



ADMINISTRATIVE APPEAL DECISION

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CLEAN WATER ACT

TIM MCCANDLESS - FILE NO. CEMVR-OD-P-2017-0625

ROCK ISLAND DISTRICT

**ADMINISTRATIVE APPEAL DECISION
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ROCK ISLAND DISTRICT**

Division Engineer: Richard G. Kaiser, Major General, U.S. Army Corps of Engineers, Mississippi Valley Division, Vicksburg, Mississippi

Review Officer (RO): Kyle Gordon, Regulatory Appeals Review Officer, U.S. Army Corps of Engineers, Mississippi Valley Division, Vicksburg, Mississippi

Appellant: Tim McCandless

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

Receipt of Request for Appeal: June 20, 2017

Site Investigation and Appeal Meeting: December 12, 2017

Summary: Mr. Tim McCandless (Appellant) is appealing the Rock Island District's (District) approved jurisdictional determination (AJD) which concluded that the U.S. Army Corps of Engineers (Corps) has Clean Water Act (CWA) jurisdiction over approximately 2,700 linear feet of stream on property located north of 160th Street and east of Grand Avenue in Butler County, Iowa (Site). According to the District's AJD, the stream on the Site is an unnamed, relatively permanent water (RPW) with seasonally continuous flow which indirectly flows into the Iowa River, a traditional navigable water (TNW).¹

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

Background Information: On May 4, 2017, the District received a report by telephone which alleged that the Appellant "had tiled and filled a stream."² In order to assist with its investigation into the alleged unauthorized work, the District requested additional information from the Appellant by letter dated May 8, 2017.³ By letter dated May 22, 2017, the Appellant provided the requested additional information to the District.⁴ By letter dated May 23, 2017, the District provided the Appellant a notice of violation which stated that the work, including "the placement of fill material into the tributary" on the Site, was "in violation of the [CWA]".⁵ At the verbal request of the Appellant,⁶ the District completed its AJD on June 1, 2017, which included a transmittal letter, a Notification of Administrative Appeal Options and Process and Request for

¹ Administrative Record (AR), pages 50- 51.

² AR, page 1.

³ AR, pages 5- 7.

⁴ AR, page 8.

⁵ AR, pages 10- 11.

⁶ AR, page 13.

Appeal Form, and an Approved Jurisdictional Determination Form (AJD Form) to record the basis of the AJD.⁷ The District's AJD concluded that approximately 2,700 linear feet of the unnamed stream on the Site is subject to CWA jurisdiction.⁸

The Mississippi Valley Division (MVD) received the Appellant's Request for Appeal (RFA) on June 20, 2017. By letter dated October 13, 2017, MVD informed the Appellant that the original RFA was not acceptable and advised the Appellant that he should submit a revised RFA in order to correct the deficiencies with the original RFA.⁹ The Appellant provided a signed tolling agreement and after-the-fact (ATF) permit application to the District on November 6, 2017. By letter dated November 13, 2017, MVD notified the Appellant that the revised RFA was accepted.

Information Received and Its Disposition During the Appeal Review: The AR is limited to information contained in the record as of the date of the Notification of Administrative Appeal Options and Process Form, June 1, 2017. Pursuant to 33 C.F.R. 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 C.F.R. 331.7(f), the Division Engineer may use such interpretation, clarification, or explanation in determining whether the AR provides an adequate and reasonable basis to support the District Engineer's decision. The information received during this appeal review and its disposition is as follows:

1. On November 16, 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 June 1, 2017, which is the date the District completed the AJD. The original AR provided by the District included photographs from a site investigation on June 6, 2017. As this site investigation occurred after the date of the District's AJD, the RO advised the District that these photographs constitute new information and that the photographs should be removed from the record. The District immediately removed the photographs and provided a revised copy of the AR to the RO and the Appellant on November 16, 2017.
2. In accordance with 33 C.F.R. 331.7, the RO held a site investigation and appeal meeting on December 12, 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 December 15, 2017.
3. According to the RFA, the Appellant is appealing the District's AJD based on the following reason:

⁷ AR, pages 48-59.

⁸ AR, pages 48-59.

⁹ The original RFA did not include a signed tolling agreement or an ATF permit application. 33 C.F.R. 331.11 states, "An appeal of an [AJD] associated with unauthorized activities will normally not be accepted unless the Corps accepts an after-the-fact permit application." Furthermore, 33 C.F.R. 331.11(c) states, in relevant part, "No administrative appeal associated with an unauthorized activity... will be accepted until such signed tolling agreement is furnished to the district engineer."

Appeal Reason 1: The Appellant disagrees with the District's determination of the flow characteristics of the tributary by asserting that "there was never any flow of water" within the aquatic resource located at the Site.¹⁰

APPEAL DECISION

Appeal Reason 1: The Appellant disagrees with the District's determination of the flow characteristics of the tributary by asserting that "there was never any flow of water" within the aquatic resource located at the Site.¹¹

Finding: Appeal Reason 1 has merit.

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

Discussion: The Appellant disagrees with the District's AJD and asserts that the District incorrectly applied law, regulation, guidance, and officially promulgated Corps policy when it determined that the stream located on the Site is subject to CWA jurisdiction. The Appellant disagrees with the District's determination of flow characteristics of the tributary and asserts that "there was never any flow of water" and that "since our tilling [sic] in year 2005 there has never been flowage" within the aquatic resource located at the Site.¹²

The term "waters of the United States" defines the jurisdictional limits of Corps' authority under the CWA and is defined by regulation to include tributaries of TNWs.¹³ According to the Rapanos Guidance,¹⁴ "a tributary includes natural, man-altered, or man-made water bodies that carry flow directly or indirectly into a [TNW]."¹⁵ Pursuant to the Rapanos Guidance, "the agencies will assert jurisdiction over non-navigable tributaries of [TNWs] that are [RPWs] where the tributaries typically flow year-round or have continuous flow at least seasonally (e.g., typically three months)."¹⁶ Although the Rapanos Guidance states that the agencies will assert jurisdiction over RPWs "without a legal obligation to make a significant nexus finding," it also states that the Corps "will include in the record any available information that documents the existence of a significant nexus between an [RPW] that is not perennial... and a [TNW], even though a significant nexus finding is not required as a matter of law."¹⁷ As part of an AJD, Districts should determine whether a tributary is a TNW, RPW, or non-RPW; provide

¹⁰ RFA, page 3.

¹¹ RFA, page 3.

¹² RFA, page 3. During the December 12, 2017 appeal meeting, the Appellant reiterated that there is currently no flow in the stream located on the Site, but clarified that the tributary may have flowed before the original, 8-inch main tiles were installed in 2005. During the appeal meeting, the Appellant also clarified that any observable flow documented by the District would have been caused by broken tiles during the installation of the new, 8-inch main tiles in 2016 (MFR, pages 2-3).

¹³ 33 C.F.R. 328.3(a)(5) (2017).

¹⁴ Following the United States 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.

¹⁵ Rapanos Guidance, page 6, fn 24.

¹⁶ Rapanos Guidance, page 6.

¹⁷ Rapanos Guidance, pages 12-13.

information, data, and rationale, which may include a significant nexus evaluation, to support their determination in the appropriate sections of the AJD Form; and ensure that the documentation and analyses for an AJD is adequately reflected in the AR and demonstrates the District's basis for asserting or declining jurisdiction.¹⁸

To evaluate the flow characteristics of a tributary, and ultimately determine whether a tributary is an RPW, the Rapanos Guidance states,

Furthermore, a tributary, for the purposes of this guidance, is 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). The flow characteristics of a particular tributary generally will be evaluated at the farthest downstream limit of such tributary (i.e., the point the tributary enters a higher order stream). However, for purposes of determining whether the tributary is relatively permanent, where data indicates the flow regime at the downstream limit is not representative of the entire tributary (as described above) (e.g., where data indicates the tributary is relatively permanent at its downstream limit but not for the majority of its length, or vice versa), the flow regime that best characterizes the entire tributary should be used.¹⁹

In this case, the District's AJD concluded that approximately 2,700 linear feet of stream on the Site is a tributary to a TNW and subject to CWA jurisdiction.²⁰ More specifically, the District concluded that the tributary is a man-altered RPW with seasonally continuous flow that flows indirectly into a TNW, the Iowa River.²¹ The District provided documentation in the AR to support its determination of the flow characteristics of the tributary, including one AJD form which documents the existence of a significant nexus between the RPW and a TNW;²² however, the District's evaluation of the flow characteristics of the tributary was limited to the boundaries of the AJD review area and not the entire reach of the tributary as instructed by the Rapanos Guidance.²³ In the absence of sufficient information to properly identify and document the reach of the tributary, the District's evaluation of the flow characteristics of the tributary and subsequent RPW determination is not consistent with the Rapanos Guidance; therefore, this reason for appeal has merit.

Conclusion: For the reason stated above, I find that the appeal has merit. Therefore the AJD is being remanded to the Rock Island Engineer for further analysis and documentation in

¹⁸ Rapanos Guidance, pages 12-13.

¹⁹ Rapanos Guidance, page 6, fn 24.

²⁰ AR, pages 48-59.

²¹ AR, pages 48-57.

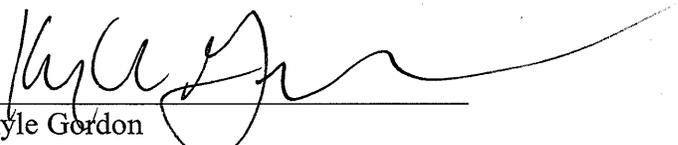
²² AR, see pages 12, 15-19, 24-47, and 50-57.

²³ AR, see pages 16-18. Based on the December 12, 2017 site investigation and appeal meeting, the District clarified that the arrows labeled "Start" and "End" on pages 16-18 of the AR indicate the location of the unauthorized work on the Site, the review area for the AJD, and the limits of the District's evaluation of the tributary (MFR, pages 4-5).

accordance with 33 C.F.R. 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.

FOR THE COMMANDER:

6 MARCH 2018
(Date)



Kyle Gordon
Regulatory Appeals Review Officer