



# **ADMINISTRATIVE APPEAL DECISION**

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**ADMINISTRATIVE APPEAL DECISION  
CLEAN WATER ACT  
GARRY LEWIS- FILE NO. MVN-2015-01591-SK  
NEW ORLEANS DISTRICT**

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NEW ORLEANS DISTRICT**

1 SEP '17

**Division Engineer:** Michael C. Wehr, Major General, U.S. Army Corps of Engineers (Corps), Mississippi Valley Division, Vicksburg, Mississippi<sup>1</sup>

**Review Officer (RO):** Jacob Siegrist, U.S. Army Corps of Engineers, Great Lakes and Ohio River Division, Cincinnati, Ohio

**Appellant:** Garry Lewis, represented by Stanley Millan, Jones Walker LLP

**Permit Authority:** Section 404 of the Clean Water Act (33 USC 1344 et seq.)

**Receipt of Request for Appeal:** October 3, 2016

**Site Visit/JD Appeal Meeting:** February 22, 2017

**Summary:** The Appellant is appealing the New Orleans District (District) approved jurisdictional determination (AJD) which concludes that the Corps has Clean Water Act (CWA) jurisdiction over approximately 11.3 acres of wetlands and 2,025 feet of tributary waters located on approximately 40 acres south of Spring Ranch Road, on and north of Milton Lane, in Section 4, T7S-R4E, Satsuma, Livingston Parish, Louisiana (“site”). The aquatic resources on the site indirectly flow into Colyell Bay, a traditional navigable water (TNW).

For reasons detailed in this appeal decision, I find two reasons for appeal have merit and eight reasons for appeal do not have merit. The AJD is remanded to the District for reconsideration and documentation. This remand is a decision on the Appeal and not a decision on the AJD. The final Corps decision on the AJD will be made by the New Orleans District Engineer.

**Background Information:** The District completed the AJD on August 26, 2016.<sup>2</sup> The AJD included a cover letter and diagram which identified the approximate 22-acre “West Tract” was comprised of 22% wetland and the approximate 18.5-acre “East Tract” was comprised of 38% wetland. The District completed two Approved Jurisdictional Determination Forms (AJD Form)

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<sup>1</sup> Pursuant to 33 CFR 331.3(a)(1), the Division Engineer has the authority and responsibility for administering the administrative appeal process. By letter dated January 6, 2017, the Division Engineer accepted the request for appeal and identified the Mississippi Valley Division (MVD) as the decision authority of the final appeal decision. The Division Engineer delegated the review of this AJD to the Great Lakes and Ohio River Division Review Officer. Regardless of this delegation, the MVD Division Engineer retains overall responsibility for the administrative appeal process. The New Orleans District Engineer retains the final Corps decision-making authority for the AJD.

<sup>2</sup> Administrative Record (AR), pages 6-25.

to record the basis of the AJD.<sup>3</sup> The “Western 20-ac block” AJD Form is the 20-acre western part of the 22-acre “West Tract” and includes 1,075 feet of tributary and 4.5 acre of wetland.<sup>4</sup> The “Eastern 20-ac block” AJD Form is the eastern 2-acre part of the “West Tract” and all of the 18.5-acre “East Tract” and includes 950 feet of tributary and 6.8 acres of wetland.<sup>5</sup>

The U.S. Army Corps of Engineers, Mississippi Valley Division received the Appellant’s Request for Appeal (RFA), submitted on behalf of Garry Lewis, on October 3, 2016. By letter dated October 26, 2016, and email correspondence on December 16, 2016, the Appellant chose to remove “new information” from the RFA to continue with the appeal process rather than a District reconsideration of the AJD incorporating the “new information.”<sup>6</sup> By letter dated January 6, 2017, the Appellant was notified the RFA was accepted and met the criteria for appeal.

### **Information Received and Its Disposition During the Appeal Review:**

The Administrative Record (AR) is limited to information contained in the record as of the date of the Notification of Administrative Appeal Options and Process Form. Pursuant to 33 CFR 331.2, no new information may be submitted on appeal. 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 AJD. However, in accordance with 33 CFR 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. The information received during this appeal review and its disposition is as follows:

1. On January 26, 2017, the District provided a copy of the AR to the RO and the Appellant. The AR is limited to information contained in the record on or before August 26, 2016, which is the date the District completed the AJD.

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<sup>3</sup> The AJD Form is the official Corps document to record the basis of the JD. The AR for the AJD should include the completed AJD Form and supporting materials, such as the necessary wetland delineation data forms. *Regulatory Guidance Letter (RGL) 07-01*, page 6-7, and *RGL 08-02*, page 2. RGL 07-01 was issued on June 5, 2007 and RGL 08-02 was issued on June 26, 2008 and both were in effect at the time of the District’s decision. However, RGL 07-01 and 08-02 have since been superseded by RGL 16-01, issued on October 31, 2016. RGLs are developed by Corps Headquarters to organize and track written guidance issued to the field offices, and are intended to promote program consistency and efficiency across the nation. RGLs are used by the Corps only to interpret or clarify Regulatory Program policy or procedures, they do not change, for example, the definition of an AJD, what constitutes an AJD per regulation, and do not change how to determine whether an aquatic resource is jurisdictional.

<sup>4</sup> See AR, pages 7 and 18-25. This topic was clarified at the February 22, 2017 Appeal Meeting and Site Visit.

<sup>5</sup> See AR, pages 7 and 10-17. This topic was clarified at the February 22, 2017 Appeal Meeting and Site Visit.

<sup>6</sup> The October 3, 2016 RFA contained new information not directly or indirectly considered by the District during the decision making process for the August 26, 2016 AJD. As this is an administrative review of the AJD, no new information may be submitted within the RFA (33 CFR 331.2). A RFA that contains new information will either be returned to the District for reconsideration or the appeal will be processed if the Appellant withdraws the new information (33 CFR 331.6(c)). The RFA was red-lined with the new information removed from consideration.

2. In accordance with 33 CFR 331.7, the RO held a site visit and appeal meeting on February 22, 2017. The appeal meeting topics were summarized and documented by the RO in a Memorandum for Record (MFR) that was provided to the Appellant and the District on March 17, 2017. Comments on the MFR, which were received from the District and the Appellant on March 31, 2017, were used to update the final MFR and attached thereto.

3. According to the RFA, the Appellant is appealing the District's AJD based on the following reasons:

**Appeal Reason 1:** "The area is not a regulated 'wetland' pursuant to 33 C.F.R. Part 328."

**Appeal Reason 2:** "The jurisdictional determination is not a delineation that 'precisely identifies' any 'wetlands' on the two tracts in question, contrary to official policy Paragraph 2, RGL No. 08-02."

**Appeal Reason 3:** "The approved jurisdictional determination was not completed and provided to the requestor 'as promptly as possible' or within sixty days of the request, pursuant to official policy Paragraphs 4 and 5 of RGL No. 08-02."

**Appeal Reason 4:** "The jurisdictional determination speculates on the 'significant nexus' of the site on flood storage, pollutant trapping, and so forth."

**Appeal Reason 5:** "The 'wetlands' lack a 'significant nexus' with traditionally navigable waters, pursuant to the *Rapanos v. U.S.* case, 547 U.S. 715 (2006), and related case law."

**Appeal Reason 6:** "Additionally, the jurisdictional determination also contains other errors of fact or omits material facts." Appeal Reason 6 has five individual paragraphs identified as 6.A. through 6.E.

In the RFA, the Appellant provided support for its reasons for appeal under "Discussion and Clarifications" at RFA, pages 3-8. The support is numbered by paragraphs that correspond to the appeal reasons identified above. Similar reasons for appeal are discussed together in the appeal decision (i.e., Appeal Reasons 1 and 6.C., and Appeal Reasons 5 and 6.D.)

## **APPEAL DECISION**

**Appeal Reason 1:** "The area is not a regulated 'wetland' pursuant to 33 C.F.R. Part 328."

**Appeal Reason 6.C.:** "Additionally, the jurisdictional determination also contains other errors of fact or omits material facts... The District apparently misread the NWI map, soil survey map, and FEMA FIMR maps as indicating hydric soils (jurisdictional determinations forms, page 8, Section IV.A). The maps show the site does not predominantly contain hydric soils."

**Finding:** Appeal Reason 1 and 6.C. do not have merit.

**Discussion:** By letter dated July 13, 2015 the Appellant requested a “USACE determination and delineation” for the site, and on July 22, 2015 submitted a wetland delineation completed in August 2013 by Plauche Environmental, LLC (2013 Plauche delineation) along with additional supporting information for the District’s consideration when making the AJD.<sup>7</sup> The Appellant completed four wetland delineation data forms for the site and characterized the site as “non-wet” or “not wetland.” In the RFA, the Appellant argues the District ignored the 2013 Plauche delineation and incorrectly determined there were wetlands on the site. In addition to the 2013 Plauche delineation identifying the area as not wetland, the Appellant states that, “all published U.S. documents known to us have previously shown this site as non-wet, with primarily non-hydric soils,” and provided reference to the National Wetland Inventory (NWI) map, hydric soils map, and a Federal Emergency Management Agency (FEMA) Flood Insurance Rate Map (FIRM).<sup>8</sup> In Appeal Reason 6.C. the Appellant suggests, “The District apparently misread the NWI map, soil survey map, and FEMA FIRM maps as indicating hydric soils.” Taken together, the Appellant suggests the District’s conclusions there were wetlands on-site was an error of fact and the decision omitted material fact.

As part of the review process, the District completed site visits between October 7, 2015 and December 18, 2015.<sup>9</sup> Notes from the first site visit reference the District’s review of the 2013 Plauche delineation.<sup>10</sup> The District notes that the 2013 Plauche delineation was completed prior to site disturbance and the report identified the site as non-wetland. The District characterized the change in site conditions from the 2013 Plauche delineation by stating, “A portion of the site has been perimeter ditched (3’x3’), cleared, leveled, interior drainage constructed and planted in longleaf pine” while a portion of the site had remained forested.<sup>11</sup> The District explained that after an in-house review of the 2013 Plauche delineation and other available resources, there was evidence of hydric soils within the site based on soil surveys and evidence of wetland signatures on a portion of the site based on aerial imagery taken before the recent disturbance.<sup>12</sup> The District investigated the disturbed and undisturbed areas during the October 7, 2015 site visit and noted, “Wetlands were documented in an undisturbed portion” of the site, and, “Additional wetlands were observed within the tract outside of obvious wetland signatures identified on aeriels.”<sup>13</sup> Based on a review of the 2013 Plauche delineation, the District’s in-house review, and observations from the first site visit, the District stated, “Data submitted by Mr. Plauche does not support his conclusion of nonwetlands.”<sup>14</sup>

The District determined additional site visits and data would be necessary to complete the jurisdictional determination and wetland delineation since the District did not agree with the conclusions of the 2013 Plauche delineation. A second site visit was completed on October 28, 2015. District notes from the site visit explain they “conducted a review of the site by walking

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<sup>7</sup> AR, pages 31-65.

<sup>8</sup> RFA, pages 3-4.

<sup>9</sup> AR, pages 26-30.

<sup>10</sup> See AR, page 28.

<sup>11</sup> AR, page 28.

<sup>12</sup> AR, page 28.

<sup>13</sup> AR, page 28.

<sup>14</sup> AR, page 28.

the perimeter of the tract to determine strategy for completing [the] delineation.”<sup>15</sup> The District identified undisturbed areas to use as a reference site, observed water movement on and off the site, and observed wetlands within the site that were not mapped by the 2013 Plauche delineation. The District completed five wetland data forms on this date that identified variability within the site to contain both wetland and upland.<sup>16</sup> The District identified challenges associated with the site to include “hydrology modification associated with perimeter ditching on portion of tracts” and portions of the site were “maintained by mowing.”<sup>17</sup>

Six more site visits and a total of 20 wetland delineation data forms were completed by the District to document the presence and absence of wetlands on the site according to the 1987 Manual<sup>18</sup> and Regional Supplement.<sup>19</sup> The Regional Supplement is designed for use with the current version of the 1987 Manual for the identification and delineation of wetlands pursuant to the CWA Section 404 regulatory program. Except where noted in the manual, the approach requires positive evidence of hydrophytic vegetation, hydric soils, and wetland hydrology for a determination that an area is a wetland.

When delineating wetlands it is important to note that, “more than one wetland factor (i.e., vegetation, soil, and/or hydrology) may be disturbed or problematic on a given site,” and generally, “wetland determinations on difficult or problematic sites must be based on the best information available to the field inspector, interpreted in light of his or her professional experience and knowledge of the ecology of wetlands in the region.”<sup>20</sup> The Regional Supplement’s Chapter 5 contains methods and procedures to delineate disturbed and difficult wetland situations.

The District determined the site contained both areas “under normal circumstances” and portions where vegetation and/or hydrology were significantly disturbed. The District also recognized the site had procedural problems that make wetland determinations difficult because the site contained a lot of wetland/non-wetland spatial variability and disturbance from recent silvicultural activities. As a result, the District completed the wetland delineation of the site based on the use of reference areas and a transect approach that can be used to estimate the percentage of wetland on the site compared to upland as described in Chapter 5 of the Regional Supplement.<sup>21</sup> Over the course of the District’s eight site visits, the District identified wetland vegetation, soil, and hydrology were present at 13 of the 20 data forms based on site specific data generated by the District.<sup>22</sup> These data forms informed the District’s identification of wetland/upland points along 21 transects to characterize the site as 22% and 38% wetland.

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<sup>15</sup> AR, page 28; see AR, page 142 (diagram of the site visit).

<sup>16</sup> AR, page 28; See AR, pages 71-83.

<sup>17</sup> AR, page 28.

<sup>18</sup> U.S. Army Corps of Engineers, *Corps of Engineers Wetlands Delineation Manual, Technical Report Y-87-1*, January 1987 (1987 Manual).

<sup>19</sup> U.S. Army Corps of Engineers, *Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Atlantic and Gulf Coastal Plain Region (Version 2.0)*, November 2010 (Regional Supplement).

<sup>20</sup> Regional Supplement, page 112.

<sup>21</sup> See Regional Supplement, pages 141-143; AR, pages 68-70.

<sup>22</sup> Wetland data form 2b at AR pages 76-77 characterized the point as wetland, but does not contain any specific vegetation data nor reference any assumptions regarding vegetation data for the data point. This is in error, but does not invalidate the delineation as a whole.

The AR includes evidence that the District reviewed and evaluated information provided by the 2013 Plauche report, as well as other supporting materials, and determined it was necessary to complete a wetland delineation for the site using the procedures in the 1987 Manual and Regional Supplement. The District's decision that the site contains wetlands is supported by substantial evidence in the AR. Accordingly, I find that this reason for appeal does not have merit.

As support for the reasons for appeal, the Appellant's RFA states, "all published U.S. documents known to us have previously shown this site as non-wet, with primarily non-hydric soils," and the Appellant believes, "The District apparently misread the NWI map, soil survey map, and FEMA FIRM maps as indicating hydric soils."<sup>23</sup> As indicated above, the 1987 Manual and the Regional Supplement are used for the identification and delineation of wetlands pursuant to the CWA Section 404 regulatory program. The documents referenced by the Appellant in the RFA are tools or background information that assist in the delineation of wetlands pursuant to the 1987 Manual and Regional Supplement.

To assist in the delineation of the site the District reviewed and evaluated background information identified in Section IV of the AJD Forms, including the NWI map, hydric soils map, and the FEMA FIRM map, as well as the 2013 Plauche delineation, wetland data sheets prepared by the District, hydrologic boundary maps, topographic maps, multiple years of aerial imagery, scientific literature, and the watershed's water quality report.<sup>24</sup> Section IV on the AJD Form summarizes the data sources used directly or indirectly to complete the jurisdictional determination.<sup>25</sup> In regards to the background information identified by the Appellant in the RFA, it is clear in the record that the District consulted the NWI maps since their classification was recorded on the wetland delineation forms;<sup>26</sup> the AR demonstrates soil information was reviewed as part of the "in-house" review of the site prior to the District's site investigations, and the District included in the record an additional soil survey for the area;<sup>27</sup> and finally, the District identified the site on the FEMA FIRM flood maps included in the AR, and determined the site was not within the 100-year floodplain.<sup>28</sup>

The District utilized the background information to assist in the delineation of the site, but the background information does not individually or in combination supplant the District's technical determination using the delineation procedures in the 1987 Manual and Regional Supplement, and the District's professional knowledge and experience. Therefore, I find that this reason for appeal does not have merit.

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<sup>23</sup> RFA, pages 4 and 7.

<sup>24</sup> See, e.g., AR, pages 17 and 25.

<sup>25</sup> U.S. Army Corps of Engineers, *Jurisdictional Determination Form Instructional Guidebook*, May 30, 2007 (Jurisdictional Guidebook), page 60.

<sup>26</sup> See, e.g., AR, pages 71 and 147.

<sup>27</sup> See, e.g., AR, pages 28 and 150-158.

<sup>28</sup> See, e.g., AR, pages 13, 21 and 148.

**Appeal Reason 2:** “The jurisdictional determination is not a delineation that ‘precisely identifies’ any ‘wetlands’ on the two tracts in question, contrary to official policy Paragraph 2, RGL No. 08-02.”

**Finding:** Appeal Reason 2 does not have merit.

**Discussion:** The Appellant believes the AJD violates Corps policy, omits material facts, and is not valid because the District’s AJD does not “precisely identify” wetlands within the site. The RFA references the Corps guidance document RGL 08-02, Paragraph 2 that states, “An approved JD precisely identifies the limits of those waters on the project site determined to be jurisdictional under the CWA/RHA. (See 33 C.F.R. 331.2).”

As indicated in footnote 3 of this document, RGLs are developed by Corps Headquarters to organize and track written guidance issued to the field offices, and are intended to promote program consistency and efficiency across the nation. RGLs are used by the Corps only to interpret or clarify Regulatory Program policy or procedures, they do not change, for example, the definition of an AJD, what constitutes an AJD per regulation, and do not change how to determine whether an aquatic resource is jurisdictional. The RGL 08-02, Paragraph 2 refers to “Approved JDs” as defined by regulation at 33 CFR 331.2:

*Approved jurisdictional determination means a Corps document stating the presence or absence of waters of the United States on a parcel or a written statement and map identifying the limits of waters of the United States on a parcel. Approved JDs are clearly designated appealable actions and will include a basis of JD with the document.*

In the *Questions and Answers on Regulatory Guidance Letter 08-02*, question number 28 asks:

*The definition of the term “approved JD” given in paragraph 2 does not make a clear distinction between a “jurisdictional determination” and a “wetland delineation.” This distinction is clearly made in 33 CFR 331.2. Also, paragraph 2(d) appears to require that approved JDs be documented with delineations. This requirement does not appear in the Corps regulations. Is the definition of an approved JD or the documentation requirements for an approved JD changed by this RGL?*

The answer to question 28 makes clear that the definition of an AJD is made at 33 CFR 331.2 and precisely identifying the boundaries of a wetland is not a requirement of an AJD. The complete answer to question 28 states:

*No. The definition of the term “approved JD” in paragraph 2 does not change the definition provided at 33 CFR 331.2. It should be noted that for the purposes of documenting approved JDs to support permit decisions (which is the focus of RGL 08-02), it is often necessary to precisely identify the limits of waters of the United States, to*

*determine the amounts of waters impact by the proposed activity. The guidance provided by paragraph 2(d) applies to approved JDs that will be used to support permit decision.*

In order to assist permit applicants interested in, for example, minimization of impacts to aquatic resources for a proposed development, it may be possible for the delineation of an AJD to identify contiguous areas of either wetland or non-wetland on the site that are large enough to be delineated and mapped separately and portions of the site mapped pursuant to Chapter 5 procedures. However, the District retains the ability to determine the review area and the delineation method required to determine the presence or absence of waters of the U.S. on the site for an AJD.

According to the definition in regulation, an AJD is “a Corps document stating the presence or absence of waters of the United States.”<sup>29</sup> In this case, the District determined the wetland/upland areas were too closely associated to identify the limits of individual wetlands and therefore, the AJD stated the presence of wetlands as a percentage of the overall site compared to uplands. The District was not required to “precisely identify” the line where wetland stops and upland begins on the parcel. I find that this reason for appeal does not have merit.

**Appeal Reason 3:** “The approved jurisdictional determination was not completed and provided to the requestor ‘as promptly as possible’ or within sixty days of the request, pursuant to official policy Paragraphs 4 and 5 of RGL No. 08-02.”

**Finding:** Appeal Reason 3 does not have merit.

**Discussion:** The Appellant states the AJD was not completed within 60 days of the request, thus nullifying the AJD. Based on the AR, the formal request for an AJD was received by the District on July 13, 2015. The District requested additional data from Mr. Plauche on July 17, 2015,<sup>30</sup> who provided the 2013 Plauche delineation to the District on July 27, 2015.<sup>31</sup> A meeting was held at the District office with the Appellant and the New Orleans District Engineer and regulatory staff on October 5, 2015 where a topic of discussion was the Appellant’s July 13, 2015 request for a jurisdictional determination.<sup>32</sup> The District then completed 8 site visits over a 3 month period between October and December 2015 to complete the necessary field work to document site conditions. The District and Appellant conversed several times in December 2015 and January 2016 regarding revising the map for the site.<sup>33</sup> However, after January 2016 there is no information in the AR to memorialize the processing of the AJD until the AJD was completed and provided to the Appellant by letter dated August 26, 2016.

Paragraph 4.b of RGL 08-02 states, “It is the Corps’ goal to process both preliminary JDs and approved JDs within 60 days,” and paragraph 5.a. of RGL 08-02 states, “It is the Corps’ goal that

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<sup>29</sup> 33 CFR 331.2.

<sup>30</sup> AR, page 31.

<sup>31</sup> AR, page 34.

<sup>32</sup> AR, page 66.

<sup>33</sup> AR, pages 29 and 67. Based on the February 22, 2017 Appeal Meeting and Site Visit, the District stated the maps provided in the 2013 Plauche delineation were not scaled properly with source data and information overlays were therefore not accurate.

every JD requested by an affected party should be completed within 60 calendar days of receiving the request.” As goals, the District should strive to complete the processing of AJDs within these timeframes. However, the guidance document, RGL 08-02, does recognize there may be situations where an AJD cannot be completed in 60 days due to District workload and site or weather conditions.<sup>34</sup> While the delay from January 2016 to August 2016 was not explained in the record, there are no timeframes required in Corps regulations for the issuance of an AJD. Accordingly, this reason for appeal does not have merit.

**Appeal Reason 4:** “The jurisdictional determination speculates on the ‘significant nexus’ of the site on flood storage, pollutant trapping, and so forth.”

**Finding:** Appeal Reason 4 does not have merit.

**Discussion:** The Appellant states, “wetlands adjacent to non-relatively permanent waters...requires a significant nexus determination.”<sup>35</sup> As part of the significant nexus determination, the District assessed, among other things, the flood storage and pollutant trapping functions of the aquatic resources on the site. However, the Appellant believes the “Corps’ jurisdictional determination speculates on pollutant trapping and floodwater retention as the nexus.”<sup>36</sup>

The term “waters of the United States” is defined by regulations to include “[w]etlands adjacent to [jurisdictional] waters.”<sup>37</sup> Pursuant to regulations, jurisdictional waters include “tributaries” of a TNW.<sup>38</sup> According to the Rapanos Guidance,<sup>39</sup> “a tributary includes natural, man-altered, or manmade water bodies that carry flow directly or indirectly into a [TNW].”<sup>40</sup> Pursuant to the Rapanos Guidance, “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 [non-RPW], (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.”<sup>41</sup> 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.<sup>42</sup>

For the purposes of determining and documenting jurisdiction, the Rapanos Guidance describes a tributary as “the entire reach of the stream that is of the same order (i.e., from the point of

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<sup>34</sup> RGL 08-02, page 4.

<sup>35</sup> RFA, page 5.

<sup>36</sup> RFA, page 5.

<sup>37</sup> 33 CFR 328.3(a)(7).

<sup>38</sup> 33 CFR 328.3(a)(5).

<sup>39</sup> Following the Supreme Court ruling in *Rapanos v. United States*, 547 U.S. 715 (2006), the U.S. Environmental Protection Agency and the Corps jointly issued a memorandum providing guidance in implementing the decision. A revised memorandum, *Clean Water Act Jurisdiction Following the U.S. Supreme Court Decision in Rapanos v. United States & Carabell v. United States* (“Rapanos Guidance”), was issued on December 2, 2008.

<sup>40</sup> Rapanos Guidance, page 6 fn. 24.

<sup>41</sup> Rapanos Guidance, page 8.

<sup>42</sup> Rapanos Guidance, page 6 fn. 24.

confluence, where two lower order streams meet to form the tributary, downstream to the point such tributary enters a higher order stream). The flow characteristics of a particular tributary will be evaluated at the farthest downstream limit of such tributary.”<sup>43</sup> Where the downstream limit of a tributary is not representative of the entire tributary, the flow regime that best characterizes the entire tributary should be used.<sup>44</sup>

As part of an AJD, a District should determine whether the tributary 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.<sup>45</sup> The District should also determine if the tributary has any adjacent wetlands on a particular site as well as in the tributary’s drainage area.

Regulations define the term “adjacent” as “bordering, contiguous, or neighboring.”<sup>46</sup> The Rapanos Guidance explains that wetlands are adjacent if one of the 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.*<sup>47</sup>

In this case, the District described the non-RPW tributaries as indirect tributaries of Colyell Bay, a TNW. As described above, non-RPW tributaries and wetlands adjacent to such tributaries are classes of water bodies that are subject to CWA jurisdiction only if a significant nexus is demonstrated with a TNW. As such, the District was required to complete a significant nexus determination for each tributary, including any adjacent wetlands to each tributary, to determine if they “are likely to have an effect that is more than speculative or insubstantial on the chemical, physical, and biological integrity of a [TNW].”<sup>48</sup>

According to the Rapanos Guidance states, “Principle considerations when evaluating significant nexus include the volume, duration, and frequency of the flow of water in the tributary and the proximity of the tributary to a [TNW].”<sup>49</sup> Additionally, “the agencies will consider other relevant factors” including “the extent to which the tributary and adjacent wetlands have the capacity to carry pollutants (e.g., petroleum wastes, toxic wastes, sediment) or flood waters to [TNWs], or to reduce the amount of pollutants or flood waters that would otherwise enter [TNWs]” and “ecological functions performed by the tributary and any adjacent wetlands which affect downstream [TNWs]...such as the capacity to transfer nutrients and organic carbon vital to support downstream foodwebs...habitat services such as providing spawning areas for recreationally or commercially important species in downstream waters, and the extent to which

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<sup>43</sup> Rapanos Guidance, page 6 fn. 24.

<sup>44</sup> Rapanos Guidance, page 6 fn. 24.

<sup>45</sup> Rapanos Guidance, pages 12-13.

<sup>46</sup> 33 CFR 328.3.

<sup>47</sup> Rapanos Guidance, pages 5-6.

<sup>48</sup> Rapanos Guidance, page 11.

<sup>49</sup> Rapanos Guidance, page 10.

the tributary and adjacent wetlands perform functions related to maintenance of downstream water quality such as sediment trapping.”<sup>50</sup>

In this case, the District described the non-RPW tributaries as indirect tributaries of Colyell Bay. The District completed an AJD Form for the “Eastern 20-ac block” portion of the site which included an approximate 950-foot non-RPW tributary and a 6.8-acre adjacent wetland.<sup>51</sup> The second AJD Form was completed for the “Western 20-ac block” portion of the site and included an approximate 1,075-foot non-RPW tributary and a 4.5-acre adjacent wetland.<sup>52</sup> The District identified characteristics of each tributary in Section III.B.1 and characteristics of the adjacent wetlands in Section III.B.2 of the AJD Forms.<sup>53</sup> The characteristics of wetlands adjacent to the tributary, but outside the review area (i.e. each of the “20-ac blocks”), were included in the cumulative analysis in Section III.B.3. (Appeal Reasons 5 and 6.D. discuss tributary length and wetland acreage, as well as the adjacent wetlands in the cumulative analysis section in further detail). A significant nexus determination was completed in Section III.C. for each non-RPW tributary and their adjacent wetlands<sup>54</sup> with additional information provided in Section IV.B.<sup>55</sup>

The appellant asserts the AJD “speculates on pollutant trapping and floodwater retention” of the significant nexus determination.<sup>56</sup> However, the record demonstrates that the District drew its conclusions based on direct observations. Regarding flood storage, the District determined each tributary and adjacent wetlands flowed into and had a nexus with a TNW, and collectively, each tributary and adjacent wetlands reduce the amount of flood waters that would otherwise enter the TNW.<sup>57</sup> The District observed multiple flow events in each tributary where flowing surface water was within the discrete and confined channels, and when the tributaries were not flowing, the District documented that portions of the channel held ponded water at each of the eight site visits.<sup>58</sup> The District described the contribution of flow from the adjacent wetlands on the site to the TNW by means of overland sheetflow from the wetlands to the tributaries and from swale and perimeter ditches within the wetlands, which act to increase the frequency and flow of water out of the wetlands and into each adjacent tributary.<sup>59</sup> The District approximated the “Western 20-ac block” to have 375 acres of adjacent wetlands and the “Eastern 20-ac block” to have 72 acres of adjacent wetlands which was based on a “[c]onservative acreage estimate” from previous jurisdictional determinations.<sup>60</sup> Based on these observations, the District concluded that each tributary and their adjacent wetlands store water, contribute to groundwater recharge, and attenuate flow during storm events that would otherwise reach the TNW.<sup>61</sup>

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<sup>50</sup> Rapanos Guidance, page 11.

<sup>51</sup> AR, pages 10-17.

<sup>52</sup> AR, pages 18-25.

<sup>53</sup> AR, pages 11-14 and 19-22.

<sup>54</sup> AR, pages 14-15 and 22-23.

<sup>55</sup> AR, pages 17 and 25.

<sup>56</sup> RFA, page 5.

<sup>57</sup> AR, *see* pages 11 and 19 for the tributaries flow path and pages 13 and 21 that the flow of water is from the wetlands to the TNW and not water flowing from the TNW to the wetlands.

<sup>58</sup> AR, pages 12, 20, and 28.

<sup>59</sup> AR, pages 13 and 21.

<sup>60</sup> AR, pages 14 and 22; *See, e.g.*, 166-176.

<sup>61</sup> AR, pages 14-15 and 22-23.

In regards to pollutant trapping, the District identified the flow within each tributary was “relatively clear to cloudy depending on sediment load and recent disturbance in the drainage area,” and identified the tributaries were included in the EPA’s Water Quality Assessment Report that found water quality impairment due to dissolved oxygen, fecal coliform, mercury, and nutrients that include nitrate/nitrite and phosphorus.<sup>62</sup> The District identified sediment as a specific pollutant in each tributary and their adjacent wetlands on the site.<sup>63</sup> Based on these observations and information, the District determined each tributary and their adjacent wetlands retain and assimilate sediment, particulates, and nutrients that would otherwise diminish water quality in the downstream TNW.<sup>64</sup>

Section IV.B. of the AJD Form contain scientific literature references and additional remarks.<sup>65</sup> These items similarly support District observations of the aquatic resource characteristics and functions to substantiate that each tributary and the adjacent wetlands contribute to flood storage and pollutant trapping. Specific to flood storage, the District recognized the aquatic resources function to store floodwaters on-site, while the value, or the benefit it provides is to downstream waters. At this site, the aquatic resources “reduce the amount of pollutants or flood waters that would otherwise enter [TNWs].”<sup>66</sup> For example, Section IV.B. states, “The development or alteration of wetlands is central to the loss of natural water retention within watersheds and an increase in flood hazards for local communities,” and Section IV.B. references a scientific paper provided in the AR which explains, “Research based on direct observation also supports the notion that wetlands play an important role in reducing the degree of flooding...Overall, it appears from the research that the presence of wetlands in a watershed will reduce or slow downstream flooding.”<sup>67</sup>

As an example regarding pollutant trapping, the AJD Form states that “Colyell Creek, Colyell Bay and tributaries are listed as 303(d) Impaired waters” with water quality impairment due to, among other things, nitrate/nitrite nutrients.<sup>68</sup> The District documented these watershed characteristics and included the scientific paper titled, *The Role of Headwater Streams in Downstream Water Quality*, in Section IV.B., to support the District’s significant nexus determination. The paper recognizes “Excess nitrogen has been linked to many environmental concerns, including the...acidification of lakes and streams (Driscoll et al., 2001), and degradation of coastal waters including high profile water quality issues such as eutrophication, hypoxia, and harmful algal blooms (NRC, 2000),”<sup>69</sup> and the “current understanding of [nitrogen nutrient cycling], land-use changes or modifications to stream channels that increase the rates of flow in headwaters streams may heighten their influence on chemical quality of downstream receiving waters.”<sup>70</sup> In addition the paper recognizes “there is mounting evidence that the

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<sup>62</sup> AR, page 12-13, 20-21, and 177-179.

<sup>63</sup> AR, pages 13 and 21.

<sup>64</sup> AR, pages 14-15 and 22-23.

<sup>65</sup> AR, pages 17 and 25; *See* Jurisdictional Guidebook, page 60.

<sup>66</sup> Rapanos Guidance, page 11.

<sup>67</sup> AR, page 201.

<sup>68</sup> AR, page 17 and 25.

<sup>69</sup> AR, page 181.

<sup>70</sup> AR, page 185.

nitrogen in downstream receiving waters is strongly connected to distant landscape sources and responds relatively rapidly to changes in these sources.”<sup>71</sup>

The District then assessed the significance of flood storage and pollutant trapping in their significant nexus determination. The significant nexus determination in Section III.C. of the AJD Forms determined each tributary and their adjacent wetlands had more than a speculative or insubstantial effect on the chemical, physical, and/or biological integrity of the TNW, Colyell Bay.<sup>72</sup>

The District sufficiently documented in the AR per the Rapanos Guidance their observations and rationale concerning flood storage and pollutant trapping of each tributary and the adjacent wetlands. The District did not speculate that each tributary and the adjacent wetlands contributes to flood storage and pollutant trapping, which consequently have a positive impact on the downstream TNW. Therefore, I find that this reason for appeal does not have merit.

**Appeal Reason 5:** “The ‘wetlands’ lack a ‘significant nexus’ with traditionally navigable waters, pursuant to the Rapanos v. U.S. case, 547 U.S. 715 (2006), and related case law.”

**Appeal Reason 6.D.:** “Additionally, the jurisdictional determination also contains other errors of fact or omits material facts... The District’s ‘significant nexus’ determination of all wetlands cumulatively in the ‘watershed’ (jurisdictional determination forms, page 6), is contrary to Corps policy in its Instructional Guidebook, page 42 (Exhibit 14). This official guidance limits the reach of the ‘significant nexus’ or cumulative inquiry to a point of the first order tributary, or as a worst case approximately one hundred and seventy acres to the east and approximately one thousand two hundred acres to the west of the tracts. The two non-relatively permanent waters of the eastern and western tributaries, are the limits of the first order tributaries. The ‘significant nexus’ reach, which we do not agree with, is at most a small drainage area, and not the entire 1.2 million acres ‘watershed’ asserted by the Corps (jurisdictional determination forms, page 2) (depicted on Exhibit 16 for clarification). Further, to our knowledge, additional wetlands are not currently delineated and assessed by the Corps in either reach. Nor are the points specified at which these two tributaries become relatively permanent waters near the creek, as alleged by the Corps. The closer these second order tributary points are to the tracts in question, the smaller the drainage area and any wetlands within the reach of any significant nexus determination would be. These omissions are error.”

**Finding:** The appeal has merit because the AR does not contain accurate and sufficient evidence to support the District’s determination that each tributary and their adjacent wetlands have a significant nexus to the TNW, Colyell Bay.

**Action:** The AJD is remanded to the District Engineer for reconsideration and documentation.

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<sup>71</sup> AR, page 185.

<sup>72</sup> See AR, pages 14-15 and 22-23.

**Discussion:** In the RFA, the Appellant stated the District incorrectly interpreted and applied case law from Rapanos and SWANCC,<sup>73</sup> and the Corps' guidance related to SWANCC, Rapanos, and the Guidebook are not supported by case law and are in error. Additionally, the Appellant asserts the District's assessment of wetlands adjacent to each tributary within the cumulative analysis area and classification of each tributary were contrary to guidance. For these reasons, the Appellant asserts the District's AR contains errors and incorrectly determined the waters on site had a significant nexus with the downstream TNW, which is 10-15 river miles from the site.

The legal sufficiency of guidance and policy is beyond the scope of the appeal process. An appeal is associated with a specific Corps action and reasons for appeal are limited to, for example, the District's application of the regulation, guidance, or policy specific to that action.

The RFA stated that based on SWANCC the "'significant nexus' cannot legally be stretched beyond the primary protection of [TNWs] (e.g. a bay) and its surrounding wetlands."<sup>74</sup> Following SWANCC, the EPA and the Department of the Army issued a Joint Memorandum, which states "neither agency will assert CWA jurisdiction over isolated waters that are both intrastate and non-navigable, where the sole basis available for asserting CWA jurisdiction rests on any of the factors listed in the 'Migratory Bird Rule'."<sup>75</sup> The Joint Memorandum further provides, "[f]ield staff should continue to assert jurisdiction over [TNWs] (and adjacent wetlands) and ... their tributary system (and adjacent wetlands)."<sup>76</sup> In this case, the District did not base jurisdiction over the tributaries and adjacent wetlands on the site pursuant to 33 CFR 328.3(a)(3) or the Migratory Bird Rule. Rather, the District asserted CWA jurisdiction over the tributaries based on 33 CFR 328.3(a)(5) and adjacent wetlands based on 33 CFR 328.3(a)(7) and the Rapanos implementation guidance.

The RFA asserts that pursuant to Justice Kennedy's Rapanos opinion the fact that the tributaries on site are 1.4 and 3.4 miles to Colyell Creek "creates a break in the significant nexus findings."<sup>77</sup> Concerning this matter, the Rapanos Guidance states, "As the distance from the tributary to the navigable water increases, it will become increasingly important to document whether the tributary and its adjacent wetlands have a significant nexus rather than a speculative or insubstantial nexus with a [TNW]."<sup>78</sup> Likewise, the Guidebook states,

*Consideration will be given to the distance between the tributary and the TNW. The tributary will not be so remote as to make the effect on the TNW speculative or insubstantial...It is not appropriate to determine significant nexus based solely on any specific threshold of distance (e.g...between a tributary and the TNW)...<sup>79</sup>*

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<sup>73</sup> Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001) ("SWANCC").

<sup>74</sup> RFA, page 6.

<sup>75</sup> Joint Memorandum, 68 Fed. Reg. 1995, 1996 (Jan. 15, 2003) (providing clarifying guidance regarding the SWANCC decision).

<sup>76</sup> 68 Fed. Reg. at 1998.

<sup>77</sup> RFA, page 5.

<sup>78</sup> Rapanos Guidance, page 11.

<sup>79</sup> Guidebook, page 54.

The District described each tributary as being 10-15 river miles from the TNW and identified the flow path from the site and into Colyell Bay, the TNW.<sup>80</sup> The District did consider the distance of each tributary and adjacent wetlands to the TNW, and as indicated above in Appeal Reason 4, the District did not speculate on the functions of the waters on site. However, as discussed below, the District made errors in determining the size and location of adjacent wetlands in the cumulative analysis section, and incorrectly applied Corps policy guidance to document tributary and wetland characteristics for the significant nexus determination.

Regarding errors in the size and location of adjacent wetlands in the cumulative analysis section, the Appellant was concerned the District inappropriately determined the area for “cumulative inquiry” and did not delineate and assess these off-site wetlands.<sup>81</sup> The Corps’ guidance limits the cumulative analysis of wetlands considered in the significant nexus determination to the wetlands adjacent to the tributary in the drainage area of the relevant reach. The size of the drainage area is based on the relevant reach of each tributary under review for jurisdiction. The Rapanos Guidance describes the relevant reach as “the entire reach of the stream that is of the same order (i.e., from the point of confluence, where two lower order streams meet to form the tributary, downstream to the point such tributary enters a higher order stream).”<sup>82</sup> To determine the characteristics of the wetlands in the drainage area, the Guidebook explains, “Information to characterize functions for offsite adjacent wetlands used in the significant nexus evaluation included in Section III.B.3 will be based on reasonably available information – field visits are not required.”<sup>83</sup> Using available information including topographic maps, hydric soils maps, multiple District site visits, and previous jurisdictional determinations,<sup>84</sup> the District identified wetlands within the “Western 20-acre block” drainage area and the “Eastern 20-acre block” drainage area.<sup>85</sup> The District’s use of available information is reasonable to characterize adjacent wetlands in the drainage area for the significant nexus determination, and site visits or comprehensive wetland delineations as suggested by the Appellant, are not required for wetlands used in the cumulative analysis drainage area. However, the District made technical errors in describing the size of the drainage area and cumulative total of adjacent wetlands based on the available information. For example, much of the wetland area identified within the cumulative analysis boundaries of the “Eastern 20-acre block” on AR, page 145 is clearly outside of the drainage area of the tributary identified on AR, page 146.

In referring to the characteristics of the tributary, the Appellant states, “the points specified at which these two tributaries become relatively permanent waters near [Colyell Creek] [are not provided]...The closer these second order tributary points are to the tracts in question, the smaller the drainage area and any wetlands within the reach of any significant nexus

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<sup>80</sup> AR, pages 10-25.

<sup>81</sup> RFA, page 7-8.

<sup>82</sup> Rapanos Guidance, page 6 fn. 24.

<sup>83</sup> Guidebook, page 53.

<sup>84</sup> The District documented several previous jurisdictional determinations in the AR to make a rational connection between the facts found and the choices made. However, the Appellant expressed concerns during the Appeal Meeting and Site Visit that the District used only a subset of previously completed jurisdictional determinations within the drainage area to determine wetlands considered within the cumulative analysis. The District should evaluate if any additional relevant jurisdictional determinations are available that may affect the size and location of adjacent wetlands.

<sup>85</sup> See AR, pages 11, 19, 28, 144, 146, and 166-176.

determination would be.”<sup>86</sup> The Appellant’s description of how to determine a second order tributary and thus the drainage area for the relevant reach is not consistent with Corps guidance to determine stream orders in a numeric classification, nonetheless the District did not correctly apply the Rapanos Guidance in this instance. The Rapanos Guidance instructs the District to evaluate “the flow characteristics of a particular tributary...at the farthest downstream limit of such tributary.”<sup>87</sup> If the “downstream limit of a tributary is not representative of the entire tributary, the flow regime that best characterizes the entire tributary should be used.”<sup>88</sup> The Rapanos Guidance on page 6 continues by stating, “A primary factor in making this determination is the relative lengths of segments with differing flow regimes.” In this case, the District described each tributary as containing ephemeral, intermittent, and perennial flow,<sup>89</sup> but the AR lacks technical analysis or an explanation of the professional judgment and available data and observations used to support the District’s determination to differentiate the tributary as a non-RPW versus an RPW.

Finally, the size (acreage) of the wetlands as well as the length of the tributary on site are not supported by accurate information in the AR. First, the AJD Form for the “Western 20-ac block” is presumably 20-acres that is entirely within the 22-acre “West Tract.” As indicated by the delineation, the “West Tract” is 22% wetland.<sup>90</sup> Therefore, the “Western 20-ac block” would have identified 4.40 acres of wetland (22% of 20 acres). However, the AJD Form identified 4.50 acres of wetland in the “Western 20-ac block.” Similarly, the “East Tract” was delineated as 38% wetland, while the “Eastern 20-ac block” AJD Form identified 6.8 acre of wetland. There is insufficient information in the record to justify the wetland acreage for the “Eastern 20-ac block.”<sup>91</sup> In regards to each tributary, the AJD map identifying each tributary on site as “Waters of the US” at AR page 7 is inconsistent with the length and description of each tributary described in the AJDs.

While the AJD concluded the waters on the site will have more than speculative or insubstantial effect on the chemical, physical, and/or biological integrity of the TNW, the AR lacks accurate and sufficient information to appropriately characterize each tributary and their adjacent wetlands. Therefore, the District’s significant nexus determination is not supported by the AR, and the reasons for appeal have merit. The AJD is remanded to the District for reconsideration and documentation.

**Appeal Reason 6.A.:** “Additionally, the jurisdictional determination also contain other errors of fact or omits material facts...The jurisdictional determination refers to a roadside ditch as non-relatively permanent waters, but they are exempt from regulation as ‘waters of the United States’ under 33 C.F.R. 328.3(b)(3)(i) as ‘ditches with ephemeral flow that are not a relocated tributary

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<sup>86</sup> RFA, page 8.

<sup>87</sup> Rapanos Guidance, page 6 fn. 24.

<sup>88</sup> Rapanos Guidance, page 6 fn. 24.

<sup>89</sup> See AR, pages 11-12, 14, 19-20 and 22.

<sup>90</sup> AR, page 70.

<sup>91</sup> The “East Tract” was identified as 18.5 acres. 38% wetland of 18.5 acres is 7.03 acres wetland. Since the “Eastern 20-ac block” includes at least 1.5 acres of the “West Tract”, 22% wetland of 1.5 acres is 0.33 acres. Therefore, 7.03 acres + 0.33 acres = 7.36 acres. However, this calculation is based on information as understood by the incomplete AR and District clarification during the February 22, 2017 Appeal Meeting and Site Visit.

or excavated in a tributary.’ The roadside ditches here have minimal flow and are not a relocated or in a tributary. Yet, the jurisdictional determination classifies these roadside ditches as ‘water of the United States.’ This finding is erroneous. See *U.S. v. Needham*, 345 F. 3d 340, 345 (5<sup>th</sup> Cir. 2003) (no CWA or OPA jurisdiction over ‘roadside ditches and the like’).”

**Finding:** Appeal Reason 6.A. does not have merit.

**Discussion:** The Appellant asserts that roadside ditches cannot be jurisdictional waters of the U.S. because they are exempt from regulation as waters of the U.S. under 33 CFR 328.3(b)(3)(i) and based on *U.S. v. Needham* case law.

The Appellant cites regulation that states, “Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary [are not waters of the U.S.].” The reference to 33 CFR 328.3(b)(3)(i) is from the Federal Register dated June 29, 2015 rulemaking titled *Clean Water Rule: Definition of “Waters of the United States”* (CWR).<sup>92</sup> The CWR became effective on August 28, 2015. However, the rule was stayed nationwide by the U.S. Court of Appeals for the Sixth Circuit on October 9, 2015 and the stay remains in place to this day.<sup>93</sup> In compliance with this nationwide stay, the Corps is not currently implementing the CWR and is using the regulations and guidance in place prior to August 28, 2015.

The District’s AJD was completed on August 26, 2016, almost a full year after the nationwide stay of the CWR. Based on the AR, the District did not rely nor reference the CWR to complete the AJD. Therefore, the reason for appeal in reference to the CWR does not have merit.

Additionally, the District determined the geographic jurisdiction over each tributary and adjacent wetlands following the Corps’ regulations at 33 CFR 328 published in the Federal Register on November 13, 1986 and the Corps’ SWANCC and Rapanos Guidance. The circuit court case cited by the Appellant concerns the definition of waters of the U.S. as used in the Oil Pollution Act and predates the U.S. Supreme Court decision in *Rapanos*.<sup>94</sup> As previously referenced, the Rapanos Guidance and the Guidebook state that a tributary includes “natural, man-altered, or man-made water body that carries flow directly or indirectly into a TNW.” A tributary that is characterized by a non-RPW flow of water is jurisdictional only if the District determines the tributary and its adjacent wetlands have a significant nexus to a TNW. In the case of roadside ditches, the Rapanos Guidance explains, “ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water are generally not waters of the United States because they are not tributaries or they do not have a significant nexus to downstream [TNWs].”<sup>95</sup> However, in this case, the District utilized the 1986 regulations at 33 CFR 328 and the Rapanos Guidance to determine the “roadside ditches” drained wetlands and were tributaries.

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<sup>92</sup> Clean Water Rule: Definition of “Waters of the United States”, 80 Fed. Reg. 37,054 (Jun. 29, 2015).

<sup>93</sup> *In re: Environmental Protection Agency*, 803 F.3d 804, 808-09 (6th Cir. 2015).

<sup>94</sup> Indeed, *Needham* deals with oil spill cleanup involving the EPA and the United States Coast Guard and does not concern Corps jurisdiction. *In re Needham*, 354 F.3d 340, 343 (5<sup>th</sup> Cir. 2003).

<sup>95</sup> Rapanos Guidance, page 12

The District's method to assert jurisdiction over the "roadside ditch" is consistent with official Corps policy guidance and the reason for appeal regarding the CWR and U.S. v. Needham does not have merit.

**Appeal Reason 6.B.:** "Additionally, the jurisdictional determination also contain other errors of fact or omits material facts...The jurisdictional determination forms (page 5) apparently rely on alleged non-silviculture or non-exempt activity, to lessen the Corps' case-by-case need to document the flow, volume, duration, frequency, proximity and ecology of the site pursuant to the Instructional Guidebook (page 15). However, Mr. Lewis has documented the silviculture exemption of the site (Exhibit 13). The Corps' view of this exemption minimizes state expertise as otherwise required by its guidance on BMP's. See 61 F.R. 7242 (February 27, 1996), id. The excuse for Corps' speculation here is unjustified. Further, Justice Kennedy in Rapanos at 779 rejected a "speculative or insubstantial" effect on water quality as creating regulatory jurisdiction, as done here. The 'significant nexus' findings are inadequate and omit material fact."

**Finding:** Appeal Reason 6.B. does not have merit.

**Discussion:** The AJD Forms at AR pages 14 and 22 contains the significant nexus determination for each tributary and their adjacent wetlands. The Appellant asserts the District lessened the case-by-case need to analyze the characteristics of the tributary and adjacent wetlands since the site had been disturbed. In essence, the Appellant argues that since the site had been impacted by silviculture, a type of forestry operation whose activities may be exempt from the CWA, the District provided less case-specific documentation and analysis as required by the significant nexus determination.

As explained above in Appeal Reason 4, the District documented their observations regarding characteristics of each tributary and their adjacent wetlands, included reference to available information in the AR, identified the nexus of the aquatic resources to the TNW, and conducted an assessment of the aquatic functions performed by each tributary and adjacent wetlands on the chemical, physical, and biological integrity of the TNW. Based on the AR, the District did not speculate on the functions of the tributary and adjacent wetlands. However, as explained in Appeal Reason 5, due to technical and documentation errors, the AR did not contain accurate and sufficient information to document the significant nexus determination for the site, and the AJD was remanded to the District for reconsideration and documentation.

The AR demonstrates the District reviewed and considered characteristics of the site before and after site disturbance, and the significant nexus analysis provides the rationale connection between the observed characteristics and their effect on the downstream TNW. I find no evidence that the District reduced the need for documentation or analysis of the significant nexus determination based on the fact the site was associated with past silviculture activities. Therefore, I find this reason for appeal does not have merit.

**Appeal Reason 6.E.:** “Additionally, the jurisdictional determination also contain other errors of fact or omits material facts...The Corps calls site wetlands ‘abutting’ a non-relatively permanent water (jurisdictional determination forms, page 4), but only approximates percentages of the ‘wetlands’ on site and does not delineation them. It is, therefore, impossible to call a wetland abutting or adjacent without a delineation. This is error or omission of material facts.”

**Finding:** Appeal Reason 6.B. does not have merit.

**Discussion:** The Appellant asserts that if a wetland is described as an overall percentage of the site, and not precisely identified, then it is not possible to determine if the wetland is abutting or adjacent to a tributary. As indicated in Appeal Reason 4, Corps regulations define adjacent as “bordering, contiguous, or neighboring” another water of the U.S.<sup>96</sup> The Rapanos Guidance explains that wetlands are adjacent if there is: 1. an unbroken surface or shallow sub-surface connection to jurisdictional waters, this connection may be intermittent, 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.<sup>97</sup>

In the AJD, the District determined that the site contained wetlands adjacent and directly abutting each non-RPW tributary that flowed indirectly into a TNW.<sup>98</sup> The AJD Form described each wetland on the site as “part of a larger wetland/upland complex transected by the excavated channel that flows” to the non-RPW tributary.<sup>99</sup> During the District’s site visit on October 28, 2015, the District observed “water movement on and off the project site” following “recent heavy rains.”<sup>100</sup> The AJD Form identified flow from the wetlands on the site to each non-RPW tributary by “Overland sheetflow” as well as flow through numerous “excavated swales and deep parameter ditches [*sic*] [perimeter ditches]” following precipitation events.<sup>101</sup> Based on evidence contained in the AR, the District observed the wetlands have a continuous surface connection with the non-RPW tributary because they directly abut the tributary.

The District’s determination that the wetland is adjacent and directly abutting each non-RPW tributary is supported by substantial evidence in the AR. As indicated in Appeal Reason 1, the District determined the need to delineate the site based on the percentage of wetland versus upland because these landscape components were too closely associated to be precisely identified. The fact that the District determined the wetlands to be a percentage of the site does not make it impossible for wetlands to directly abut a tributary, and for this reason I find this reason for appeal does not have merit.

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<sup>96</sup> 33 CFR 328.3(c) and 33 CFR 328.3(7).

<sup>97</sup> Rapanos Guidance, pages 5-6.

<sup>98</sup> AR, pages 13 and 21.

<sup>99</sup> AR, pages 14 and 22.

<sup>100</sup> AR, page 28.

<sup>101</sup> AR, pages 13 and 21.

**Conclusion:** Based upon the discussions of Appeal Reasons 5 and 6.D., I find that the appeal has merit. The AR does not contain accurate and sufficient evidence to support the District's determination that each tributary and adjacent wetlands have a significant nexus to the TNW, Colyell Bay. The AJD is being remanded to the New Orleans District Engineer for reconsideration of the decision and additional documentation in accordance with 33 CFR 331.10(b). Authority to make the final Corps decision on the AJD resides with the New Orleans District Engineer pursuant to this remand. This concludes the Administrative Appeals Process.



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

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