Brays Bayou is listed as a priority impaired water on the Texas Council for Environmental Quality Water Quality Inventory and 303d List for excessive amounts of Dioxin, PCBs, and bacteria. There are 6.45 acres within the 100 year flood plain of Brays Bayou, beginning north of South Braeswood and west of South Gessner Drive and ending where Brays Bayou connects to the Houston Ship Channel.

The Revised Rapanos Guidance states that the agencies will assert jurisdiction over the following types of waters when they have a significant nexus with a TNW: (1) non-navigable tributaries that are not relatively permanent, (2) wetlands adjacent to non-navigable tributaries that are not relatively permanent, and (3) wetlands adjacent to, but not directly abutting, a relatively permanent tributary (e. a., separated from it by uplands, a berm, dike or similar feature).

Additionally the Revised Rapanos Guidance states that, in considering how to apply the significant nexus standard, the agencies have focused on the integral relationship between the ecological characteristics of tributaries and those of their adjacent wetlands, which determines in part their contribution to restoring and maintaining the chemical, physical and biological integrity of the Nation's traditional navigable waters. The ecological relationship between tributaries and their adjacent wetlands is well documented in the scientific literature and reflects their physical proximity as well as shared hydrological and biological characteristics. The flow parameters and ecological functions that Justice Kennedy describes as most relevant to an evaluation of significant nexus result from the ecological inter-relationship between tributaries and their adjacent wetlands. For example, the duration, frequency, and volume of flow in a tributary, and subsequently the flow in downstream navigable waters, is directly affected by the presence of adjacent wetlands that hold floodwaters, intercept sheet flow from uplands, and then release waters to tributaries in a more even and constant manner. Wetlands may also help to maintain more consistent water temperature in tributaries, which is important for some aquatic species. Adjacent wetlands trap and hold pollutants that may otherwise reach tributaries (and downstream navigable waters) including sediments, chemicals, and other pollutants.

In response to questions asked at the appeal conference, the District indicated that the Revised Rapanos Guidance indicates that if there is a measurable connection between the ponds on the property that there is a significant nexus. They further indicated that Brays Bayou being listed as a 303(d) impaired water further supported the conclusion of significance. Finally, the District indicated that the determination that there was a significant nexus relied on other similarly situated wetlands along Brays Bayou.

In response to questions asked at the appeal conference, the Appellant indicated that a significant nexus analysis will assess the flow characteristics and functions of the tributary itself and the functions performed by all wetlands adjacent to the tributary to determine if they significantly affect the chemical, physical, and biological integrity of downstream traditional navigable waters and that when wetland effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term “navigable waters”. The Appellant indicated that Brays Bayou is a channelized, concrete lined waterway that has 79 sewage treatment plants (STP) discharging into it. Some of the STPs discharge 12 to 16 million gallons per day each into the bayou. A very conservative estimate of 1 million gallons per day of effluent discharge from each STP into Brays Bayou would give it a base flow of 79 million gallons a day of flow. The actual base flow is higher. Brays Bayou is approximately 45 river miles long with many tributaries and drainage ditches flowing into it. The watershed for Brays Bayou is quite large and any rainfall into a portion of the watershed increases the flow, which results in a tremendous amount of water moving down the bayou. The Appellant believes that the ponds on the property, even if full to the brim, would be of no significance to Brays Bayou. The Appellant compared the effect of the ponds on Brays Bayou to that of emptying a bucket of water into a fast moving river. The Appellant asserted that there is simply no way that water from the decorative ponds would have any impact on the flow volume, water quality, chemical composition, or biological diversity of Brays Bayou. The Appellant indicated that the Corps has estimated that that approximately 5.0 acres of wetlands are in the relevant portion of Brays Bayou. The Appellant stated these wetlands are temporary, scattered and isolated from each other. They are typically 1-2’ wide and anywhere from 3 to 15’ long. The Appellant indicated these wetlands hug the channel walls until high flows dislodge them and move the material downstream. The Appellant asserted that this type of wetland does not help the water quality or biological diversity of Brays Bayou because they are too small compared to the tremendous volume of water that rushes past them and their short time in place before they are washed downstream.

The District has listed, in the administrative record, a number of characteristics of the wetlands on the property relative to Brays Bayou and of Brays Bayou itself, including Brays Bayou being listed as an impaired water, as supporting its conclusion that there is a significant nexus between the wetlands on the property and the nearest downstream TNW. However, the District has not supported its conclusion by including in the administrative record an explanation of how these characteristics, considered either alone or together, result in the wetlands on the property having a significant nexus with the nearest downstream TNW.

Therefore, prior to making its final decision, the District must further consider whether characteristics of wetlands on the property and of Brays Bayou support a conclusion that there is a significant nexus between the wetlands on the property and the nearest downstream TNW. The District must then document its consideration of those characteristics and how that consideration leads to its conclusion as to whether there is a significant nexus between the wetlands on the property and the nearest downstream TNW.

INFORMATION RECEIVED AND ITS DISPOSAL DURING THE APPEAL

REVIEW: The administrative appeal was evaluated based on the District's administrative record, the Appellant's Request for Appeal, discussions at the appeal meeting, and written responses to questions provided with the agenda and discussed at the appeal conference from the Appellant and the District.

CONCLUSION: In accordance with 33 CFR Section 331.9, the appeal is remanded to the District for further evaluation consistent with this decision. The District must document that it has evaluated the possibility that aquatic features on the project site fall into a category of waters that generally would not be considered waters of the United States and, if they do, whether there might be a case specific reason to assert jurisdiction. The District must also evaluate the source of hydrology for the three ponds and consider the potential that areas which have been determined to meet wetland criteria would revert to uplands if the application of municipal water were to cease. Finally, the District must document how its consideration of characteristics of wetlands on the property and Brays Bayou leads to its conclusion as to whether there is a significant nexus between the wetlands on the property and the nearest downstream TNW.

This is the final decision of the Division Engineer on the merits of the appeal and concludes the administrative appeal process. The District Commander shall, upon reconsideration of this appeal as indicated, provide the final Corps decision to the Division Engineer and Appellant.



ANTHONY C. FUNKHOUSER
Colonel, USA
Commanding