ADMINISTRATIVE APPEAL DECISION
CLEAN WATER ACT
VIC GUNDERSON - FILE NO. MVP-2008-00520
ST. PAUL DISTRICT

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March 30, 2015

Review Officers (ROs): Thomas Cavanaugh, USACE, South Pacific Division, and Thomas McCabe, USACE, Mississippi Valley Division

Appellant: Mr. Vic Gunderson, 7299 Hill Road, Virginia, Minnesota 55792

Date of Receipt of Request for Appeal: July 14, 2014

Date of Acceptance of Request for Appeal: August 20, 2014

Appeal Conference/Site Visit Date: September 16, 2014

ACCEPTED REASON FOR APPEAL: The Mississippi Valley Division (MVD) accepted the Request for Appeal (RFA) by Mr. Vic Gunderson (Appellant), dated July 7, 2014. The Appellant provided one reason for the appeal. This document addresses the reason.

SUMMARY OF APPEAL DECISION: Mr. Gunderson is appealing a U.S. Army Corps of Engineers (USACE or Corps) approved jurisdictional determination (AJD) under the Clean Water Act (CWA) made by the St. Paul District (the District). The RFA asserts that the District misidentified drainage patterns/flows on the AJD map. Specifically, the RFA states that due to elevation restrictions, water cannot travel from Fawn Lake as the District indicated and therefore Fawn Lake is isolated and non-jurisdictional.

While the District developed a description of the hydrologic connections from Fawn Lake to the nearest downstream traditional navigable water (TNW), the Pike River, from maps, aerial photos, and some ground checking, the District did not sufficiently consider existing topography in describing those hydrologic connections. Therefore, the District's decision is not supported by the record. As a result, the appeal is found to have merit. The AJD is remanded to the District for reconsideration. The District must therefore reevaluate its conclusion that Fawn Lake is a water of the United States. In considering the jurisdictional status of Fawn Lake and associated wetlands, the District must fully document its consideration of topography, along with data and observations

that lead to its final decision, as well as the evaluation of such data and observations.

BACKGROUND INFORMATION: Mr. Vic Gunderson and his wife, Mrs. Michelle Gunderson, own and operate Organic Gold Black Dirt, Inc.

The property is an approximately 220 acre site (the property or site), located at 7299 Hill Road, Virginia, St. Louis County, Minnesota (47.67032° North, -92.45416° West).

On May 14, 2014, the District evaluated the site, as part of making its jurisdictional determination (JD), using the 1987 *Wetland Delineation Manual* (1987 WDM), the Code of Federal Regulations (C.F.R.), and supporting guidance documents.

An AJD for the Property was completed by the District on May 16, 2014. The District's jurisdictional determination concluded that the property contained 25 acres of non-wetland, jurisdictional waters and 105 acres of wetlands.

On June 11, 2014, the District provided the Appellant with the AJD for the property. The District's JD letter, dated June 11, 2014, to the Appellant referenced an attached Figure 1, as depicting the review area for the AJD, and stated that the enclosed map represented a reasonable approximation of the subject waters on the property based on remote sensing. Furthermore, the provided determination did not constitute a "wetland delineation."

The Appellant disagreed with the District's conclusion that waters on the Property were subject to USACE jurisdiction and appealed, citing the reason for appeal addressed in this appeal decision.

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

REASON FOR APPEAL[1]: Elevation on 303 Rd is 1462'. Water cannot travel south as elevation on Laine property is 1470' to 1480'. Water travels SW and spreads thru Haavisto property. Does not travel to county ditches. Elevation determined by survey - Minn Dept of Waters (DNR).

FINDING: This appeal has merit.

[1] Taken directly from the Request For Appeal

ACTION: The District must reevaluate its conclusion that Fawn Lake is a water of the United States. In considering the jurisdictional status of Fawn Lake and associated wetlands, the District must fully document its consideration of topography, along with data and observations that lead to its final decision, as well as the evaluation of such data and observations.

DISCUSSION: In the RFA, the Appellant asserts that water cannot travel south, as determined by the District. Therefore, the Appellant believes the lake to be isolated and non-jurisdictional.

The District completed one AJD form for the waters and wetlands on the property. In Section I.C of the AJD form, the District identified the Pike River as the nearest downstream TNW. Section II.B.1.a of the AJD form indicates that the review area contains wetlands directly abutting relatively permanent waters (RPW) that flow directly or indirectly into a TNW.

Section III.D.4 of the AJD[2] form indicates that Fawn Lake is a named lake approximately 25 acres in size surrounded on all sides (without manmade or natural barrier) by coniferous bog wetlands. That section further states that water leaves the lake basin to the south through these abutting coniferous bog wetlands. The District concluded that no manmade or natural barriers exist between the lake and wetlands. The District further concluded that water from the wetland complex flows from North to South. The District stated that a man-made ditch (Ditch 1) cut in the 1930s through the existing coniferous bog wetland complex transports water from the wetland system across Hill Road through a culvert. The District concluded that Ditch 1 is a non-RPW. The District indicated that wetlands abut Ditch 1 along its entire length and, during the May 14, 2014 site visit, District staff observed flow in Ditch 1 across Hill Road (CR 303). The District further stated that coniferous bog wetlands abut Ditch 1 on both sides of Hill Road. The District indicated that, after crossing Hill Road, surface water flows through Ditch 1[3] for approximately 0.4 miles into a larger designated county ditch (Ditch 2). The District determined that there is one contiguous wetland system that extends from Fawn

[2] Section III.D.2 of the AJD form contains much of the same information as that in Section III.D.4. The "additional comments to support JD" section also states that Fawn Lake is a named lake, approximately 25 acres in size, containing water year-round.

[3] Visible on 2013 aerial photography.

Lake to Ditch 2. The District indicated that, approximately 0.25 miles downstream of the point where Ditch 1 discharges into Ditch 2, Ditch 2 was observed as containing rapid flow during the May 14, 2014, site visit and that it is bordered, or abutted, along its length by existing wetlands. The District further stated that Ditch 2 contains defined bed and banks at this location and appears to flow perennially. The District indicated that USGS Topographic Maps show Ditch 2 as being perennial approximately 0.25 mile upstream of the Ditch 1 discharge point. Based on USGS Topographic Map data, field observations of May 14, 2014, and a review of other remote sensing data, the District concluded that Ditch 2 becomes an RPW 0.25 miles upstream of the Ditch 1 discharge point.

The District stated that Ditch 2 is bordered by native existing wetlands (coniferous bog and alder thicket primarily) along its entire length to Sandy River. The District stated that those wetlands are visible on the USGS Topographic Map and aerial photography. The District stated that the flow of surface water from Fawn Lake, its abutting wetlands, and its watershed is transported approximately 2.7 miles via Ditch 2 into the Sandy River (a perennial tributary and RPW) which flows approximately 2 miles into the Pike River, a TNW.

The District indicated that four maps in the Administrative Record (AR) document the connection of surface water to the Pike River: Figure 1, Landscape 2013 Air Photo Map, Landscape Topo Map, and the Landscape LiDAR Map. The District indicated that Figure 1 shows the approximate jurisdictional wetland boundaries (green) within the Appellant's property boundaries (yellow).

Procedures for making JDs for waters of the United States are described in the Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency Concerning the Determination of the Geographic Jurisdiction of the Section 404 Program and the Application of the Exemptions Under Section 404(f) of the Clean Water Act (MOA), dated January 19, 1989, later amended on January 4, 1993.

33 C.F.R. § 328 and 33 C.F.R. § 329, define "waters of the United States" and "navigable waters of the United States," respectively, and prescribe policy, practice and procedures to be used in determining the extent of such jurisdiction. In determining jurisdiction, the Corps' Revised Rapanos Guidance requires that Corps districts and EPA regions demonstrate and document in the administrative record that a particular water either (1) fits within a class of waters, which it identifies as

not requiring a significant nexus determination, or (2) that the water has a significant nexus with a TNW. Classes of waters, which do not require a significant nexus determination, include TNWs, wetlands that are adjacent to TNWs and RPWs, and wetlands that are adjacent and abutting an RPW.

Corps districts are also required to determine CWA jurisdiction over other non-navigable tributaries and over other wetlands adjacent to non-navigable tributaries based on a fact-specific analysis to determine whether they have a significant nexus with traditional navigable waters[4].

33 C.F.R. § 328.3(b) defines wetlands as "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 C.F.R. § 328.3(c) defines "adjacent" as "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, USACE considers wetlands adjacent if any one of following three criteria is satisfied: (1) there is an unbroken surface or shallow sub-surface connection to jurisdictional waters, even if intermittent; (2) the wetlands are physically separated from jurisdictional waters by man-made dikes or barriers, natural river berms, beach dunes, and the like; or (3) the wetlands' proximity to a jurisdictional water is reasonably close, supporting the science-based inference[5] that such wetlands have an ecological interconnection with jurisdictional waters.

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[4] The Revised Rapanos Guidance states that the Corps districts 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.g., separated from it by uplands, a berm, dike or similar feature). The Revised Rapanos Guidance requires that, in considering how to apply the significant nexus standard, the USACE must focus 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 TNWs.

[5] Because of 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 anadramous and catadramous fish, move between such waters for spawning and their life stage requirements. Migratory species, however, shall not be used to support an ecologic interconnection.

Corps districts are required to ensure that the information in the administrative record adequately supports any jurisdictional determination. The record shall, to the maximum extent practicable, explain the rationale for the determination, disclose the data and information relied upon. If applicable, Corps districts shall explain what data or information received greater or lesser weight, and what professional judgment or assumptions were used in reaching the determination. The Corps districts will also demonstrate and document in the administrative record that a particular water either fits within a class identified above as not requiring a significant nexus determination, or that the water has a significant nexus with a traditional navigable water. As a matter of policy, Corps districts will include in the record any available information that documents the existence of a significant nexus between a relatively permanent tributary that is not perennial (and its adjacent wetlands if any) and a traditional navigable water, even though a significant nexus finding is not required as a matter of law. All pertinent documentation and analyses for a given jurisdictional determination (including the revised form) shall be adequately reflected in the administrative record and clearly demonstrate the basis for asserting or declining CWA jurisdiction. Maps, aerial photography, soil surveys, watershed studies, local development plans, literature citations, and references from studies pertinent to the parameters being reviewed are examples of information that will assist staff in completing accurate jurisdictional determinations. The level of documentation may vary among projects.

In this case, the District developed a description of the hydrologic connections from Fawn Lake to the nearest downstream TNW, the Pike River, through a combined review of maps, aerial photos, and some limited ground observations. However, the subsequent site visit, taken in conjunction with the appeal meeting, revealed some inaccuracies and inconsistencies with the administrative record. More specifically, there were difficulties in locating the hydrologic connections, which had been presumed from interpretation of maps and aerial photos, during the District's initial site visit. As such, the administrative record, as clarified by the appeal meeting, does not support the District's decision.

Information Received and its Disposition during the Appeal Review: The administrative appeal was evaluated based on the District's administrative record, the Appellant's RFA, and discussions at the appeal meeting.

Conclusion: The District must reevaluate its conclusion that Fawn Lake is a water of the United States. If after completing the required reevaluation the District's final decision is that Fawn Lake and its associated wetlands are subject to CWA jurisdiction, that JD must be based on data and documented ground observations of hydrologic connections that support its determination or, absent those connections, an analysis, as required by the Revised Rapanos Guidance, supporting a conclusion that a significant nexus exists between waters on the property and the nearest downstream TNW. In considering the jurisdictional status of Fawn Lake and associated wetlands, the District must fully document data and observations that lead to its final decision, as well as the evaluation of such data and observations.

This concludes the Administrative Appeal Process. The District shall, upon completion of these tasks, provide its final decision to the Division Engineer and Appellant.

Michael C. Wehr
Major General, U.S. Army
Division Commander