



ADMINISTRATIVE APPEAL DECISION

US ARMY CORPS OF ENGINEERS

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ADMINISTRATIVE APPEAL DECISION

CLEAN WATER ACT

METRO SAND AND GRAVEL - FILE NO. MVR-OD-P-2015-305

ROCK ISLAND DISTRICT

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ROCK ISLAND DISTRICT**

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

Appellant: Metro Sand & Gravel, LLC, represented by Ms. Nichoel Church, Snyder & Associates, Inc.

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

Receipt of Request for Appeal: October 26, 2015

Site Visit/JD Appeal Meeting: April 6, 2016

Summary: The Appellant is appealing the Rock Island District's (District) approved jurisdictional determination (AJD) which concludes that the Corps has Clean Water Act (CWA) jurisdiction over approximately 130 acres of wetland located adjacent to the Des Moines River, a traditional navigable water (TNW), approximately 2.5 miles north of Carlisle, in Polk County, Iowa ("site").

For reasons detailed in this appeal decision, I find the appeal has merit. The AJD is remanded to the District for reconsideration and documentation. The final Corps decision in this case will be made by the Rock Island District Engineer.

Background Information: The AJD includes an approximate 130-acre site located 2.5 miles north of the city of Carlisle, Iowa. The Des Moines River borders the northern and eastern boundary of the review area and a private levee encircles the site. The levee was built prior to the 1930s, which has reduced floodwaters from the Des Moines River from coming onto the site and allowed most of the 130 acres to be farmed annually. The levee was functional until the flood of record occurred for the Des Moines River at this location in June 2008. The record flood breached the levee in the northwest corner of site. The levee has not been rebuilt, and the site has been subject to periodic flooding from the Des Moines River.

On July 8, 2015, the District provided the Appellant with an AJD, which concluded the site contained approximately 130 acres of wetlands subject to regulation under Section 404 of the CWA.¹ The Appellant provided the District with additional information to request a reconsidered AJD on September 4, 2015.²

On September 29, 2015, the District completed the reconsidered AJD for the site.³ After

¹ Administrative Record (AR), pages 213-216 and 222-231.

² AR, page 119.

³ AR, pages 3-6, 10-20, and 322. Transmittal enclosures were clarified during JD appeal meeting and site visit.

reconsideration, the District reached the same conclusion as the previous AJD that the approximate 130-acre site was comprised entirely of wetlands subject to regulation under Section 404 of the CWA.

The U.S. Army Corps of Engineers, Mississippi Valley Division received the Appellant's Request for Appeal (RFA) of the September 29, 2015 AJD on October 26, 2015. By letter dated February 11, 2016, 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 February 12, 2016, 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 September 29, 2015, which is the date the District completed the AJD.
2. In accordance with 33 CFR 331.7, the RO held a site visit and appeal meeting on April 6, 2016. 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 April 19, 2016. Comments on the MFR, which were received from the District on April 29, 2016 and from the Appellant on April 28, 2016, were used to update the final MFR.

The RO, District, and Appellant identified three documents⁴ within the Appellant's RFA, which were received by the District during the review of the AJD, but were not included in the AR for the AJD appeal. During the appeal meeting, the Appellant stated they believed the documents were pertinent to the merits of the decision or relevant to the decision making process. As the three documents were received by the District while the AJD was pending and under review, the District provided clarification regarding how the documents were considered not relevant to the merits of the AJD nor relevant to the decision making process during the review of the AJD. The District stated the three documents were received but were not utilized in determining whether wetlands were present on the site. While the District acknowledged receipt of the three documents, for the reasons stated above, they were not included in the District's AR that was provided to the RO and the Appellant.

⁴ The documents were identified on the JD Appeal Meeting and Site Visit MFR as vii., 2012 Phase I Report; x., Least Tern Habitat & Nesting Survey; and xvi., August 19, 2015 email to from Nichoel Church to Al Frohlich.

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

Appeal Reason 1: "...an incorrect application of the current regulatory criteria and associated guidance for identifying and delineating wetlands..."⁵

Appeal Reason 2: "...an incorrect application of official guidance..."⁶

Appeal Reason 3: "...omission of supporting information"⁷

In the RFA, the Appellant provided support for its reasons for appeal made under 17 separate "objections." The objections support one or more of the identified reasons for appeal and will be addressed in the respective sections and appear in **bold** type.

APPEAL DECISION

Appeal Reason 1: "...an incorrect application of the current regulatory criteria and associated guidance for identifying and delineating wetlands..."

Finding: Appeal Reason 1 has merit because the AR does not contain substantial evidence to support the District's determination that the entire site consists of 130 acres of wetland.

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

Discussion: In the RFA, the Appellant provided numerous objections to support its reasons for appeal that the District incorrectly applied the current regulatory criteria and associated guidance for identifying and delineating wetlands. While the overall reason for appeal has merit, there are objections which individually do not have merit. Each objection will be discussed, either collectively or individually, below:

OBJECTION – The following objection does not have merit.

- **"...for Metro Sand and Gravel's pending application to construct a mining operation near the Des Moines River..."⁸**

The Appellant stated they felt the District allowed "intended or future use of a property to influence their determination...The USACE should consider the property as it is in present day."⁹ The Appellant asserted the District verbally stated that multiple proposed sand-gravel

⁵ RFA, page 1

⁶ RFA, page 1

⁷ RFA, page 1

⁸ RFA, page 1

⁹ RFA, page 1

operation projects were being concurrently reviewed and each would receive similar, if not the same, regulatory decision. The Appellant felt this statement was unacceptable and the intended or future use of a property should not influence the District's determination. Rather, the Appellant believes the District should have considered the property as it is at the time of review, which the Appellant believes to be mostly non-wetland as provided in its wetland delineations completed in 2011, 2014, and 2015.¹⁰

The District clarified during the appeal meeting that this statement was made in reference to the District's current workload. The District had an application and pending jurisdictional determination (JD) for a separate sand-gravel mining operation. The District's statement that the projects "will receive similar, if not the same, regulatory decision" was stating the District would provide each sand-gravel application with an AJD to document site-specific geographic jurisdiction. At the appeal meeting the District stated there was no bias and each project's jurisdiction was considered independently.

The District has the discretion to determine what form of JD is appropriate (an AJD versus a preliminary JD) for any particular circumstance, and guidance states, generally, AJDs should be used to support individual permit applications.¹¹ Furthermore, a JD does not include a determination that a particular activity requires a Department of the Army permit.¹² It was appropriate for the District to determine, based on the relevant factors including the pending individual permit application for the proposal, that an AJD would be completed to make a site-specific geographic jurisdictional determination for the site. After review, the AR contains no evidence indicating any bias or determination of jurisdiction based on a specific activity.

OBJECTIONS – The following two objections do not have merit.

- **Field Determination. Date(s) July 10, 2014¹³**
- **Not checked- Data sheets prepared by the Corps¹⁴**

On July 10, 2014, the District completed a site investigation to review the 2011 wetland delineation submitted by the Appellant. As indicated on page 3 of the RFA, and in the AR in

¹⁰ The reference to wetland delineation reports in the AR will be made based on the year in which they were delineated. The 2011 wetland delineation contained at AR 528-557 was delineated in December 2011, submitted by report dated January 26, 2012, and received by the District on November 20, 2012. The 2014 wetland delineation contained at AR 308-423 was delineated in September 2014, submitted by report dated March 2, 2015, and received by the District along with a Department of the Army permit application on March 4, 2015. The 2015 wetland delineation contained at AR 232-296 was delineated in April 2015, submitted by cover letter dated April 27, 2015, and received by the District on April 28, 2015.

¹¹ *Regulatory Guidance Letter* (RGL) No. 08-02, pages 2-4. RGL 08-02 was issued on June 26, 2008 and was in effect at the time of the District's decision. However, RGL 08-02 has since been superseded by RGL 16-01, which was 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.

¹² 33 CFR 331.2

¹³ RFA, page 3

¹⁴ RFA, page 6

several locations, portions of the site were flooded at the time of the site investigation. The Appellant asserts, “The fact that the project boundary was flooded during the USACE visit on [July 10, 2014] does not prove the area is a wetland.”¹⁵ Additionally, the Appellant objects to the District not returning to the site for additional investigation or verification.¹⁶

The District requested the Appellant perform an updated wetland delineation within the site.¹⁷ The District’s request was based on the July 2014 site investigation and conclusion that the Appellant’s 2011 wetland delineation was inadequate since it was completed outside of the growing season with an insufficient number of data points.¹⁸ While the Appellant provided subsequent information and wetland delineations, the District did not return to the site for additional investigations.

Site investigations for AJDs are at the discretion of the District,¹⁹ and there is no indication in the AR that the District simply equated inundation at the site on July 10, 2014 as proof alone the site was a wetland. These objections do not show merit for the appeal. Additional discussion of the District’s wetland delineation and AJD are contained below.

OBJECTIONS – The following three objections do not have merit.

- **“The wetlands identified in Snyder & Associates wetland delineation directly abut the Des Moines River.”²⁰**
- **“Wetlands: Approximately 130 acres.”²¹**
- **Wetlands adjacent to TNWs: Approximately 130 acres.²²**

The three objections provided in the RFA are similar and will be addressed together. The Appellant stated in each of the objections, the wetlands delineated in the 2011 and 2014 wetland delineation are “located outside the project boundary.” In essence, the Appellant decreased the area of investigation of its 2015 wetland delineation from the original sizes of the 2011 and 2014 wetland delineations, and disagreed with the District providing an AJD for an area larger than the Appellant’s 2015 wetland delineation boundary.

The Appellant originally submitted a wetland delineation in 2011 which identified Wetland A (6.76 acres) and Wetland B (69.6 acres) within a delineation report boundary identified on page 538 of the AR, as the “Excavation Site.” The overall acreage of the “Excavation Site” was not provided, but is similar to the 130 acre site boundary.

¹⁵ RFA, page 3

¹⁶ RFA, page 6

¹⁷ AR, pages 298-304

¹⁸ AR, page 7-8

¹⁹ RGL No. 08-02, page 6 and *Questions and Answers on Regulatory Guidance Letter 08-02 (Q&A)*, page 6 and RGL 07-01, page 5. See footnote 11. RGL 07-01 was issued on June 5, 2007 and was in effect at the time of the District’s decision. However, RGL 07-01 has since been superseded by RGL 16-01, which was issued on October 31, 2016.

²⁰ RFA, page 4

²¹ RFA, page 4

²² RFA, page 5

The Appellant completed a second delineation in 2014 which generally followed the overall boundary of the 2011 “Excavation Site,” but delineated several different features within the overall boundary as depicted on page 321 of the AR. The 2014 delineation identified Wetlands A (5.46 acres), B1 (12.9 acres), B (58.4 acres), and C (0.08 acres), an area labeled as Open Water (acreage unidentified), and an area labeled as Project Boundary (acreage unidentified). The overall acreage of the 2014 delineation was not provided.

The Appellant completed a third delineation in 2015 where it reduced the size of the delineation boundary to an area labeled as “2015 Project Boundary.” Figure 1, on page 242 of the AR, describes the “2015 Project Boundary” as approximately 54 acres.

Based on multiple delineations and revisions to the overall project, the Appellant reduced its project boundary to the area identified as the “2015 Project Boundary,” as depicted on page 242 of the AR. The Appellant stated there were no wetlands within the “2015 Project Boundary” based on information contained in the 2014 delineation, as supplemented by the 2015 delineation.²³ Therefore, the Appellant disagrees with the District’s AJD boundary because it includes areas that are located outside of the “2015 Project Boundary.” These objections do not show merit for the appeal. The boundary for an AJD is at the discretion of the District,²⁴ and the District determined the review area for the site to be 130-acres. A review area for an AJD can encompass the boundaries of a proposed project, an area smaller than the proposed project, or an area that exceeds a proposed project based on all the relevant factors of the site.

OBJECTIONS – The following three objections have merit.

- **1987 Delineation Manual²⁵**
- **Data Sheets prepared/submitted by or on behalf of the applicant/consultant. Office does not concur with data sheets/delineation report.²⁶**
- **Other information (please specify): The NRCS wetland determination is not valid for this CWA AJD. Wetland A- 5.46 acres, Wetland B- 58.4 acres, Wetland B1-12.9 acres, Wetland C- 0.08 acres. Area near Area C is approximately 50 acres. Total acres is approximately 130 acres.²⁷**

The Appellant submitted wetland delineations completed in 2011, 2014, and 2015, along with additional supporting information as contained in the AR for the District’s consideration when making the AJD. The delineations completed by the Appellant identified a total of 76.8 wetland acres within the 130-acre site.²⁸ In contrast, the District’s AJD identified 130-acres of wetland within the 130 acre site. As the District did not concur with the Appellant’s delineations, the

²³ AR, page 240

²⁴ RGL 08-02 Q&A, page 2. See footnote 11.

²⁵ RFA, page 4

²⁶ RFA, page 5

²⁷ RFA, page 8

²⁸ The Appellant does not disagree that the 130-acre site contains some wetlands. The Appellant’s 2014 delineation report identified Wetland A, 5.46 acres; Wetland B, 58.4 acres; Wetland B1, 12.9 acres; Wetland C, 0.08 acres.

Appellant argues the District incorrectly delineated wetlands according to the 1987 Manual²⁹ and Regional Supplement.³⁰

The boundary the District identified for the AJD was approximately 130 acres.³¹ The area has been manipulated by man-induced and natural processes. Most notably the area has been altered by a levee built prior to 1930 for agricultural purposes, a levee breach in 2008, periodic flooding from the Des Moines River, and agricultural activities for at least the last 85 years.³²

Due to natural processes and recent disturbances at the site, the District concluded the procedure outlined in Chapter 5 of the Midwest Regional Supplement was required to complete the wetland delineation.³³ Chapter 5 “provides guidance for making wetland determinations in difficult-to-identify wetland situations...It includes regional examples of problem area wetlands and atypical situations.”³⁴ The District informed the Appellant by letter dated April 1, 2015,³⁵ that Chapter 5 should have been used to delineate wetlands within the site.

On April 27, 2015, the Appellant responded to the District with the 2015 wetland delineation.³⁶ The 2015 delineation contained additional data points within the review area as well as data points in a nearby reference area pursuant to the Chapter 5 procedures. The Appellant stated there were no wetlands within the 54 acre “2015 Project Boundary” based on the 2014 delineation, as supplemented by the 2015 delineation.³⁷

The District did not concur with the conclusions of the Appellant’s 2011, 2014, and 2015 wetland delineations, and instead completed its own wetland delineation using the Chapter 5 procedures, discussed at pages 218-219 of the AR. The reason for the District’s non-concurrence with the Appellant’s delineations stems from the Appellant’s use of the Chapter 5 procedures for problematic vegetation, rather than to identify problematic hydric soils for the site.³⁸ The District relied on the Appellant’s 2014 delineation to characterize hydrophytic vegetation and wetland hydrology at the site.³⁹

In following the Chapter 5 procedures, the District determined the site contained problematic hydric soils and characterized the problematic soils as “Fluvial Sediments within Floodplains”

²⁹ Environmental Laboratory. 1987. Corps of Engineers Wetlands Delineation Manual. Technical Report Y-87-1, U.S. Army Engineer Waterways Experiment Station, Vicksburg, MS. (87 Manual).

³⁰ U.S. Army Corps of Engineers. 2010. Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Midwest Region (Version 2.0), ed. J.S. Wakeley, R.W. Lichvar, and C.V. Noble. ERDC/EL TR-10-16. Vicksburg, MS. U.S. Army Engineer Research and Development Center. (Regional Supplement).

³¹ AR, page 12

³² AR, see pages 22-49, 217, and 232-261

³³ AR, page 298

³⁴ Regional Supplement, page 100

³⁵ AR, page 298

³⁶ AR, pp. 232-296

³⁷ AR, page 240

³⁸ AR, page 8

³⁹ AR, see pages 7-10, 217-221. The 1987 Manual, used in combination with the Regional Supplements, is the current federal delineation manual used in the Clean Water Act Section 404 regulatory program for the identification and delineation of wetlands. 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.

and “Recently Developed Wetlands.”⁴⁰ The District used the problematic hydric soil procedures, as described in section 4(e.) of the Midwest Regional Supplement, to document that the site contained hydric soils.⁴¹ The 4(e.) procedures outline the use of gauge data to determine inundation or saturation for 14 or more consecutive days during the growing season⁴² at least 50 percent of the time annually.⁴³ Based upon these procedures, the District determined the entire 130-acre site consisted of hydric soils.⁴⁴

As evidence the site was inundated or saturated at least 50 percent of the time, to meet one of the criteria for hydric soil, the District extrapolated a gauged elevation at which it believed water would be present on-site based on river gauge data since 2008.⁴⁵ The District stated, “...on July 10, 2014...water was present over much of the proposed site...The gage reviewed was the Des Moines River gage located in downtown Des Moines just below the Raccoon River...Since water was standing on the site [on July 10, 2014], we concluded that at 21.25 (at the downtown gage) this would be a good level to look at for other dates [for inundation at the site]....We can safely assume that if the DM [Des Moines] River is above 20 feet at that gage, water will be present on the site.”⁴⁶

In determining jurisdiction under the Corps’ authorities, 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.”⁴⁷ Recognizing that problematic sites are evaluated based on the best information available at the time and professional judgment, the AR does not contain substantial evidence to support the District’s determination of inundation during the growing season.⁴⁸ There is very limited analysis and supporting correlation of the extrapolation method and the inferred relationship between the river gauge and the site. For example, there is no narrative on the distance between the river gauge and site, elevation differences of the two sites, the elevation differences within the site, or the boundaries of potential inundation within the site. Additionally, it is unclear how a lower elevation from what was observed on July 10, 2014 is a “safe assumption” that the site would be inundated, when there is no discussion of depth of water during inundation or topography of the review area. Pages 8-9 of the AR indicates that during periods of inundation, according to the District’s extrapolation method, the available “aerial photos show water present *on at least a portion of the site*” and “*a large portion of this site will meet [the hydric soil] definition,*” and during the July 10, 2014 site investigation, “water was present *over much of the proposed site [emphasis added].*” Based on these statements, portions of the site may not be inundated during

⁴⁰ Regional Supplement, page 113 and AR page, 217-219

⁴¹ Regional Supplement, page 113 and AR page, 217-219

⁴² Regional Supplement, pages 70-72

⁴³ Regional Supplement, pages 117-118

⁴⁴ AR, pages 218-219

⁴⁵ AR, page 8-10 and 217-221. Prior to 2008 the area was protected from flooding by the agricultural levee.

⁴⁶ AR, page 8

⁴⁷ Regional Supplement, page 100.

⁴⁸ The Chapter 5 procedure 4(e.) determines hydric soils based on inundation or saturation periods. The District limited their discussion to inundation and made no reference to saturation or to the period considered to be the growing season for this location.

the time periods the District has identified, and therefore, these areas may not be sufficiently inundated to meet the hydric soil definition.

Accordingly, I find that this reason for appeal has merit. The AR does not contain substantial evidence to support the District's determination that the site consists of 130 acres of wetland based on guidance provided in the 1987 Manual and Midwest Regional Supplement. The AJD is remanded to the District for reconsideration and documentation.

Appeal Reason 2: "...an incorrect application of official guidance..."

Finding: Appeal Reason 2 has merit because the AR does not contain substantial evidence of the basis of jurisdiction.

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

Discussion: In the RFA, the Appellant provided numerous objections to support its reason for appeal that the District incorrectly applied official guidance in making the AJD. While the overall reason for appeal has merit, there are objections which individually do not have merit.

OBJECTION – The following objection does not have merit.

- **“The determination by the NRCS found no wetlands, however this determination is not valid for Clean Water Act purposes.”⁴⁹**

The Appellant submitted to the District via email a Certified Wetland Determination from the Natural Resources Conservation Service (NRCS) completed for the site.⁵⁰ As indicated in the NRCS cover letter, the wetland “determination was completed in accordance with the National Food Security Act Manual Wetland Identification procedures” and “[t]his certified wetland determination/delineation has been conducted for the purposes of implementing the Food Security Act of 1985 as amended.”⁵¹ The NRCS stated as its “preliminary technical determination” the review area contained “Non Wetlands”⁵² and included four sampling points in which it completed wetland delineation data forms. As indicated on page 2 of the AR, the Appellant believes “the NRCS wetland determination should be valid confirmation that the project boundary does not have hydric soils and is not a wetland.”

The NRCS and the Corps developed joint guidance (NRCS/Corps guidance) on conducting wetland determinations for the Clean Water Act and the Food Security Act.⁵³ The purpose of the guidance was to reaffirm the NRCS and Corps commitments to ensuring that federal wetland

⁴⁹ RFA, page 2

⁵⁰ AR, pages 119-144. A certified wetland determination is defined in the NRCS/Corps MOU as a wetland determination made by the NRCS that is of sufficient quality to make a determination of ineligibility for program benefits under the Food Security Act of 1985.

⁵¹ AR, pages 120-121

⁵² AR, page 120

⁵³ Guidance on Conducting Wetland Determinations for the Food Security Act of 1985 and Section 404 of the Clean Water Act. February 25, 2005. Signed by Bruce I. Knight, Chief, NRCS and George S. Dunlop, Deputy Assistant Secretary of the Army, Office of the Assistant Secretary of the Army (Civil Works). (NRCS/Corps guidance)

programs are administered in a manner that minimized the impacts on affected landowners consistent with the important goal of protecting wetlands. The NRCS/Corps guidance states, “To the maximum extent permissible by current statute and regulation, NRCS and COE [Corps] will rely on each other’s wetland determinations.”⁵⁴

The NRCS and the Corps are federal agencies with a common goal of protecting wetlands, but there are differences in each agency’s missions and authorities, to include laws, regulations, and policy guidance. Recognizing these differences, a wetland delineation completed by one agency may not always be accepted by the other agency. The NRCS/Corps guidance clearly contemplates this, identifying the Corps as solely responsible for wetland determinations for the CWA purposes.⁵⁵

As discussed above, the NRCS provided the Appellant with a NRCS Certified Wetland Determination that characterized the site as containing “Non Wetland” areas. However, the District stated on the AJD Form, “The NRCS wetland determination is not valid for this CWA AJD,” and on page 9 of the AR, the District recognized the NRCS completed the wetland delineation based on the Food Security Act and “did not take into account any of the Chapter 5 methods.” Meanwhile, the District determined the procedures outlined in Chapter 5 of the Midwest Regional Supplement for problematic wetland determinations were appropriate to delineate wetlands for the purposes of the CWA.⁵⁶ For this reason, the District stated it did not accept the NRCS wetland delineation, and I find this objection not to have merit.

OBJECTIONS – The following two objections have merit.

- **We reviewed the additional information and reached the same conclusion as the previous determination.**⁵⁷
- **Data sheets prepared/ submitted by or on behalf of the applicant/consultant. Office does not concur with data sheets/delineation reports.**⁵⁸

The Appellant’s objections state that the District did not provide justification for the AJD. On page 1 of the RFA, the Appellant stated “Approved jurisdictional determinations are required to include a basis of jurisdictional determination within the document.” The Appellant objects to the District’s determination, arguing that the District “has not provided justification for their determination that wetlands are present,”⁵⁹ “has not provided evidence or sound reasoning to support this area is a wetland,”⁶⁰ and has not provided the reason “the [District] [did] not concur with the data sheets/delineation reports.”⁶¹

33 CFR 331.2 defines an AJD as:

⁵⁴ NRCS/Corps guidance, page 4

⁵⁵ NRCS/Corps guidance, page 3

⁵⁶ AR, page 9

⁵⁷ RFA, page 8

⁵⁸ RFA, page 5

⁵⁹ RFA, page 1

⁶⁰ RFA, page 6

⁶¹ RFA, page 6

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.

The AJD Form is the official Corps document to record the basis of the JD, and the AR for the AJD must include the completed AJD Form and supporting materials, such as the necessary wetland delineation data forms.⁶²

The District indicated it did not concur with the Appellant's wetland data forms for hydric soils or the Appellant's Chapter 5 approach, and chose to complete its own delineation based on the Chapter 5 procedures for problematic hydric soils.⁶³ The District stated that while the hydric soils information on the Appellant's data forms were incorrect, the vegetation and hydrology information in the Appellant's 2014 wetland delineation report were adequate to document hydrophytic vegetation and wetland hydrology.⁶⁴

The District's basis of JD was documented on the AJD Form, and the AR did contain supporting information to conclude portions of the site met the three parameters of a wetland for the purposes of the CWA, which are hydrophytic vegetation, hydric soils and wetland hydrology.⁶⁵ However, issues remain regarding the District's approach on documenting the basis of the JD for the entire site.

First, as discussed relative to Appeal Reason 1, the AR does not contain substantial evidence to support the District's determination that the site consists of 130 acres of wetland based on guidance provided in the 1987 Manual and Midwest Regional Supplement.

Second, on page 8 of the AR, the District stated, "Most [of the Appellant's 2014 wetland delineation] data points showed that vegetation was hydric, hydrology was present, but the soils were non-hydric [emphasis added]." The District did not provide any explanation or discussion of the data points which did not contain hydrophytic vegetation and/or wetland hydrology even though the District determined the entire site to be wetland. This is notable because the District determined portions of the site to be wetland even though the data forms they relied upon to document the site did not meet all three parameters of a wetland.⁶⁶

Lastly, the District's use of the figure on page 322 of the AR as "identifying the limits of waters of the United States" is problematic without any accompanying narrative. The District identified the site to be approximately 130 acres, and stated the site is comprised entirely of wetland, however the AJD Form identified "Wetland A – 5.46 acres, Wetland B – 58.4 acres, [Wetland] B1 – 12.9 acres, Wetland C – 0.08 acre [and] Area near Area C is approximately 50 acres."⁶⁷ It is unclear from the map and the AR, what are the limits of waters of the United States. For

⁶² RGL 07-01, page 6-7, and RGL 08-02, page 2. See footnote 11 and 19.

⁶³ AR, page 8 and AR, page 217-221

⁶⁴ AR, pages 7-9

⁶⁵ Regional Supplement, page 1

⁶⁶ The Appellant's 2014 wetland delineation data forms are at AR, pages 324-411. The following data points did not contain hydrophytic vegetation and/or wetland hydrology: Data Points 7, 9, 11, 13, 21, 30, 34, and 42.

⁶⁷ AR, page 19

example, the AJD form specifically identified 126.84 acres of wetland⁶⁸ (less than the approximate 130-acres identified elsewhere on the AJD Form), and there are portions of the map which appear as open water and upland.

For these reasons, I find that this reason for appeal has merit. The District's application of the Chapter 5 procedures for hydric soils for the entire site, along with its reliance on the Appellant's submitted delineation forms for hydrophytic vegetation and wetland hydrology, was not fully developed in the AR. The AR does not contain substantial evidence to document the basis of jurisdiction for the site or the reasoning for why the District does not concur with the Appellant's data sheet and delineation reports. The map to identify the limits of waters of the United States is sufficiently lacking clarity as well. The AJD is remanded to the District for reconsideration and documentation.

Appeal Reason 3: "...omission of supporting information"

Finding: Appeal Reason 3 does not have merit.

Discussion: The Appellant identified several sources of information referenced on the AJD Form under "Section IV: Data Sources" that support the Appellant's assertion the area is non-wetland rather than support the District's conclusion the review area is wetland. Additionally, the Appellant believes the District omitted supporting information contained within the geotechnical report that would indicate the site was non-wetland.

OBJECTIONS – The following five objections do not have merit.

- **Maps, plans, plots, or plat submitted by or on behalf of the applicant/consultant: Snyder & Associates.**⁶⁹
- **U.S. Geological Survey map(s). Cite scale & quad name: Des Moines SE, IA 24K.**⁷⁰
- **USDA Natural Resources Conservation Service Soil Survey. Citation: Polk County Soil Survey.**⁷¹
- **National wetlands inventory map(s). Cite name: Google Earth NWI layer.**⁷²
- **Photographs: Aerial (Name & Date): Multiple years of aerial imagery from the Iowa Ortho Map Server, 1930's, 1960's, 1970's, 1980's, 1990's, 2002, 2004, 2005, 2006, 2007, 2008, 2009, 2-1-, 2011, 2012, 2013, 2014. Other (Name & Date): Photos from site visit July 10, 2014.**⁷³

⁶⁸ AR, page 19

⁶⁹ RFA, page 5

⁷⁰ RFA, page 6

⁷¹ RFA, page 6

⁷² RFA, page 7

⁷³ RFA, page 7

The Appellant contends that several of the data sources referenced by the District in Section IV of the AJD Form, in addition to documents provided by the Appellant, in the AR are “photos, maps, and plans” evidencing that the majority of the site is not wetland.⁷⁴

As referenced earlier, an AJD is a Corps document which states the presence or absence of waters of the United States on a parcel with a map identifying the limits of jurisdiction.⁷⁵ As defined by regulation, AJDs are appealable and include a basis of jurisdiction within the document.⁷⁶ RGL 07-01 and 08-02 state that the AJD Form, as completed according to the AJD Form Guidebook,⁷⁷ is the basis and rationale of the AJD. Page 6 of RGL 07-01 states that “[m]aps, aerial photography, soil surveys, watershed studies, scientific literature...are examples of background information that will assist staff in delineating waters of the U.S. and completing accurate JDs...[and] this information (such as the wetland delineation data forms) must be referenced in the file, with any conclusions formulated from this information stated in the JD form.”⁷⁸

The AJD Form Guidebook similarly states supporting “information should be referenced in the file, with any conclusions formulated from this information stated in the Approved JD form.”⁷⁹ In regards to the sources of information the AJD Form Guidebook states, “All reviewed information that contributed to an Approved JD should be adequately reflected in the administrative file,”⁸⁰ and, “[Section IV: Data Sources] identifies the sources of data used to support the determination.”⁸¹

The District’s AJD Form concluded the site contained 130 acres of wetland adjacent to the Des Moines River, a “Traditional Navigable Water” (TNW). By law, wetlands adjacent to TNWs are “jurisdictional waters of the United States” and the conclusions regarding the basis of the JD on the AJD Form requires minimal documentation.⁸² The District did adequately document its conclusion on the AJD Form that the site contained wetlands adjacent to a TNW and provided appropriate references of the reviewed information that contributed to its decision. However, as discussed earlier, the supporting information was not adequate to determine the site was comprised of 130 acres of wetland.

I find the sources of data included on the AJD Form were adequately referenced and contained within the AR. It is neither necessary nor practical for the District to rebut every piece of data contained within the AR or address each individual picture for the District to adequately document its basis of JD. For this reason, I find these objections do not have merit.

⁷⁴ RFA, page 5. As indicated on page 2 above, three items were received by the District, but not included in the District’s AR for the appeal due to the District’s determination not to utilize them to determine the wetland delineation.

⁷⁵ 33 CFR 331.2

⁷⁶ 33 CFR 331.2

⁷⁷ U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook. U.S. Army Corps of Engineers and the U.S. Environmental Protection Agency. May 30, 2007. See footnote 11 and 19.

⁷⁸ See footnote 19.

⁷⁹ AJD Form Guidebook, page 47.

⁸⁰ AJD Form Guidebook, page 48.

⁸¹ AJD Form Guidebook, page 60.

⁸² AR, page 13 and 33 CFR 328.3

OBJECTION – The following objection does not have merit.

- “The boring log also does not contain information relevant to the presence or absence of a hydric soil.”⁸³

The Appellant submitted two geotechnical reports to the District as new information for reconsideration of the AJD.⁸⁴ The Appellant believes the geotechnical reports describe soil color, texture, and morphology that is “not representative of hydric soils.”⁸⁵ Essentially, the Appellant believes the basis of the JD is lacking due to the omission of this report and other supporting information mentioned above.

The geotechnical reports on pages 61 and 85 of the AR, identify that the purpose of the reports were to describe soil borings to “explore the subsurface conditions with respect to possible sand and gravel borrow operations.” The boring logs estimate the quantities of mineable sand and gravel within areas investigated by the respective borings and describe soil types based on the Unified Soil Classification System.⁸⁶

In its September 29, 2015 AJD letter, regarding the geotechnical reports, the District stated, the geotechnical reports do “not contain information relevant to the presence or absence of a hydric soil.”⁸⁷ Additionally, the District addressed the geotechnical reports on page 9 of AR, stating “We cannot accept the boring logs that they submitted also because they are not used to document wetland presence or absence. They are strictly for determining quantity and types of materials on site.”

I find the District did not omit the referenced supporting information from the AR. For this reason, I find this objection does not have merit. Upon remand, it would be prudent for the District to explain why the geotechnical report may not have been applicable to the wetland delineation based on relevant guidance.

Conclusion: Based upon the discussions of Appeal Reasons 1 and 2, I find that the appeal has merit. The AJD is being remanded to the Rock Island 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 Rock Island District Engineer pursuant to this remand. This concludes the Administrative Appeals Process.



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

⁸³ RFA, page 2

⁸⁴ AR, page 61-116

⁸⁵ RFA, page 2-3

⁸⁶ AR, page 62

⁸⁷ AR, page 3