

**ADMINISTRATIVE APPEAL DECISION
FALLS MEMORIAL HOSPITAL JURISDICTIONAL DETERMINATION
ST. PAUL DISTRICT
CORPS FILE NUMBER 2007-5740-KJU
MAY 8, 2009**

Review Officer: James B. Wiseman, Jr., U.S. Army Corps of Engineers, Mississippi Valley Division (MVD)

Appellant: Falls Memorial Hospital, International Falls, Minnesota

Authority: Section 404 of the Clean Water Act

Approved Jurisdictional Determination Conference: October 29, 2008

Summary of Appeal Decision: Falls Memorial Hospital is appealing a St. Paul District (MVP) jurisdictional determination dated June 18, 2008. For reasons detailed in this document, the appeal was found to have no merit. There is substantial evidence in the administrative record (AR) to support the MVP jurisdictional determination (JD).

Background Information: On May 15-16, 2008, MVP conducted a field investigation for purposes of making a JD on the property of St. Mary's Clinic, located in Section 4, Township 70 N, Range 24 W, Koochiching County, Minnesota. The property is the location for the proposed construction of Falls Memorial Hospital (FMH). By letter dated June 18, 2008, MVP issued an approved jurisdictional determination which showed that most of the proposed FMH site is wetlands subject to regulation under the Clean Water Act (CWA). By letter dated August 5, 2008 and received by Mississippi Valley Division (MVD) on August 7, 2008, Mr. Mark J. Yanik, agent for FMH, submitted a Request for Appeal (RFA) form. By letter dated September 3, 2008, the MVD Review Officer (RO) informed Mr. Yanik that the RFA was complete and acceptable and that he would conduct a review of the administrative record for the FMH approved jurisdictional determination.

Information Received and Its Disposal During the Appeal:

33 C.F.R. § 331.3(a)(2) sets the authority of the Division Engineer to hear the appeal of this jurisdictional determination. However, the Division Engineer does not have authority under the appeal process to make a final decision regarding a

jurisdictional determination, as that authority remains with the District Engineer. Upon appeal of the District Engineer's decision, the Division Engineer or his RO 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. § 331.2, no new information may be submitted on appeal. Neither the Appellant nor the District may present new information to MVD. 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 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.

1. MVP provided a copy of the administrative record (AR) to the RO and the Appellant. The RO received the AR on September 26, 2008. The administrative record is limited to information contained in the record by the date of the NAP form, which in this case was June 18, 2008.

2. A site visit and an appeal meeting were held on October 29, 2008. During the appeal meeting, the appellants provided a copy of a letter which had been faxed to the Mississippi Valley Division office. The letter included additional comments about the MVP jurisdictional determination. The RO stated that he was unsure of whether the contents of this letter could be considered in the appeal, but that he would consult with his representative from the MVD Office of Counsel. On consultation with counsel, it was determined that the contents of the letter constituted clarifying information and would be considered in making the appeal decision.

3. On January 23, 2009, the RO forwarded a draft Memorandum for Record (MFR) detailing the site visit and appeal meeting to FMH and MVP. FMH responded by e-mail on January 30, 2009, and the response is included in the final MFR. MVP responded by memorandum dated February 6, 2009, and the response is also included in the final MFR. The final MFR was prepared on March 9, 2009 (Exhibit 1) and a copy was provided to MVP and the appellant.

Jurisdictional Determination Background: Regulations, Guidance, and Court Cases

In 1985, the U.S. Environmental Protection Agency (EPA) General Counsel signed the Migratory Bird Memo, which opined that movement of migratory birds across state boundaries could be used as a link to interstate commerce. The Corps, in preamble language to its 1986 regulations, adopted the EPA legal memo as the "Migratory Bird Rule" (MBR).¹ The MBR generally allowed the Corps to assert Clean Water Act (CWA) jurisdiction over nearly all natural water bodies, including wetlands that were used or could be used as habitat by migratory birds. In 2001, the MBR was invalidated by the U.S. Supreme Court's decision in the *Solid Waste Agency of Northern Cook County (SWANCC) v. Corps*, which held that isolated, intrastate, non-navigable waters could not be regulated under the CWA based solely on the presence of migratory birds. Following the *SWANCC* decision but prior to the decision in *Rapanos* (discussed below), it was generally believed that a water body (including a wetland) was subject to CWA jurisdiction if it was part of the U.S. territorial seas, a traditional navigable water, any tributary to a traditional navigable water, or a wetland adjacent to any one of the above. In addition, isolated wetlands and other waters might be considered jurisdictional where they had the necessary link to either traditional navigable waters or interstate commerce. In 2003, the EPA and the Corps provided joint guidance in Appendix A² of the Advanced Notice of Proposed Rulemaking on the CWA Regulatory Definition of "Waters of the United States."

In 2007, as a result of a U.S. Supreme Court decision,³ EPA and the Corps, in coordination with the Office of Management and Budget and the President's Council on Environmental Quality, developed a guidance memorandum (*Rapanos* guidance⁴). The *Rapanos* guidance requires the application of two new standards, as well

¹ The "Migratory Bird Rule" was not a rule or a part of any Corps or EPA regulation, but instead consisted of examples in a preamble published in the *Federal Register*. The preamble language was never subject to notice and comment rulemaking procedures under the Administrative Procedures Act, and was never codified in the Code of Federal Regulations (CFR). Instead, it was advanced as a basis for asserting jurisdiction in a guidance memo.

² 68 F.R. 1995-1998.

³ Combined cases of *Rapanos v. United States* and *Carabell v. United States*. 126 S. Ct. 2208 (2006).

⁴ Grumbles, Benjamin H. and John Paul Woodley, Jr. 2007. 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.

as a greater level of documentation, to support an agency jurisdictional determination (JD) for a particular water body. The first standard, based on the plurality opinion in the *Rapanos* decision, recognizes regulatory jurisdiction over a water body that is not a traditional navigable water 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 Corps and EPA may assert jurisdiction over the following categories of water bodies: (1) traditional navigable waters, (2) all wetlands adjacent to traditional navigable waters, (3) relatively permanent non-navigable tributaries of traditional navigable waters, and (4) wetlands that directly abut relatively permanent, non-navigable tributaries of traditional navigable waters.

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 traditional navigable water (TNW). Consequently, the agencies may assert jurisdiction over every water body that is not a relatively permanent water (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 body 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 Corps to strive for more thoroughness and consistency in the documentation of jurisdictional determinations. To meet this requirement, the Corps now uses a standardized JD form. Instructions for completing the form are found in *U.S. Army Corps of Engineers Jurisdictional Form Instructional Guidebook* (Guidebook).⁵ The Guidebook clarifies terms commonly used in the

⁵ The Guidebook was issued on June 1, 2007 as Regulatory National Standard Operating Procedures for conducting an approved jurisdictional determination and documenting practices to support an approved JD. Information on *Rapanos* related memorandums, guidance, forms, guidebooks, etc., may be found at www.usace.army.mil/cw/cecwo/reg/.

form, presents an overview on jurisdictional practices, and supplements the form instructions.

Appellant's Reasons for Appeal as Stated in the RFA

1. The site is highly disturbed. This is evidenced by the site history, the presence of crushed rock in the surface soil layers, and the fact that part of the site is now a clinic and parking lot.

FINDING: This reason for appeal does not have merit.

DISCUSSION: In order to determine whether an area contains a wetland subject to U.S. Army Corps of Engineers (Corps) jurisdiction, a Corps district must first establish whether or not the area meets the criteria for a wetland as defined by regulation.⁶ Explicit in the definition is the consideration of three environmental parameters: hydrology, soils, and vegetation. Positive wetland indicators of all three parameters are normally present in undisturbed wetlands. Procedures for determining whether these parameters are present in an area are found in the *Corps of Engineers Wetlands Delineation Manual*⁷ (1987 Manual) and related guidance.

For the FMH wetland delineation, the soils and/or hydrology in part of the area had been previously impacted. According to MVP:

The soils on portions of the site have been excavated, stripped and/or buried by the placement and subsequent removal of dredged or fill material throughout the years. Photo documents show that construction of a mill worker camp occurred in 1989. This included the deposition of fill material on a large portion (30+ acres) of the site where trailers and parking areas were constructed. It appears that the fill material was underlain with a layer of gravel.⁸

⁶ "The term *wetlands* means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas." 33 CFR § 328.3(b)

⁷ Environmental Laboratory. 1987. *Corps of Engineers Wetlands Delineation Manual*. Technical Report Y-87-1. U.S. Army Waterways Experiment Station. Vicksburg, MS.

⁸ See p. 13 of the Site Investigation Report prepared by MVP in May 2008.

Disturbance in and of itself does not preclude the Corps from asserting jurisdiction over an area. In fact, the 1987 Manual includes procedures for conducting wetland delineations in disturbed areas.⁹

Due to these disturbed, atypical conditions, MVP assembled an experienced delineation team¹⁰ and established a comprehensive sampling scheme, in accordance with procedures in the 1987 Manual, to assess the project area. Data were collected at 24 sample sites,¹¹ and 19 sites were determined to be wetlands. Data forms¹² found in the administrative record confirm the presence of indicators of all three required wetland parameters at these 19 sites. A wetland delineation map¹³ was developed based on data collected at the sample sites. Based on the information in the AR, the map appears to be an accurate representation of wetlands on the project site.

ACTION: No action is required.

2. Rainfall leaves the site only through the city storm water system.

3. Storm water ditches on the west side of the site do not flow continuously (only during storm events and the spring melt). At the nearest point on the west side, the Rainy River is 1100 feet from the site.

4. Storm water collection pipes on the east side of the site have only intermittent flow, and there is a distance of several thousand feet from the site to the Rainy River.

5. Even if the site itself is determined to be wetland, those wetlands are not jurisdictional, since they are not adjacent to the Rainy River.

⁹ Environmental Laboratory. 1987. Part IV - Methods, Section F - Atypical Situations, p. 73-83.

¹⁰ The team included Chris Noble, Research Soil Scientist at the Corps of Engineers Engineering Research and Development Center and the Corps lead soil scientist for wetland delineation, and Steve Eggers of MVP who is a member of the National Advisory Team for the Corps wetland delineation manual. The team included other subject matter experts. A complete list of participants may be found in Appendix A of the Site Investigation Report, which is found in the AR.

¹¹ AR, Site Investigation Report, p. 12.

¹² AR, Site Investigation Report, Appendix B.

¹³ AR, Site Investigation Report, Fig. 9, p. 20.

FINDING: These reasons for appeal do not have merit.

DISCUSSION: These four reasons for appeal are considered together. MVP did not take jurisdiction over ditches or pipes that are part of the city storm water system. However, they did use these ditches to establish adjacency of the project area to the Rainy River, as discussed above.

For CWA purposes, the term "adjacent" means bordering, contiguous or neighboring.¹⁴ Revised Rapanos guidance¹⁵ further addresses the definition of adjacency, stating that:

[T]he agencies consider wetlands adjacent if one of the following three criteria are 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 barriers, natural rivers 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.

MVP determined that the project area is adjacent to the Rainy River¹⁶, which is a traditional navigable water. According to the Rapanos guidance, wetlands adjacent to traditional navigable waters are jurisdictional. MVP observed current drainage conditions on the site and determined that the general drainage flow is to the north and northwest through the city storm water system to an outfall structure on the Rainy River. These observations are supported by maps and other documentation in the AR.¹⁷ MVP determined that while the storm water system was not jurisdictional, it provides a "discrete hydrologic connection" from the wetland to the Rainy River. Using a non-jurisdictional ditch to establish adjacency to a TNW is supported in the Guidebook, which states:

¹⁴ 33 C.F.R. § 328.3(c)

¹⁵ Grumbles, Benjamin H. and John Paul Woodley, Jr. 2008. Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* and *Carabell v. United States*. Revised guidance released December 2, 2008.

¹⁶ In the vicinity of the FMH project site, the Rainy River is an international water defining the boundary between the United States and Canada.

¹⁷ AR; Site Investigation Report, Fig. 3 (p. 8), Fig. 8 (p. 14); maps and photographs in Technical Information Project File notebook.

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.¹⁸

By letter dated January 7, 2009 (with copy to MVP), the RO informed the appellant of the revised guidance and requested that MVP take whatever action they deemed necessary in light of the revised guidance. By letter dated January 13, 2009, MVP informed the appellant and the RO that they considered the FMH jurisdictional determination to be consistent with the revised guidance. MVP further stated that:

[W]e believe the revised guidance strengthens our position by clarifying that a wetland is "adjacent" if there is an unbroken surface or shallow sub-surface connection to jurisdictional waters; a characteristic of the wetlands at the site we discussed in our jurisdictional determination and thoroughly documented in the administrative record.

MVP also investigated site history by examining old aerial photographs and soil maps and concluded that this analysis supported a historical direct connection from the FMH site to the Rainy River.

ACTION: No action is required.

Appellants Additional Reasons for Appeal

By letter dated October 27, 2008, the appellant provided clarifying information regarding the reasons for appeal and brought up the following additional issues:

1. The hydrology monitoring wells provided inadequate data.

FINDING: This reason for appeal does not have merit.

DISCUSSION: Sample holes for assessing hydrology and soils on the project site were dug at each of the 24 sample points during the May 15-16, 2008 site investigation according to standard methods in the 1987 Manual. In addition to recording hydrology data from each sample hole during the site investigation, 18 sample holes were left open and hydrology measurements were

¹⁸ Guidebook, p. 36

recorded during an additional 10-day period from May 19-29, 2008.¹⁹

The sample holes were not standard hydrology monitoring wells, as established by the national technical standard.²⁰ MVP used observations from the 10-day period to provide anecdotal data to support the hydrology determination which had been made using data collected during the site investigation on May 15-16, 2008.

Of the 18 sample holes, 17 had a water table or were saturated within 12 inches of the soil surface during the entire 10-day period.²¹ The remaining sample had been determined to be non-wetland. These sample holes were not covered, so measurements over the 10-day period could have been influenced by precipitation.²² According to MVP, "the water tables in the bore holes were generally high throughout the monitoring period and it is very unlikely that the rainfall of May 29 had any bearing on the results." While this statement is speculative, the hydrology data gathered during the 10-day period was not the determining factor in the assessment of wetland hydrology on the site. Wetland hydrology was determined by the occurrence of at least one primary indicator of wetland hydrology at the time of the site investigation.

ACTION: No action is required.

2. Rainfall prior to sampling was not "normal".

FINDING: This reason for appeal does not have merit.

DISCUSSION: Using methodology established by the U.S. Department of Agriculture, Natural Resources Conservation Service and recommended for use by the Corps in wetland delineations,²³ MVP examined precipitation data from February through April prior to

¹⁹ During the appeal conference, when asked by the RO, MVP stated these observations were made by a staff member of the local Soil and Water Conservation District.

²⁰ U.S. Army Corps of Engineers. 2005. Technical Standard for Water-Table Monitoring of Potential Wetland Sites. Wetland Regulatory Assistance Program, ERDC TN-WRAP-05-2.

²¹ AR, Site Investigation Report, Appendix D.

²² According to local weather data (AR, Site Investigation Report, p. 16), from the time the holes were open until May 24, 2008, only a trace amount of rain had fallen; from May 24-28, 2008, 0.73 inches of rain fell; and 1.46 inches fell on May 29, 2008.

²³ Sprecher, S.W. and Warne, A.G. 2000. Accessing and Using Meteorological Data to Evaluate Wetland Hydrology. ERDC/EL TR-WRAP-00-01, U.S. Army Engineer Research and Development Center, Vicksburg, MS.

the 15-16 May 2008 field investigation, and determined that antecedent precipitation conditions were normal.²⁴

ACTION: No action is required.

3. The assumption by MVP that there is an unbroken, large wetland complex that provides continuous surface and subsurface hydrologic continuity between the site and the Rainy River is unproven.

FINDING: This reason for appeal does not have merit.

DISCUSSION: MVP used the city storm water system, not the wetland complex, to establish a discrete hydrologic connection between the FMH site and the Rainy River. The MVP discussion of the wetland complex was part of their historical analysis in support of the adjacency determination, and was not the sole reason for asserting jurisdiction.

ACTION: No action is required.

4. There are breaks in hydric soil continuity which further disproves the existence of adjacency to the Rainy River.

FINDING: This reason for appeal does not have merit.

DISCUSSION: MVP used the city storm water system, not hydric soil continuity, to establish adjacency between the site and the Rainy River. The MVP discussion of hydric soil continuity was part of their historical analysis in support of the adjacency determination, and was not the sole reason for asserting jurisdiction.

ACTION: No action is required.

5. Corps and EPA Rapanos guidance states that the agencies will not exert jurisdiction over swales, erosional features and ditches including roadside ditches that are excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water.

FINDING: This reason for appeal does not have merit.

DISCUSSION: MVP did not assert jurisdiction over the ditches in the city storm water system.

²⁴ AR, Site Investigation Report, p. 3.

ACTION: No action is required.

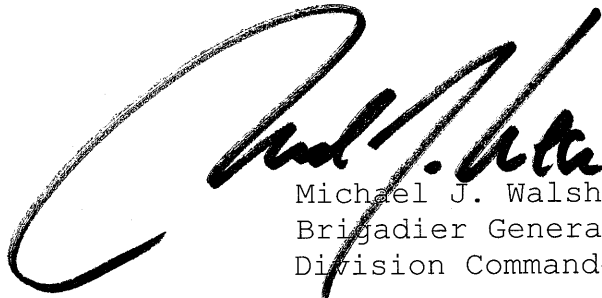
6. Regardless of whether the hydrologic connection is relatively permanent or not, in order for the Corps to now assert jurisdiction, they must prove significant nexus.

FINDING: This reason for appeal does not have merit.

DISCUSSION: As discussed above in "**Jurisdictional Determination Background: Regulations, Guidance, and Court Cases**", a significant nexus analysis is required before asserting jurisdiction over three classes of waters: (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. For wetlands adjacent to a traditional navigable water, a significant nexus analysis is not required by the Rapanos guidance. MVP determined that the FMH project site is adjacent to the Rainy River, a traditional navigable water, and provided substantial evidence in the AR to support that determination. Accordingly, a significant nexus evaluation was not required.

ACTION: No action is required.

CONCLUSION: I find that the appellant's reasons for appeal do not have merit. There is substantial evidence in the administrative record to support the MVP determination that the FMH project site contains wetlands subject to Corps jurisdiction pursuant to Section 404 of the Clean Water Act. The final decision will be the District Engineer's jurisdictional determination dated June 18, 2008.



Michael J. Walsh
Brigadier General, U.S. Army
Division Commander