ADMINISTRATIVE APPEAL DECISION
CLEAN WATER ACT
KENTLAND FARMS - FILE NO. MVR-2012-1619
ROCK ISLAND DISTRICT

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September 30, 2013

Review Officer (RO): Ms. Mary J. Hoffman, U.S. Army Corps of Engineers, Northwestern Division, Portland, Oregon

Appellant: Mr. Brian L. Wenzel, Kentland Farms

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

Receipt of Request for Appeal: 29 March 2013

Site Visit/Appeal Meeting: 12 June 2013

Summary: The Appellant is challenging an approved jurisdictional determination (AJD) completed by the Rock Island District (District) which concluded that the U.S. Army Corps of Engineers (Corps) has Clean Water Act (CWA) jurisdiction over a stream and wetlands located on Kentland Farms property located in Stephenson County, Township 27 North, Range 5 East, Sections 26 and 27, near Kent, Illinois. The appeal challenged the AJD on the basis that the district incorrectly applied law, regulation or officially promulgated policy when identifying federal CWA jurisdiction over the stream and wetlands on the subject property. The Appellant submitted three acceptable reasons for appeal regarding: 1) the significant nexus determination; 2) the defined limits or boundaries of CWA jurisdiction; and 3) a conflict with the Natural Resources Conservation Service (NRCS) wetland determination.

A fourth reason presented in the RFA is, "Construction of a 40 ft grass waterway (what was originally requested) would actually provide more habitat for upland wildlife species than the current ditch. A waterway would also slow surface runoff preventing scouring referred to in JD, and reduce sediment flow from agriculture activities in the watershed. All of these would reduce flooding and improve water quality of the TNW Pecatonica River and Yellow Creek". This reason does not fit criteria presented in 33 CFR 331.5(a)(2) which outlines acceptable reasons for the appeal of a jurisdictional determination and thus will not be evaluated within this appeal decision document.

For reasons detailed in this document, one of the three reasons for appeal is found to have merit. The AJD is remanded to the District Engineer for reconsideration, additional evaluation and documentation sufficient to support the decision. The final Corps decision on jurisdiction in this case will be made by the Rock Island District Engineer.

Background Information: The Appellant, Mr. Brian L. Wenzel, Kentland Farms, submitted a request, dated 12 October 2012, for a wetland (and jurisdictional) determination for the subject property.

The District conducted a site visit on 31 October 2012, and determined conditions at the site met wetland criteria in accordance with the Corps 1987 Wetland Delineation Manual, in combination with the Midwest Regional supplement. The Corps notified the Appellant, preliminarily in a letter dated 13 December 2012 and finally, in a letter dated 28 January 2013 that the stream/wetland complex found on the subject property was determined to be waters of the United States under jurisdiction of Section 404 of the Clean Water Act. The tributary stream, within the project site measures 1750[1] feet long and in combination with the riparian wetlands encompasses 1.5 acres. The Appellant submitted a complete Request for Appeal (RFA), dated 25 March 2013, which was received by the Mississippi Valley Division office on 29 March 2013. The appellant was informed by letter dated 19 April 2013 that three of the four reasons presented in the RFA were accepted under this 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

[1] This measurement, 1750 feet, was corrected from the on-site stream measurement erroneously denoted in the AR. The District, at the appeal site meeting clarified that the on-site stream measures 1750 feet and the offsite grassy waterway just downstream measures 2300 feet. The AJD letter to Kentland Farms, dated 28 Jan 2013, erroneously referred to the on-site stream measurement as '2300 feet long', when it should have been '1750 feet long'.

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. The District provided a copy of the AR to the RO and the Appellant on 30 April 2013. The AR is limited to information contained in the record prior to 28 January 2013.

2. A site visit and informal appeal meeting was held on 12 June 2013. During the site visit, the Appellant and the District provided an overview of the aquatic features using aerial photographs and USGS maps to discuss the flow path from the subject stream and wetlands to the nearest Traditionally Navigable Water (TNW). Attendees drove along the drainage channel and wetland perimeter. We followed the offsite 2300-ft 'grass waterway' (an agricultural grassy swale) from Kent Rd, downstream to the railroad grade. Open water was pooled at this point, where it joined 'unnamed tributary #2'. We also followed the 1750-ft 'Kentland Farms stream' from Kent Rd upstream to the property fence line. The District provided printed large and small scale maps which depicted the flow path from the subject Kentland Farms site to Yellow Creek, a reasonably permanent water (RPW), and its confluence with the Pecatonica River, a traditionally navigable water (TNW). A culvert was observed beneath Kent Rd, connecting the Kentland Farms stream to the grassy waterway. The maps depict a continuous surface connection between the subject stream, and the TNW via the 2300-ft 'grass waterway', the 'unnamed tributary #2', the 'unnamed tributary #1', the Yellow Creek (RPW) and the Pecatonica River (TNW). The District estimated that distance from Kent Rd to Yellow Creek is ~3 miles, and ~31 miles from Kent Rd to the Pecatonica River. The RO's notes from the site visit are contained in the appeal review record.

3. The Appellant provided a written clarification of his reasons for appeal to the RO at the 12 June 2013 meeting. This clarification was placed in the appeal review record. Also, the Appellant provided (to the RO) a copy of an NRCS letter, dated 29 March 2013, which describes the NRCS' certified wetland determination. Since this letter was not available to

the District for consideration during its jurisdictional evaluation and resultant determination, it is not contained in the AR. As such it will not be included for consideration under this appeal[2]; however it is contained in the appeal record.

The RO's notes from the 12 June 2013 appeal site visit and meeting were provided to the Appellant and the District. Comments received from both parties were incorporated into the RO's notes, and placed in the appeal review record on 20 June 2013.

APPEAL EVALUATION, FINDINGS, AND INSTRUCTIONS TO THE ROCK ISLAND DISTRICT ENGINEER

Appellant's First Reason for Appeal: "The area in question by its location and the fact presented does not have a significant nexus to the TNW Pecatonica River and therefore would not be under the jurisdiction of the U.S. Army Corps of Engineers"

Finding: This reason for appeal has merit

Action: The AJD is remanded to the District Engineer. Upon remand, the District shall reconsider the JD and provide sufficient documentation of a significant nexus of the stream/wetland complex to the nearest Traditional Navigable Water. Recognize that as the distance from the TNW increases, so does the need to support a conclusion that the nexus is significant in that it is substantial and more than speculative.

Discussion: The Appellant believes that the stream and wetlands lack a significant nexus with Traditional Navigable Waters (TNW). The Appellant acknowledges that the subject waters are within the Pecatonica watershed, but due to a 2300-foot distance of the subject waters to a "continuous surface water connection", and a 30-mile[3] distance to the Pecatonica River, which is the nearest TNW, that the nexus is neither "significant" nor "substantial".

According to the *US Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook,* dated May 30, 2007

[2] See Third Reason for Appeal, in this document, for discussion of differences between the Federal Clean Water Act and the Federal Food Security Act on the jurisdictional status of certain wetlands.

[3] In the RFA, the Appellant estimated the distance at 23-miles; the District verified during the site visit that the distance between the subject property and the Pecatonica River is actually 30-miles.

(pp15-1 and 54-57, the significant nexus findings (for non-RPW and its adjacent wetlands, where the non-RPW flows directly or indirectly into a TNW) will include:

- Field staff will explain the specific connections between the characteristics documented and the functions/services that affect a TNW. Specifically, an evaluation will be made of the frequency, volume, and duration of flow; proximity to a TNW; capacity to transfer nutrients and organic carbon vital to support food webs; habitat services such as providing spawning areas for important aquatic species; functions related to the maintenance of water quality such as sediment trapping; and other relevant factors.
- In addition, the evaluation will also consider the functions performed cumulatively by any and all wetlands that are adjacent to the tributary, such as storage of flood water and runoff; pollutant trapping and filtration; improvement of water quality; support of habitat for aquatic species; and other functions that contribute to the maintenance of water quality, aquatic life, commerce, navigation, recreation, and public health in the TNW. This is particularly important where the presence or absence of a significant nexus is less apparent, such as for a tributary at upper reaches of watershed. Because such a tributary may not have a large volume, frequency, and duration of flow, it is important to consider how the functions supported by the wetlands, cumulatively, have more than a speculative or insubstantial effect on the chemical, physical, or biological integrity of a TNW.

The District summarized in the AJD form (Section III.C.2) in the AR (Bates Stamped page 015) their significant nexus findings for the 1750-foot long non-RPW tributary stream, and the 1.5 acres of adjacent wetlands (stream/wetland complex). The stream/wetland complex flows [offsite through a culvert beneath N. Kent Road] into a 2300-foot long agricultural grass waterway, identified as 'Ag. Grass Waterway (Tiled)' in the AR, on the page 004 (Bates Stamp) aerial photograph/map. The 'Ag. Grass Waterway (Tiled)' waterway includes subsurface drainage tile with an inlet at N. Kent Road [and outlet at the ag field boundary, near the railroad trestle]. In this section, the District states that, "the waterway and tile carry surface and subsurface flows from the [onsite] stream/wetland complex to the tributary stream downstream, then to Yellow Creek [RPW] which flows to the Pecatonica River [TNW]."

At the 12 June 2013 site visit the Appellant and District referred to the [offsite] 2300-ft waterway as 'non-jurisdictional' [in that the agricultural field was previously certified by the NRCS as a prior-converted cropland (PCC)]. The 2300-ft "Ag. Grass Waterway (Tiled)" lies between the subject stream/wetlands complex and a downstream unnamed tributary of the Yellow Creek. Jurisdiction of this off-site Ag Grass Waterway was not addressed in the AR. The *Guidebook* references aquatic features (such as swales, some ditches, pipes, or other manmade features[4]) which although they are not jurisdictional waters of the United States themselves, may still contribute to a surface hydrologic connection, conveying water between the subject stream/wetlands and the TNW. The District documented its findings that the grass waterway provides a hydrologic 'surface and subsurface (tiled) connection' between the subject stream/wetlands complex and the downstream tributaries to the Yellow Creek, and Pecatonica River in the AJD form, section III.C.2.

The characteristics of the subject waters are documented on the AJD form in III.B.1 (tributary), and III.B.2 (adjacent wetlands). We noted (also discussed during the site visit/meeting) that the District reported characteristics of the off-site grass waterway/swale (which is within the relevant reach[5]), rather than the characteristics of the on-site adjacent wetlands on the AJD form in section III.B.2(i)(c). As a result, documentation of characteristics of the on-site/adjacent wetlands was incomplete in the AJD form.

Finally, the District provided a summary conclusion regarding its significant nexus determination in Section III.C.2 as follows:

> "The stream/wetland complex provides reduced velocities of surface and subsurface flows from agricultural chemicals from rainfall runoff and suspended sediments benefiting water quality downstream, filters suspended sediments from surface flows benefiting water quality downstream, produce a high diversity of vegetation, seed, and fruit benefiting amphibious, upland, and migratory wildlife. Vegetative matter, seeds, and fruit are carried downstream in stream

[4] See *Guidebook*, Section II, for examples of aquatic features and applicable discussion.

[5] See *Guidebook*, Section II, B *Identifying the Reach Relevant to the Significant Nexus Determination for Non-RPW and Their Adjacent Wetlands*

flows benefiting aquatic species in Yellow Creek and the Pecatonica River."

This summary conclusion provides general characteristic of wetland functions and services, but fails to explain the specific connections between the documented characteristics found at the site and if or how these stream/wetland functions and services would affect the Pecatonica River (TNW) located 30 miles downstream.

As a result, I find that this reason for appeal has merit. The AR does not support the District's determination that the subject property contains jurisdictional waters or wetlands, and thus the JD will be remanded. Upon remand, the District shall reconsider the JD and provide additional documentation of the significant nexus of the stream/wetlands complex, including an analysis of whether the stream/wetlands have more than a speculative or insubstantial effect on the physical, chemical, and biological integrity of the nearest traditional navigable water, the Pecatonica River.

Appellant's Second Reason for Appeal: "Section 4[04] of the Clean Water Act defines landward limits of jurisdiction as the high tide line in tidal waters and the ordinary high water mark as the limit in non-tidal waters. The area in question is not within the boundaries of the high water mark of the TNW "Pecatonica River" which is the base of the jurisdiction in question. The area in question is also not within the high water mark of Yellow Creek "the tributary". The high water mark of nameless creek #1 and nameless creek #2 which feed Yellow Creek do not include this area in question either. The approved JD form Section III, B, 2, i, d refers to a 500 year flood plain. A 500 year flood plain and high tide marks are extreme and the most restrictive classifications that could be used and certainly far beyond the intent of the law."

Finding: This reason for appeal does not have merit

Action: No further action is required

Waters of the United States include those waters listed in the Code of Federal Register, Title 33, Part 328 (51 FR 41250 Nov. 13, 1986). For the purpose of regulation, the term *waters of the United States* is defined at § 328.3(a)(1)-(8). Tributaries

of navigable waters[6] are included in the definition of *waters of the United States* under subsection (a)(5) and wetlands adjacent

to tributaries[7] are included in the definition of *waters of the United States* under subsection (a)(7). The lateral limits of jurisdiction in those waters defined as *waters of the United States* may be divided into three categories including territorial seas, tidal waters, and non-tidal waters. The category of waters that pertains to the Appellant's subject waters is *non-tidal waters of the United States,* found at § 328.4 (c). The limits of jurisdiction in *non-tidal waters of the United States* is stated as follows:

> (2) When adjacent wetlands are present, the jurisdiction extends beyond the ordinary high water mark to the limit of the adjacent wetlands

The fact that the tributary (and adjacent wetlands) lies within or outside of a floodplain (of a navigable water) is not solely determinative of a significant nexus[8] nor is it a concluding factor is determining whether waters meets the CWA definition of *waters of the United States*, as discussed directly above.

As per the *Guidebook,* and stated above, the Corps will assert Clean Water Act jurisdiction over wetlands adjacent to TNWs, and wetlands adjacent to another water of the U.S. where such wetlands have a significant nexus with downstream TNWs. The District established through a significant nexus determination (see discussion under First Reason for Appeal, above) that the subject stream/wetland complex is within the tributary system of the navigable water, the Pecatonica River. Thus the District determined that the stream/wetland complex meets the definition of *waters of the United States* as established by federal regulatory authority of the CWA in compliance with federal laws, regulations, current policies and guidance.

As a result I find that his reason for appeal does not have merit.

Appellant's Third Reason for Appeal: "The USDA Natural Resource Conservation Service has inspected the sight on two previous occasions. A final inspection by Stephen Higgins, WCC

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[6] § 328.3(a)(1) provides a CWA definition of navigable waters.
[7] § 328.3(a)(8) refers to wetlands adjacent to [any of the] waters identified in (a) (1) through (6)
[8] See *Guidebook*, section IV. "Detailed JD Form Instructions", further explanations provided under section III.C "Significant Nexus Determination"

Coordinator Soul Scientist has determined that the area in question and all adjacent areas are classified as NW (Non-Wetland)"

Finding: This reason for appeal does not have merit

Action: No further action is required

Discussion: Differences between the Federal Clean Water Act (CWA) and the Federal Food Security Act (FSA) on the jurisdictional status of certain wetlands makes it impossible for one lead agency to make determinations that are valid for the administration of both of these Federal laws. In recognition of this, on February 25, 2005, the US Department of the Army and the US Department of Agriculture, Natural Resources Conservation Service (NRCS) issued joint agency guidance on conducting wetland determinations where FSA and CWA jurisdictions may overlap (2005 Joint Memo).[9]

Due to differences existing between the CWA and FSA on jurisdictional status of certain wetlands, the wetlands may be regulated by both agencies, or by one agency but not the other. In cases where responsibilities coincide, both the Corps and NRCS need to make separate determinations of the extent of wetlands or waters on a site. Guidance outlined in the 2005 Joint Memo, advises the agencies to coordinate determinations. In addition, the 2005 Joint Memo, states that each agency should advise the landowner that that its wetland determination does not apply to the other agency, or include the extent of that other agency's jurisdiction.

In compliance with the agency guidance outlined in the 2005 Joint Memo, the District coordinated its CWA jurisdictional findings and wetland delineation field investigation data sheets with the NRCS through electronic mail, dated 1 November 2012 (Bates Stamp page 059) as documented in the AR. In addition, the District's letter to the Appellant, dated 13 December 2012 (Bates Stamp, page 063) advised the Appellant of the specificity of their determination through the following statement:

> 'Our wetland delineation is valid for our regulatory purposes under the Clean Water Act. If you propose to fill

[9] Memorandum to the Field, *Guidance on Conducting Wetland Determinations for the Food Security Act and Section 404 of the Clean Water Act,* NRCS and DA, February 25, 2005.

any part of the wetland, you should check with the USDA Farm Service Agency and Natural Resources Conservation Service (NRCS) to complete any necessary request forms for compliance under the Wetland Conservation Provisions of the Food Security Act, as amended. A copy of our completed wetland delineation forms has been sent to the NRCS office. They may use our wetland delineation or complete their own. Even though we may authorize the fill, grading, and tiling of the upstream reach, any such proposal will also need approval of the NRCS for arm Program compliance.'

The District followed current agency guidance and procedures concerning wetland determinations conducted on agricultural lands with overlapping federal jurisdiction and regulatory authorities.

As a result, I find that this reason for appeal does not have merit.

Conclusion: In summary, for the reasons stated above, I find that this appeal has merit since the District's AR does not support its determination that the subject property contains jurisdictional wetlands and waters. I am remanding the AJD back to the District for reconsideration in light of this decision. The District shall complete these tasks within 60 days from the date of this appeal decision and upon completion, provide the Division office and the Appellant with its decision document and final AJD.

Peter A. DeLuca
Brigadier General, U.S. Army
Division Commander