ADMINISTRATIVE APPEAL DECISION
CLEAN WATER ACT
D CONSTRUCTION - FILE NO. 2009-0497
ROCK ISLAND DISTRICT

ADMINISTRATIVE APPEAL DECISION
D CONSTRUCTION (MORRIS SAND AND GRAVEL)
JURISDICTIONAL DETERMINATION
FILE NO. 2009-0497
ROCK ISLAND DISTRICT
NOVEMBER 6, 2009

Review Officer: James B. Wiseman, Jr., U.S. Army Corps of Engineers, Mississippi Valley Division (MVD)

Appellant/Applicant: D Construction (Morris Sand and Gravel)

Point of Contact: Mr. Patrick Hickey, EnCAP, Inc. (Agent)

Authority: Section 404 of the Clean Water Act

Receipt of Request for Appeal: 16 July 2009

Approved Jurisdictional Determination Appeal Meeting and Site Visit: 19 August 2009

Summary of Appeal Decision: D Construction (Morris Sand and Gravel) is appealing a U.S. Army Corps of Engineers (USACE) jurisdictional determination (JD) made by Rock Island District (MVR) for wetlands located on property in Grundy County, Illinois. The Request for Appeal (RFA) asserts that MVR has incorrectly determined that the wetlands are adjacent to a traditional navigable water and thus subject to regulation pursuant to the Clean Water Act. The appeal is found to have no merit. The final decision on jurisdiction will be the District Engineer's approved jurisdictional determination dated 19 May 2009.

Background Information: With cover letter dated 17 April 2009, EnCAP, Inc. (EnCAP) submitted a wetland delineation report[1] to MVR and requested an approved jurisdictional determination for a tract of land located near the Illinois and Michigan Canal (I&M Canal) in Section 35, T34N-R7E, and Section 2, T33N-R7E, near the town of Morris, Grundy County, Illinois. The report concluded that 3.4 acres of the tract in five distinct areas met the criteria for wetlands based on standard Corps of Engineers methodology, but that "all five wetlands appear to be isolated, and therefore not regulated by the USACE."[2] The JD was assigned to Mr. Mike Hayes as the project manager for MVR. In a

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[1] Administrative Record (AR), p. 45-104.
[2] AR p. 45

conversation on 23 April 2009, Mr. Hayes asked Mr. Pat Hickey, the EnCAP point of contact, for an elevation survey of the area showing the elevation of the surface of the I&M Canal relative to the elevation of saturated soils in the five wetlands.[3] Based on survey data collected on 27 April 2009,[4] elevation maps (both plan and cross-section views) were provided to MVR with cover letter dated 1 May 2009.[5] Staff from MVR and Region 5 of the U.S. Environmental Protection Agency (EPA) met with EnCAP staff for an onsite meeting on 14 May 2009 to verify the wetland delineation. On 19 May 2009, MVR issued an approved JD which stated that all five wetland areas on the project site are jurisdictional and regulated under Section 404 of the Clean Water Act.

On behalf of D Construction (Morris Sand and Gravel), Mr. Hickey submitted a Request for Appeal (RFA) challenging the MVR JD. The RFA was received by the Mississippi Valley Division on 16 July 2009 and accepted by letter dated 17 July 2009. An appeal conference and site visit was held on 19 August 2009.

Information Received and its Disposal During the Appeal:

33 C.F.R. § 331.3(a)(2) sets the authority of the Division Engineer to hear the appeal of this jurisdictional determination. However, the Division Engineer does not have authority under the appeal process to make a final decision regarding jurisdictional determinations, as that authority remains with the District Engineer. Upon appeal of the District Engineer's determination, the Division Engineer or his Review Officer (RO) conducts an independent review of the administrative record to address the reasons for appeal cited by the appellant. The administrative record is limited to information contained in the record by the date of the Notification of Administrative Appeal Options and Process (NAO/NAP) form. Pursuant to 33 C.F.R. § 331.2, no new information may be submitted on appeal. Neither the appellant nor the District may present new information to MVD. 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 administrative record. Such interpretation, clarification, or explanation does not become part of the administrative record because the District Engineer did not consider it in making the decision on the JD. However, in accordance with 33 C.F.R. § 331.7(f), the Division

[3] AR, p. 44
[4] AR. p. 31-41
[5] AR, p. 41

Engineer may use such interpretation, clarification, or explanation in determining whether the administrative record provides an adequate and reasonable basis to support the District Engineer's decision.

1. MVR provided a copy of the administrative record (AR) to the RO (received on 4 August 2009) and to Mr. Hickey. The AR is limited to information contained in the record by the date of the NAO/NAP form. In this case, that date is 19 May 2009.

2. A site visit/appeal meeting was held on 19 August 2009. The RO prepared a draft Memorandum for Record (MFR) summarizing the meeting and site visit and supplied a copy to Mr. Hickey and MVR on 11 September 2009 for comment. Via email, MVR and Mr. Hickey indicated that the MFR appeared to accurately portray the meeting and site visit. A final MFR was prepared on 18 September 2009.

Jurisdictional Determination Background: Regulations, Guidance, and Court Cases

In 1985, the U.S. Environmental Protection Agency (EPA) General Counsel signed the Migratory Bird Memo, which opined that movement of migratory birds across state boundaries could be used as a link to interstate commerce. The Corps, in preamble language to its 1986 regulations, adopted the EPA legal memo as the "Migratory Bird Rule" (MBR).[6] The MBR generally allowed the Corps to assert CWA jurisdiction over nearly all natural water bodies, including wetlands that were used or could be used as habitat by migratory birds. In 2001, the MBR was invalidated by the U.S. Supreme Court's decision in the *Solid Waste Agency of Northern Cook County (SWANCC) v. Corps,* which held that isolated, intrastate, non-navigable waters could not be regulated under the CWA based solely on the presence of migratory birds. Following the *SWANCC* decision but prior to the decision in *Rapanos* (discussed below), it was generally believed that a water body (including a wetland) was subject to CWA jurisdiction if it was part of the U.S. territorial seas, a traditional navigable water, any tributary to a traditional navigable water, or a wetland adjacent to any one of the above. In addition, isolated wetlands and other waters might be considered jurisdictional where they had the necessary link to

[6] The "Migratory Bird Rule" was not a rule or a part of any Corps or EPA regulation, but instead consisted of examples in a preamble published in the *Federal Register.* The preamble language was never subject to notice and comment rulemaking procedures under the Administrative Procedures Act, and was never codified in the Code of Federal regulations (CFR). Instead, it was advanced as a basis for asserting jurisdiction in a guidance memo.

either traditional navigable waters or interstate commerce. In 2003, EPA and the Corps provided joint guidance in Appendix A[7] of the Advanced Notice of Proposed Rulemaking on the CWA Regulatory Definition of "Waters of the United States."

In 2007, as a result of the U.S. Supreme Court *Rapanos* decision,[8] EPA and the Corps, in coordination with the Office of Management and Budget and the President's Council on Environmental Quality, developed a guidance memorandum (Rapan*os* guidance).[9] The Rapanos guidance requires the application of two new standards, as well as a greater level of documentation, to support an agency JD for a particular water body.

The first standard, based on the plurality opinion in the *Rapanos* decision, recognizes regulatory jurisdiction over a water body that is not a traditional navigable water if that water body is "relatively permanent" (i.e., it flows year-round, or at least "seasonally") and over wetlands adjacent to such water bodies if the wetlands directly abut the water body. In accordance with this standard, the Corps and EPA may assert jurisdiction over the following categories of water bodies: (1) traditional navigable waters, (2) all wetlands adjacent to traditional navigable waters, (3) relatively permanent non-navigable tributaries of traditional navigable waters, and (4) wetlands that directly abut relatively permanent, non-navigable tributaries of traditional navigable waters.

The second standard, for tributaries that are not relatively permanent, is based on the concurring opinion of Justice Kennedy and requires a case-by-case "significant nexus" analysis to determine whether waters and their adjacent wetlands are jurisdictional. 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 traditional navigable water (TNW). Consequently, the agencies may assert jurisdiction over every water body that is not a relatively permanent water (RPW) if that water body is determined (on the basis of a fact-specific analysis) to have a significant nexus with a TNW. The classes of water body that are subject to CWA jurisdiction, if such a

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[7] 68 F.R. 1995-1998.

[8] Combined cases of *Rapanos v. United States* and *Carabell v. United States*. 126 S. Ct. 2208 (2006).

[9] Grumbles, Benjamin H. and John Paul Woodley, Jr. 2007, 2008. Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* and *Carabell v. United States*. Original guidance released June 5, 2007; revised guidance released December 2, 2008.

significant nexus is demonstrated, are: (1) non-navigable tributaries that do not typically flow year-round or have continuous flow at least seasonally, (2) wetlands adjacent to such tributaries, and (3) wetlands that are adjacent to but that do not directly abut a relatively permanent, non-navigable tributary. Revised Rapanos guidance,[10] issued on 2 December 2008, further addressed specific issues, including traditional navigable waters, adjacency, and the determination of relatively permanently waters.

Implementation of the *Rapanos* decision requires the Corps to strive for more thoroughness and consistency in the documentation of jurisdictional determinations. To meet this requirement, the Corps now uses a standardized JD form. Instructions for completing the form are found in *U.S. Army Corps of Engineers Jurisdictional Form Instructional Guidebook* (Guidebook).[11] The Guidebook clarifies terms commonly used in the form, presents an overview on jurisdictional practices, and supplements the form instructions.

Basis for Appeal as Presented by Appellant

Appellant's Reasons for Appeal

1. Wetlands 2, 3, and 4 are not adjacent to a traditional navigable water and are not jurisdictional.

2. Wetlands 1 and 5 are adjacent to the Illinois and Michigan Canal, but the canal is not a natural water body. The creation of the canal has provided the means by which the United States government is asserting jurisdiction over all five wetland areas and the assertion of jurisdiction is questionable.

FINDING: These two reasons for appeal are considered together and do not have merit.

DISCUSSION: The two central issues in this appeal are whether or not the I&M Canal is a TNW, and whether or not the wetlands on the project site are adjacent to the I&M Canal.

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[10] Grumbles and Woodley. 2008.

[11] The Guidebook was issued on June 1, 2007 as Regulatory National Standard Operating Procedures for conducting an approved jurisdictional determination and documenting practices to support an approved JD. Information on *Rapanos* may be found at http://usace.army.mil/CECW/Pages/cecwo_reg.aspx.

TNW Discussion:

According to the Rapanos guidance, EPA and the Corps should assert jurisdiction over "[a]ll waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide." The guidance further states that according to regulations at 33 C.F.R. § 328.3(a)(1) and 40 C.F.R. § 230.3(s)(1), such waters include all of the "navigable waters of the United States," defined in 33 C.F.R. § 329 and by the federal courts, plus all other waters that are navigable-in-fact. Waters are to be considered traditional navigable waters if: (a) they are subject to Section 9 or 10 of the Rivers and Harbors Act, (2) a federal court has determined that the water body is navigable-in-fact under federal law, (c) they are waters currently being used for commercial navigation, including commercial waterborne recreation, (d) they have historically been used for commercial navigation, including commercial water-borne recreation, or (e) they are susceptible to being used in the future for commercial navigation, including commercial water-borne recreation.

The administrative record contains several references to the designation of I&M Canal as a TNW:

1. The canal is included in a pamphlet issued for MVR by the U.S. Government Printing Office in 1998 entitled "Caring for the Nation's Waters," which contains a list and map of the "Navigable Waters of the United States (Traditional)" found in the district.
2. Sections II(A) and III(A) of the Approved Jurisdictional Determination Form dated 18 May 2009[12] prepared for this project include a detailed history of the canal including references to its historical commercial, passenger and recreational use in navigation.[13]
3. During the appeal conference, the RO asked MVR if a navigation study had been done pursuant to 33 C.F.R. § 329.14, the regulation governing the determination of navigability. MVR responded that they were unable to locate any files, but that they do have public notification records dated 17 May 1979 that

[12] AR, p. 9
[13] Based on a personal communication with Mr. Hayes of MVR, this information comes from articles in the *Encyclopedia of Chicago* and *Wikipedia, the Free Encyclopedia*.

designate the I&M Canal as a navigable water of the United States under Section 10 of the Rivers and Harbors Act of 1899.[14]

4. On 12 May 2009, Mr. Dan Johnson, the MVR Regulatory Branch Chief, contacted Mr. David Olson[15] at USACE Regulatory Headquarters (HQ), Washington, DC, to discuss, among other things, the jurisdictional status of the I&M Canal. According to the conversion record,[16] Mr. Olson concurred with Mr. Johnson's opinion that I&M Canal is a TNW due to historical use.

Therefore, the MVR determination that the I&M Canal is a TNW is supported by substantial evidence in the AR.

Adjacency Discussion:

On 14 May 2009, MVR staff met with staff from EPA and representatives of EnCAP to verify the EnCAP wetland delineation report. With a minor adjustment to the southern boundary of wetland 4, all agreed that the five wetland areas met wetland parameters as established in the Corps of Engineers Wetlands Delineation Manual (1987 Manual)[17] and the interim regional supplement.[18] Therefore, the appeal concerns whether or not the five areas on the project site are jurisdictional, not whether or not they meet established wetland criteria.

In order to be jurisdictional in this case, the five wetland areas must be determined to be adjacent to a regulated water. Since it has already been established that the AR contains substantial evidence that the I&M Canal is a regulated TNW, a determination must be made whether or not the AR supports the MVR conclusion that all five wetland areas are adjacent to the canal.

Mr. Hayes prepared an inspection report which stated that all five wetlands areas met the definition of adjacent as found in

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[14] See Appendix A. Mr. Johnson furnished a copy of the document to the RO by email on 30 September 2009. The RO sent a copy to Mr. Hickey for inclusion in his copy of the AR.

[15] Mr. Olson is the HQ point of contact for the Mississippi Valley Division (including MVR) and for jurisdictional issues.

[16] AR, p. 30

[17] Environmental Laboratory. 1987. *Corps of Engineers Wetlands Delineation Manual*, Technical Report Y-87-1, U.S. Army Engineer Waterways Experiment Station, Vicksburg, Miss.

[18] U. S. Army Corps of Engineers. 2008. *Interim Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Midwest Region*, ed. J. S. Wakeley, R. W. Lichvar, and C. V. Noble. ERDC/EL TR-08-27. Vicksburg, MS: U.S. Army Engineer Research and Development Center.

Corps of Engineers regulations.[19] The AR also contains a document entitled *Points Considered in Determining Adjacency,*[20] in which Mr. Hayes describes the location of the five areas and concludes that all are adjacent to the I&M Canal. In particular, Mr. Hayes states that wetland 1 and wetland 5 directly abut the towpath berm[21] which abuts the canal. The appellant does not dispute that wetland 1 and 5 are adjacent to the canal.[22] Mr. Hayes also indicated that wetlands 2, 3, and 4 do not directly abut the towpath berm, but that all three lie within 330 feet of the ordinary high water mark (OHWM) of the I&M Canal.[23] He also describes that these three wetland areas occupy the same wooded lot as wetland 1 and 5, and that it is likely that insects, amphibians, reptiles, birds, and mammals that use the canal also use the five wetlands areas. Mr. Hayes concludes that wetlands 2, 3, and 4 are "neighboring" to the canal and thus also meet the regulatory definition of adjacent.

Regulations at 33 C.F.R. 328.3(c) state that "wetlands separated from other waters of the United States by man-made dikes or barriers ..." are adjacent wetlands. The Rapanos guidance further explains the regulatory definition of adjacency, stating that wetlands are adjacent if one of three criteria are satisfied: (1) there is an unbroken surface or shallow sub-surface connection to jurisdictional waters; (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. Wetlands 1 and 5 meet the second

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[19] 33 C.F.R. § 328.3(c): "The term 'adjacent' means bordering, contiguous or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent wetlands."

[20] AR, p. 24

[21] A towpath is a road or trail on the bank of a river, canal, or other inland waterway. The purpose of a towpath is to allow a land vehicle, beasts of burden, or a team of human pullers to tow a boat, often a barge (from "Towpath," *Wikipedia, The Free Encyclopedia,* http://en.wikipedia.org/w/index.php?title=Towpath&oldid=309077214). In this case, the towpath is a road approximately eight feet wide which is located on top of a man-made berm presumably constructed using the material excavated during construction of the canal.

[22] See the appellant's written answer to question 1 posed by the RO during the appeal conference, which may be found in the Memorandum for Record summarizing the appeal conference and site visit (Appendix A).

[23] Based on the survey map,[23] of the five wetlands areas, the distal boundary of wetland 4 is the furthest away from the OHWM of the canal (650 feet), therefore all 3.4 wetland acres identified on the project site lie within that distance of the canal.

criterion, and wetlands 2, 3, and 4 meet the second and third criteria.

The conclusion by MVR that all five wetland areas are adjacent to the I&M Canal, a TNW, is supported by substantial evidence in the AR and is not contrary to a requirement of law, regulation, or officially promulgated Corps policy guidance. Accordingly, the record supports the MVR determination that these wetlands are regulated pursuant to Section 404 of the Clean Water Act.

ACTION: No action is required.

3. Wetlands 2, 3, and 4 are not adjacent (bordering, contiguous, or neighboring) a TNW for the following reasons: (a) The canal is clay lined and at a higher elevation than the subject wetlands; therefore, there is not an unbroken surface or shallow sub-surface connection; (b) Wetland 2 is located approximately 230 feet from the TNW, Wetland 3 is located between 175 and 525 feet from the TNW, and Wetland 4 is located approximately 335 feet from the TNW; and (c) There is no evidence that there is an ecological interconnection between the wetlands and the TNW; A significant separation exists between the wetlands and TNW including a gravel towpath, berm of the canal, and Wetlands 1 and 5; To assume there is an ecological interconnection between the TNW and Wetlands 2, 3, and 4 is speculative.

FINDING: This reason for appeal does not have merit.

DISCUSSION: MVR considers wetlands 2, 3, and 4 to be neighboring the I&M Canal, thus meeting the regulatory definition of adjacent.

As noted above, an unbroken surface or shallow subsurface hydrologic connection is only one of three criteria listed in the Rapanos guidance, and is not a requirement for the determination that a wetland area is adjacent. There is also no requirement in the Rapanos guidance that a wetland lie within a certain distance of a TNW in order to be considered adjacent.

As noted above, the third criterion in the Rapanos guidance for a determination that a wetland is adjacent is that the wetland in question be "reasonably close, supporting the science-based inference that such wetlands have an ecological interconnection with jurisdictional waters." The guidance further states:

> Because of the scientific basis for this inference, determining whether a wetland is reasonably close to a jurisdictional water does not generally require a case-specific demonstration of an ecologic interconnection. In the case of a jurisdictional water and a reasonably close wetland, such implied ecological interconnectivity is neither speculative nor insubstantial.

Since the AR demonstrates that all five wetland areas are contained within the same forested area and are within short distances of each other and of the I&M Canal, MVR reasonably concluded that an ecological interconnection exists. In addition, if each of the non-abutting wetland areas is considered separately (based on distances cited by the appellant), wetland 2 is as close as 230 feet from the canal, wetland 3 is as close as 175 feet, and wetland 4 is 335 feet from the canal, and all these relatively short distances appear to fall within the concept of "reasonably close", especially considering that the entire area of wetland 2 and wetland 3 and parts of wetland 4 are closer to the canal than parts of wetland 1.

The AR supports the conclusion by MVR that wetlands 2, 3, and 4 are adjacent to the I&M Canal, and that conclusion is not contrary to a requirement of law, regulation, or officially promulgated Corps policy guidance.

ACTION: No action is required.

4. There is not a significant nexus between the wetlands and the TNW. The chemical, physical, and biological integrity of the downstream TNW cannot be affected by these wetlands.

FINDING: This reason for appeal does not have merit.

DISCUSSION: As discussed above, the AR supports the MVR determination that the I&M Canal is a TNW, and that the five wetland areas are adjacent to the canal. The Rapanos guidance does not require a significant nexus analysis for wetlands adjacent to a TNW.

ACTION: No action is required.

CONCLUSION:

I find that the reasons for appeal cited by D Construction (Morris Sand and Gravel) do not have merit. There is substantial documentation in the administrative record to support the District's jurisdictional determination. The final decision on jurisdiction in this case is the Rock Island District Engineer's jurisdictional determination dated 19 May 2009.

Michael J. Walsh
Brigadier General, U.S. Army
Division Engineer

Appendix A

Appeal Conference/Site Visit Memorandum for Record

CEMVD-PD-KM 18 Sep 09

MEMORANDUM FOR RECORD

SUBJECT: D Construction (Morris Sand and Gravel) Jurisdictional Determination Appeal Conference and Site Visit, Rock Island District (Corps File No. CEMVR-OD-P-2009-0497), 19 Aug 2009

1. Appellant: D Construction
   Location of Site: Section 2, T33N-R7E, Grundy County, Illinois

2. Review Officer: James B. Wiseman, Jr., Ph.D., U.S. Army Corps of Engineers, Mississippi Valley Division (MVD)

3. Participants:

Mr. Pat Hickey	ENCAP, Inc. (Agent for D Construction)
Mr. Bob Schmude	Chamlin and Associates
Mr. Todd Sandeno	D Construction
Mr. Dan Johnson	Rock Island District (MVR)
Mr. Mike Hayes	MVR
Dr. Wiseman	Administrative Appeals Review Officer (RO)

4. Conference Summary:

The RO met representatives from D Construction and MVR at NRCS offices in Morris, Illinois on 19 August 2009. The meeting began at approximately 10:45 am. The RO made introductory remarks explaining the role of the RO and the reason for the meeting and site visit. The RO asked if any other attendees would like to make an opening statement.

Mr. Hickey made an opening statement on behalf of the appellant. He began by referring to 2008 Corps Rapanos guidance and by quoting the definition of "adjacent" as "contiguous, bordering or neighboring" and that the appellant asserts that wetlands on the site (in particular wetlands #2, #3 and #4) do not meet this definition. He further stated that he did not think it was the intent of the guidance for the Corps to take jurisdiction over such areas. Mr. Hickey also pointed out that wetlands #2, #3 and #4 averaged 400 feet away from the Illinois and Michigan Canal and asserted that this distance was too far to meet the definition of adjacency.

Mr. Hayes made an opening statement on behalf of MVR. He began by referencing page 24 of the administrative record which is a statement of MVR's judgment concerning adjacency in this case. He specifically stated that MVR considered wetlands #1 and #5 to be "abutting" a traditional navigable water (TNW) and wetlands #2, #3 and #4 to be "neighboring" a TNW due to the proximity, similar elevation and the fact that these wetlands are all part of the same woodlot.

The RO then asked if all the meeting participants considered the administrative record complete. All answered affirmatively, but the RO requested that Mr. Hickey and Mr. Hayes search their email records one more time. As confirmed by email from Mr. Hickey on 21 Aug 09 and from Mr. Hayes on 24 Aug 09, no additional documents were found.

Prior to the appeal conference, the RO provided Mr. Hickey and MVR with a list of questions about the administrative record to be discussed during the conference (Appendix A). Mr. Hayes and Mr. Hickey provided documents with written answers to the questions to the RO via email (on 17 Aug 09 and 21 Aug 09, respectively). These documents are found in Appendix B and Appendix C and were discussed during the conference.

The RO reviewed the data forms found at p. 77-104 of the administrative record. Several errors were noted, but none resulted in a change to the conclusion of wetland or non-wetland for each sample site.

The conference ended at approximately 12:00 pm.

5. Site Visit: The meeting attendees conducted a site visit from approximately 12:20 pm until 1:00 pm. The site visit was held for the RO to get a familiarity with the general topography of the site and for the RO to view the Illinois and Michigan Canal and the tow path. The attendees walked down the western boundary of the site and viewed wetland #1 and the tow path which it abutted.

6. A draft of this MFR was forwarded to Mr. Hickey and MVR for review and comment on 11 September 2009. All agreed that the MFR accurately summarized the conference and site visit, as stated in email dated 18 September 2009 from Mr. Hickey, email dated 12 September 2009 Mr. Hayes of MVR, and email dated 14 September 2009 from Mr. Johnson of MVR.

James B. Wiseman, Jr., Ph.D.
Administrative Appeals Review Officer

Appendix A

Questions for Appeal Conference
D Construction – Grundy County, IL
Rock Island District Jurisdictional Determination
CEMVR-OD-P-2009-0497

Questions for Rock Island District:

1. What is the HUC Code for this site?
2. What is the growing season in Grundy County, Illinois?
3. On the JD Form (Administrative Record p. 10 (AR-10)) you describe the tow path adjacent to the Illinois & Michigan Canal as a "man-made barrier", yet on AR-24 you describe the tow path as a "man-made structure". Is the tow path fill or structure? Please clarify.
4. Does the Illinois & Michigan Canal have an established OHWM in the project area?
5. The term "neighboring" is not defined in Corps regulations. However, on AR-24, you conclude Item B with the statement: "This fits the definition of 'neighboring'." Please clarify.
6. The AR includes the pamphlet *Caring for the Nations Waters* (AR-18). The Illinois & Michigan Canal is listed in that pamphlet as a navigable water of the United States. Also, the JD Form includes a narrative describing the history of that waterway (AR-9). To your knowledge, was a navigation study done for this waterway pursuant to 33 CFR 329.14? If so, is a copy of that study in MVR files?
7. On AR-20 you mention that minor adjustments needed to be made to Wetland 4. Please explain.
8. Please clarify what you mean by "onsite discussion with Region 5, U.S. EPA representatives" on the JD Form (AR-16). Please characterize these discussions. Do you normally consult with EPA on jurisdictional determinations?
9. The record contains two telephone records (AR-19, AR-30) which summarize discussions with Mr. David Olson at Corps HQ. Did you call specifically to talk to Mr. Olson? If so, why did you seek his opinion on this matter?

Questions for Mr. Pat Hickey (ENCAP, Inc. – Agent for D Construction):

1. On your Request for Appeal form (RFA), you mainly refer to wetland sites 2, 3, and 4. Does this mean that you are not appealing the JD for wetland sites 1 and 5? Please clarify.
2. You state that a "significant separation exists between the wetlands and TNW including a gravel two path, berm of the canal, and Wetlands 1 and 5." Please clarify. Are you saying that there a berm adjacent to the canal which is distinct and separate from the tow path?
3. You mention that the canal is clay-lined and at a higher elevation than the subject wetlands and refer to hydrologic connections. Are you saying that the existence of clay creates an impervious layer which prevents shallow sub-surface connection to the wetland? By "higher elevation" are you referring to the water surface? If so, is this water surface elevation the same as the ordinary high water mark?
4. Your last statement on the RFA refers to the Illinois & Michigan Canal as a "man-made water body, which creation thereof has prompted a 'taking' of land (on-site wetlands) that otherwise would not be subject to USACE regulation." The meaning of this statement is unclear. Can you please clarify and/or expound on the point you are making with this statement?

Note to MVR and Mr. Hickey:

Please be prepared to review field data found on the data forms (AR 77-104) during the appeal conference.

Appendix B – MVR Answers to RO Questions

1. **What is the HUC Code for this site?** 07120005

2. **What is the growing season in Grundy County, Illinois?** The Grundy County, IL Soil Survey contains the following growing season data. From this data, it appears that the growing season in Grundy County generally starts in late April and ends in early to mid-October.

Table 2.--Freeze Dates in Spring and Fall
(Recorded in the period 1971-96 at Gebhard Woods State Park)

Probability	Temperature		
	24 oF	28 oF	32 oF or lower
Last freezing temperature in spring:			
1 year in 10 later than--	Apr. 18	Apr. 28	May 15
2 years in 10 later than--	Apr. 13	Apr. 23	May 10
5 years in 10 later than--	Apr. 3	Apr. 14	Apr. 28
First freezing temperature in fall:			
1 year in 10 earlier than--	Oct. 18	Oct. 5	Sept. 23
2 years in 10 earlier than--	Oct. 23	Oct. 11	Sept. 28
5 years in 10 earlier than--	Nov. 1	Oct. 22	Oct. 8

Table 3.--Growing Season
(Recorded in the period 1971-96 at Gebhard Woods State Park)

Probability	Daily minimum temperature during growing season: Higher than 24 °F	Higher than 32 °F	Higher than 28 °F
9 years in 10	191 Days	168 Days	144 Days
8 years in 10	198 Days	176 Days	150 Days
5 years in 10	211 Days	190 Days	162 Days
2 years in 10	224 Days	205 Days	174 Days
1 year in 10	230 Days	213 Days	181 Days

3. On the JD Form (Administrative Record p. 10 (AR-10)) you describe the tow path adjacent to the Illinois & Michigan Canal as a "man-made barrier", yet on AR-24 you describe the tow path as a "man-made structure". Is the tow path fill or structure? Please clarify. The tow path is constructed out of soil materials (fill). However, it was also constructed as a means to allow mule teams to pull barges along the watercourse. So, it could be interpreted as a structure composed of fill material.

4. Does the Illinois & Michigan Canal have an established OHWM in the project area? Yes

5. The term "neighboring" is not defined in Corps regulations. However, on AR-24, you conclude Item B with the statement: "This fits the definition of 'neighboring'." Please clarify. While "neighboring" is not a term that is defined in Corps regulations, it is used as a term in Corps regulations. Corps guidance states that the term adjacent means "bordering, neighboring, or contiguous". As such we are compelled to consider the term "neighboring" when determining adjacency of a wetland to a TNW. For us, a neighbor is someone who lives close by, not just next door, but in the neighborhood. Neighbors generally interact with each other to some degree. In this case we felt that the wetlands that we called neighboring are close enough to the TNW that there is a high probability of at least some biological interaction between the wetlands and the TNW. In addition, neighbors typically share a physical feature or setting such as a street, block or section of town. In this case the I&M Canal and the wetlands deemed adjacent by virtue of 'neighboring' occupy (primarily) the same soil types (1107-Sawmill & 73-Ross). Sawmill is considered hydric in Grundy County. The abutting and neighboring wetlands lie at the approximately the same elevation, between 498 and 501, and all are in the same FEMA flood zone. In addition, theI&M Canal and all five wetlands occupy the same wood lot.

6. The AR includes the pamphlet *Caring for the Nations Waters* (AR-18). The Illinois & Michigan Canal is listed in that pamphlet as a navigable water of the United States. Also, the JD Form includes a narrative describing the history of that waterway (AR-9). To your knowledge, was a navigation study done for this waterway pursuant to 33 CFR 329.14? If so, is a copy of that study in MVR files? We were unable to locate a navigation study for the Illinois & Michigan Canal. However, we do have public notification records dated 17 May 1979 that designate the Illinois and Michigan Canal as a navigable water of the United States under Section 10 of the Rivers and Harbors Act of 1899.

7. On AR-20 you mention that minor adjustments needed to be made to Wetland 4. Please explain. When we met with Pat Hickey of ENCAP on May 14, 2009 to review his wetland delineation in the field we observed that the Wetland 4 area flagged by Mr. Hickey did not encompass the entire wetland area. He agreed with this observation and we adjusted the south boundary of Wetland 4, moving the flags to coincide with the actual wetland boundary.

8. Please clarify what you mean by "onsite discussion with Region 5, U.S. EPA representatives" on the JD Form (AR-16). Please characterize these discussions. Do you normally consult with EPA on jurisdictional determinations? We don't usually consult on a regular basis with the USEPA at the time we are making our jurisdictional determinations. The USEPA does however review our jurisdictional determinations that require a significant nexus analysis and our isolated waters determinations. For this project, we coordinated early with USEPA because we knew that the determination had the possibility of being more complex than usual and we wanted their opinion prior to writing the approved Jurisdictional Determination. USEPA Region 5 participated in the field visit on May 14, 2009 when we met with Pat Hickey to review his wetland delineation.

9. The record contains two telephone records (AR-19, AR-30) which summarize discussions with Mr. David Olson at Corps HQ. Did you call specifically to talk to Mr. Olson? If so, why did you seek his opinion on this matter? Mr. Olson is the Corps Headquarters Regulatory staff member who supports Rock Island District on any matters that require clarification of regulations or Corps guidance. We called him specifically to discuss this project since he works with a number of other Corps Districts and may have knowledge of other similar situations to this one. Mr. Olson is also very familiar with Corps regulations and guidance and he can generally help clarify and interpret guidance.

Appendix C – Appellant Answers to RO Questions

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CEMVR-OD-P-2009-497 Morris Sand & Gravel

Appeal of Jurisdictional Determination issued May 19, 2009

The following information is being provided in response to USACE questions emailed to ENCAP, Inc. on August 12, 2009. The numbers below correspond to the numbered questions in the email.

1. ENCAP's opinion is that Wetlands 2, 3 and 4 are not adjacent to Traditional Navigable Waters (TNW) of the U.S. and therefore not jurisdictional. Wetlands 1 and 5 are adjacent to the I & M Canal which was historically used for the navigation and commerce, and is hydrologically connected to the Illinois River. However, the canal is not a natural water body. The creation of the canal has provided the means by which the U.S. Government is asserting jurisdiction over all five wetlands. Since guidance regarding jurisdictional determinations is not clear regarding man-made TNW, the jurisdictional status of all five wetlands is questionable.

2. The tow path consists of a gravel trail approximately 8 feet in width that is heavily used by pedestrians and bicyclists. The berm being referred to is the earthen slope located south of the canal. The berm and tow path were created during construction of the canal and are basically one structure. Separation of the two areas was pointed out in the submittal to indicate that both the path and berm contribute to the division between the subject wetlands and the open water within the canal.

3. Yes I am saying that the existence of clay creates an impervious layer which prevents shallow sub-surface connection to the wetland. By higher elevation, I am referring to the surveyed elevation of the water surface in the canal (503.48) and the surveyed elevation of the wetlands (generally around 499). It appears that the water level within the canal does not fluctuate very much due to its elevated location above the surrounding lands.

4. ENCAP, Inc. is referring to the term "taking" as an action by the federal government, as a regulatory ruling, that imposes a restriction on the use of private property for which the owner must be compensated. For example, if the I & M Canal were being built today, it is highly likely that isolated wetlands along the alignment would be exempt from being regulated as waters of the U.S., or the owners of the land on which the wetlands were located would be compensated for the designation of the wetlands as jurisdictional. As indicated in item 1 above, JD guidance is not clear regarding man-made navigable waters of the U.S. so this matter is being brought up for discussion.

ENCAP, Inc.