



# **ADMINISTRATIVE APPEAL DECISION**

US ARMY CORPS OF ENGINEERS

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**ADMINISTRATIVE APPEAL DECISION  
CLEAN WATER ACT  
BRAD CAVINESS- FILE NO. MVM-2014-104  
MEMPHIS DISTRICT**

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**MEMPHIS DISTRICT**

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

**Appellant:** Mr. Brad Caviness, landowner, represented by Mr. David Fowlkes, Cypress Tree Environmental Consulting, LLC

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

**Receipt of Request for Appeal:** June 30, 2015

**Site Visit/Jurisdictional Determination (JD) Appeal Meeting:**  
September 23, 2015

**Summary:** The Appellant is appealing the Memphis District's (District) approved jurisdictional determination (AJD) which concludes that the Corps has Clean Water Act (CWA) jurisdiction over an 18.5 acre wetland located in a 22.4-acre parcel in Section 6, Township 2 North, Range 6 West, Prairie County, Arkansas ("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 jurisdictional determination in this case will be made by the Memphis District Engineer.

**Background Information:** The site is located approximately 500 feet northwest of the intersection of Highway 86 and Crowder Road in Prairie County, Arkansas. On March 24, 2014, the District provided the Appellant with a preliminary jurisdictional determination (PJD), which states that the site may contain waters of the U.S. subject to regulation under Section 404 of the CWA.<sup>1</sup> The PJD form identified an estimated

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<sup>1</sup> Administrative Record (AR), pages 338-343.

23-acre wetland within the site based on a review of maps, aerial photography, soil survey maps, National Wetland Inventory maps, and a site visit conducted on March 14, 2014.<sup>2</sup>

The Appellant submitted a detailed wetland delineation report, dated August 5, 2014, and an application for Department of the Army permit.<sup>3</sup> The delineation report concluded the site contained an 18.5-acre wetland<sup>4</sup>, and the application proposed to clear and grade the entire site for irrigated agricultural crop production.<sup>5</sup>

On September 12, 2014, the District published a public notice to advise interested parties of the permit proposal and to solicit comments on the proposed activity.<sup>6</sup> The Administrative Record (AR) includes comments from the public notice and supplemental information for the application submitted after the public notice.<sup>7</sup> Following a site visit, the District forwarded a letter, dated October 31, 2014, requesting additional information, including information as to alternatives analysis and mitigation work plan.<sup>8</sup> The appellant responded to this request on December 8, 2014.<sup>9</sup> By letter dated February 6, 2015, the District requested further information from the Appellant to complete processing of the permit application.<sup>10</sup> The Appellant submitted additional information regarding the site and requested a reevaluation of the jurisdictional determination on March 9, 2015.<sup>11</sup> The District completed an AJD for the site by letter dated June 17, 2015,<sup>12</sup> and determined the 18.5-acre wetland within the site was a jurisdictional water of the U.S. subject to regulation under Section 404 of the CWA. The AJD Form identified the wetland as an 18.5-acre wetland that directly abuts a seasonal relatively permanent water (RPW) (ditch) that flows indirectly into a traditional navigable water (TNW) (White River).<sup>13</sup>

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<sup>2</sup> AR, pages 338-343.

<sup>3</sup> AR, pages 216-336.

<sup>4</sup> AR, page 218.

<sup>5</sup> AR, page 317.

<sup>6</sup> AR, pages 209-215.

<sup>7</sup> AR, pages 75-208.

<sup>8</sup> AR, pages 160-161.

<sup>9</sup> AR, pages 133-156.

<sup>10</sup> AR, pages 70-71.

<sup>11</sup> AR, pages 64-68.

<sup>12</sup> AR, pages 11-12.

<sup>13</sup> AR, pages 15-23.

The U.S. Army Corps of Engineers, Mississippi Valley Division received the Appellant's Request for Appeal (RFA) of the AJD on June 30, 2015. By letter dated August 4, 2015, the Appellant was notified the RFA met the criteria for appeal and 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 contained in the Notification of Administrative Appeal Options and Process Form that was sent to the Appellant by the District. 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 are as follows:

1. The District provided an electronic copy of the AR to the RO on August 17, 2015. The AR was received by the Appellant on August 19, 2015. The AR is limited to information contained in the record on or before June 17, 2015, which is the date the District completed the AJD.
2. As provided for in the Corps' Appeal Program regulations, 33 CFR 331.7, the RO held a site visit and appeal meeting on September 23, 2015. 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 October 2, 2015. Comments on the MFR, which were received from the District on October 8, 2015 and from the Appellant on October 13, 2015, were used to update the final MFR dated October 13, 2015.

**APPEAL DECISION**

**Appeal Reason:** "We continue to suggest that the ditches that abut the 18.5 acre wetland are manmade, straight line, without a name irrigation ditches. These ditches are used to both convey irrigation water and capture irrigation water being used on

adjacent cropland fields. These are small manmade ditches that are almost one mile from a named ditch that may or may not be an RPW. These are irrigation ditches with no significant connection to Waters of the United States. The farm field ditches run through mostly precision leveled cropland. With leveled fields and straight ditches there is very little runoff. Any excess water is captured and re-lifted back onto the adjacent rice fields. Any water that does runoff is relatively free of sediments because the land is level or nearly level."

In essence, the appeal challenges the District's determination that the wetland is adjacent to a jurisdictional water because, Appellant argues, the ditch which the wetland directly abuts is not a seasonal RPW and, therefore, neither the wetland nor the ditch have a significant nexus to the White River (TNW).

**Finding:** The appeal has merit because the AR does not contain substantial evidence to support the District's determination that the ditch directly abutted by the wetland is an RPW, or that the wetland and/or the ditch have a significant nexus to a TNW (White River).

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

**Discussion:** In the RFA, the Appellant refers to "ditches that abut the wetland." The District identified only one ditch as an RPW (jurisdictional water). This ditch flows from west to east across the northern part of the site.<sup>14</sup> It then runs north from the northeast corner of the property and water could flow through two possible routes to separate tributaries.<sup>15</sup> The District's determination is based on only one of these routes, and only that route is discussed in this Appeal Decision.

The term "waters of the United States" is defined by regulations to include "[w]etlands adjacent to [jurisdictional] waters."<sup>16</sup> Pursuant to regulations, jurisdictional waters

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<sup>14</sup> See e.g., AR, pages 11-23 The AR references a second ditch located on the east side of the wetland at pages 66 and 67. It was clarified during the September 23, 2015 site visit and appeal meeting that the ditch along the east side of the wetland was located outside of the site, was not identified on the AJD Form, and was not the District's basis for the indirect connection of the wetland to the TNW.

<sup>15</sup> See AR, pages 2-10 and 16

<sup>16</sup> 33 CFR § 328.3(a)(7).

include "tributaries" of a TNW.<sup>17</sup> According to the Rapanos Guidance<sup>18</sup>, "a tributary includes natural, man-altered, or manmade water bodies that carry flow directly or indirectly into a [TNW]."<sup>19</sup> As stated in the Guidance, "[b]oth the plurality opinion and the dissent [in *Rapanos*] would uphold CWA jurisdiction over non-navigable tributaries that are 'relatively permanent' - waters that typically ... flow year-round or waters that have a continuous flow at least seasonally (e.g., typically three months)."<sup>20</sup> Thus, a wetland that is "adjacent" to a RPW is a jurisdictional water of the U.S.<sup>21</sup>

The term "adjacent" is defined as "bordering, contiguous, or neighboring."<sup>22</sup> The Rapanos Guidance explains that wetlands are "adjacent" if one of the following three criteria is satisfied: (1) "there is an unbroken surface or shallow subsurface connection to jurisdictional waters," which 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>23</sup>

In the AJD, the District determined that the site contains a wetland<sup>24</sup> that is adjacent to an RPW that flows indirectly into a TNW.<sup>25</sup> Specifically, the District determined that the wetland is adjacent to and directly abuts a manmade ditch that flows indirectly into the White River.<sup>26</sup> The AJD Form states the wetland and ditch "have contiguous flow ... during and/or after

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<sup>17</sup> 33 CFR § 328.3(a)(5).

<sup>18</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>19</sup> Rapanos Guidance, at 6 fn. 24. The fact that the ditch is "manmade" is not germane to the geographic jurisdictional determination.

<sup>20</sup> Rapanos Guidance, at 6-7.

<sup>21</sup> See 33 CFR § 328.3(a)(7).

<sup>22</sup> See 33 CFR § 328.3(c).

<sup>23</sup> Rapanos Guidance, at 5-6.

<sup>24</sup> It is undisputed that the site contains an 18.5-acre wetland. There is no disagreement on the wetland delineation. See, e.g., AR, pages 209 and 218.

<sup>25</sup> AR, page 15.

<sup>26</sup> AR, pages 16-17.

rain events or crop irrigation events."<sup>27</sup> The flow characteristics are described as "overland sheet flow" that moves water across the wetland and through "confined eroded cuts" into the ditch "during low flow events."<sup>28</sup> The AJD Form references pictures in the AR as support for the District's conclusion of abutting where the pictures show the wetland and ditch in close physical proximity with water flowing from the wetland into the ditch through eroded cuts.<sup>29</sup> The District documented that the wetland has at least intermittent "unbroken surface" connection, and is "adjacent" to the ditch.

The District also defined the ditch's flow route to the White River. The AJD Form and figures provided in the AR identify the ditch's flow path through unnamed "tributaries of Short Creek to Short Creek to Faras Run to Wattensaw Bayou to The White River."<sup>30</sup> The District determined the flow paths based on aerial images, observations in the field of flowing water in the site and along accessible roads, and topographic maps.<sup>31</sup>

The District's determination that the wetland is adjacent to the ditch and that the ditch is connected to a TNW through four tributaries is supported by substantial evidence in the AR. However, the AR does not contain substantial evidence for the District's determination that the ditch, to which the wetland is adjacent, is an RPW. RPWs are "waters that typically (e.g., except due to drought) flow year-round or waters that have a continuous flow at least seasonally (e.g., typically three months)."<sup>32</sup> RPWs "do not include ephemeral tributaries which flow only in response to precipitation and intermittent streams, which do not typically flow year-round or have continuous flow at least seasonally."<sup>33</sup>

While the AR states that the ditch was a seasonal RPW with twenty or more flow events per year, the AR does not provide any

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<sup>27</sup> AR, page 19.

<sup>28</sup> AR, page 19.

<sup>29</sup> AR, pages 21, 52-54 & 61.

<sup>30</sup> AR, pages 2-10 & 16. The figures provided in pages 2-10 also identify a potential flow path through unnamed tributaries of Buck Creek, a direct tributary to Faras Run. However, this other flow path was not identified on the AJD Form and was not the District's basis for the indirect connection of the ditch to the TNW. See AR, page 16.

<sup>31</sup> AR, pages 22-23.

<sup>32</sup> Rapanos Guidance, at 6-7.

<sup>33</sup> Rapanos Guidance, at 7.

other information on the duration and volume of flow in the ditch.<sup>34</sup> The sections on the AJD Form for such information were left blank.<sup>35</sup> The AR indicates that the ditch was identified as a seasonal RPW based on the presence of ordinary high water mark (OHWM) indicators, multiple observed flow events, information that is contained within the AR including, but not limited to, the annual rainfall table and high water table within the soils, and a connection to The White River. The AR also identified three site visits completed in March 2014, October 2014, and March 2015 as evidence that the ditch flows seasonally.<sup>36</sup> What the AR lacks is technical analysis of the observed conditions to support the District's determination that the ditch is a seasonal RPW. There is no narrative regarding the site visits which discusses precipitation or other conditions on the ground before or during the site visits.<sup>37</sup> Without such information, it is not apparent from the AR that the subject ditch is not one in which the flow could be short-lived (ephemeral) or flow only in response to precipitation.

Turning to the issue of whether the wetland and/or the ditch has a significant nexus to a TNW, without substantial evidence that the ditch is an RPW, the AR lacks substantial evidence that the wetland or the ditch have a significant nexus to a TNW. Even if there had been substantial evidence to support the District's determination that the wetland abuts a seasonal RPW, under Corps policy, available information that documents the existence of a significant nexus must also be established. As a matter of policy, the AR must include any available information that documents the existence of a significant nexus between an RPW that is not perennial (and its adjacent wetlands if any) and a TNW.<sup>38</sup>

The Jurisdictional Guidebook<sup>39</sup> states:

A significant nexus exists if the tributary, in combination with all of its adjacent wetlands, has more than a speculative or an insubstantial effect on the

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<sup>34</sup> AR, page 17.

<sup>35</sup> AR, page 17.

<sup>36</sup> AR, page 21.

<sup>37</sup> Rapanos Guidance, at 6-7.

<sup>38</sup> Rapanos Guidance, at 13.

<sup>39</sup> *U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook* (May 30, 2007) (Jurisdictional Guidebook).

chemical, physical, and/or biological integrity of a TNW. Principal 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, plus the hydrologic, ecologic and other functions performed by the tributary and all of its adjacent wetlands.<sup>40</sup>

In its "significant nexus" analysis, the District relies on general characteristics of wetland functions and services, and generally infers that there is a chemical, biological, and physical connection to the TNW. For example, with respect to a "chemical connection," it states generally that "Bottomland Hardwood wetlands are known to absorb sediments and nutrients."<sup>41</sup> Likewise, it relies on the fact that "Bottomland hardwood wetlands are known to support many aquatic [fauna]" for a biological connection.<sup>42</sup> For a "physical connection," it relies on "precipitation events or surface inflow from agricultural runoff" as "water was observed flowing from the wetland to the abutting RPW."<sup>43</sup>

However, as noted above "significant nexus exists if the tributary, in combination with all of its adjacent wetlands, has more than a speculative or an insubstantial effect on the chemical, physical, and/or biological integrity of a TNW."<sup>44</sup> As the Jurisdictional Guidebook states, "[p]rincipal 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, plus the hydrologic, ecologic and other functions performed by the tributary and all of its adjacent wetlands." The AR does not contain substantial evidence regarding volume, duration and frequency of the flow in the ditch or specific information regarding the hydrologic, ecologic, and other functions performed by the ditch and/or the wetland.

Accordingly, I find that the appeal has merit. The AR does not contain substantial evidence to support the District's determination that the ditch directly abutted by the wetland is an RPW; or that the wetland and/or the ditch have a significant nexus to a TNW (White River).

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<sup>40</sup>Jurisdictional Guidebook, at 7.

<sup>41</sup> AR, page 20.

<sup>42</sup> AR, page 20.

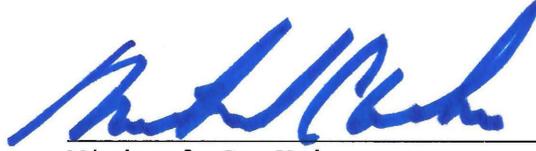
<sup>43</sup> AR, page 20.

<sup>44</sup> Jurisdictional Guidebook, at 7.

**Conclusion:** For the reasons stated above, I find that the appeal has merit. The AJD is remanded to the District for reconsideration and documentation. The final Corps jurisdictional decision in this case will be made by the Memphis District Engineer.

12 JULY '16

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Date



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