



**ADMINISTRATIVE APPEAL DECISION  
CLEAN WATER ACT  
CT Properties, LLC  
NWO-2016-01685-WEH  
OMAHA DISTRICT**

**April 3, 2018**

**Review Officer (RO):** Kyle B. Gordon, U.S. Army Corps of Engineers, Mississippi Valley Division, Vicksburg, Mississippi, for the Northwestern Division<sup>1</sup>

**Appellant:** CT Properties, LLC, represented by Mr. Stephen D. Mossman, Attorney, Mattson Ricketts Law Firm

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

**Receipt of Request for Appeal:** September 1, 2017

**Informal Appeal Meeting:** November 9, 2017

**Summary:** The Appellant is challenging an approved jurisdictional determination (AJD) completed by the Omaha District (District) which concluded that the U.S. Army Corps of Engineers (Corps) has Clean Water Act (CWA) jurisdiction over approximately 5.43 acres of wetland on property located north of Fort Circle and west of U.S. Route 275 in Douglas County, Nebraska (Site).<sup>2</sup> The Appellant disagrees with the District's AJD and asserts that the wetland characteristics at the site are not jurisdictional because they were formed solely through construction activities. This document addresses the Appellant's reason for appeal cited in its Request for Appeal (RFA).

For reasons detailed in this document, the appellant's reason for appeal is found to not have merit. In this case, the final Corps decision on jurisdiction is the Omaha District's AJD, dated July 7, 2017.

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<sup>1</sup> Pursuant to 33 CFR 331.3(a)(1), the Division Engineer has the authority and responsibility for administering the administrative appeal process. By Memo dated September 22, 2017, the Division Engineer accepted the request for appeal and identified the Northwest Division (NWD) as the decision authority on the final appeal decision, and delegated the review of this AJD to the Mississippi Valley Division Review Officer. The NWD Division Engineer retains overall responsibility for the administrative appeal process.

<sup>2</sup> Sections II.B.1.b. and III.D.4. of the District's AJD Form indicate that approximately 5.75 acres of jurisdictional wetland are located within the review area (see Administrative Record (AR), pp. 63 and 70); however, sections III.B. and IV.B. indicate that approximately 5.43 acres of jurisdictional wetland are located within the review area (see AR pp. 65, 67, 68, and 72). During the informal AJD appeal meeting, the District clarified that the correct approximation of jurisdictional wetland within the review area is 5.43 acres (see Memorandum for Record (MFR), pp. 3- 4).

## Background Information:

**Federal Clean Water Act Jurisdiction:** Federal CWA jurisdiction is determined according to implementing regulations found at 33 CFR 328, current agency guidance, and standard procedures including the 2008 EPA/Corps *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States* (Rapanos Guidance), the U.S. Army Corps of Engineers *Jurisdictional Determination Form Instructional Guidebook*<sup>3</sup> (JD Guidebook), 1987 Corps of Engineers *Wetlands Delineation Manual* (1987 Manual), and Regulatory Guidance Letters (RGL).<sup>4</sup> In 2007, as a result of the U.S. Supreme Court *Rapanos* decision,<sup>5</sup> the Environmental Protection Agency (EPA) and the Corps, in coordination with the Office of Management and Budget and the President's Council on Environmental Quality, issued a guidance memorandum to ensure that jurisdictional determinations, permit actions, and other relevant actions are consistent with the *Rapanos* decision and supported by the AR. The two agencies issued joint revised Rapanos Guidance on December 2, 2008 in response to public comments received and the agencies' experience in implementing the *Rapanos* decision.<sup>6</sup>

The Rapanos Guidance requires the application of two standards to support an agency jurisdictional determination for certain water bodies. The first standard, based on the plurality opinion in the *Rapanos* decision, recognizes regulatory jurisdiction over traditional navigable waters (TNW) and their adjacent wetlands, as well as a water body that is not a TNW, 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 abuts the water body. In accordance with this standard, the Corps and EPA may assert jurisdiction over the following categories of water bodies: (1) TNWs, (2) all wetlands adjacent to TNWs, (3) relatively permanent non-navigable tributaries (with at least seasonal flow) of TNWs (RPW), and (4) wetlands that directly abuts relatively permanent, non-navigable tributaries of TNWs.

The second standard, for tributaries that are not relatively permanent, is based on the concurring opinion of Justice Kennedy and requires a case-specific "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 TNW. Consequently, the agencies may assert jurisdiction over any water body that is not a relatively permanent water if that water body is determined (on the

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<sup>3</sup> *Jurisdictional Determination Form Instructional Guidebook*. U.S. Army Corps of Engineers and Environmental Protection Agency. 30 May 2007. This *JD Guidebook* is intended to be used as the U.S. Army Corps of Engineers Regulatory National Standard Operating Procedures for conducting an AFD and documenting practices to support an AFD.

<sup>4</sup> <http://www.usace.army.mil/Missions/CivilWorks/RegulatoryProgramandPermits/GuidanceLetters.aspx>

<sup>5</sup> Combined cases of *Rapanos v. United States* and *Carabell v. United States*. 126 S. Ct. 2208 (2006).

<sup>6</sup> 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.

basis of a fact-specific analysis) to have a significant nexus with a TNW. The classes of water bodies that are subject to CWA jurisdiction, if such a significant nexus is demonstrated, are: (1) non-navigable tributaries that do not typically flow year-round or have a 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.

**Brief Chronology Regarding the Subject Appeal:** The District received a request for a Pre-Application Meeting from the Appellant on August 10, 2016.<sup>7</sup> The District met the Appellant at the Site on September 20, 2016 to discuss potential permitting requirements, and suggested that the Appellant provide a delineation to determine the presence and/or extent of aquatic resources on the Site.<sup>8</sup> The Appellant provided a Request for Corps Jurisdictional Determination on November 3, 2016,<sup>9</sup> which included a "Preliminary Wetland Determination" report completed by B2 Environmental, Inc. (B2 Report).<sup>10</sup> The District completed the AJD, which concluded that Waters of the U.S. are present on the Site, and notified the Appellant of its findings on April 17, 2017 by providing the AJD form and a Notification of Administrative Appeal Options and Process and Request for Appeal form.<sup>11</sup>

On June 13, 2017, the Appellant requested that the District reconsider its original AJD based on new information not provided to or reviewed by the District during its evaluation of the April 17, 2017 AJD.<sup>12</sup> This new information included a letter containing clarifying information, photographs of the Site taken on January 31, 2007, the B2 Report, and an affidavit of Paul B. Virgillito dated June 13, 2017. In accordance with 33 CFR 331.6(c), the District reconsidered its AJD and determined that the information did not change its original AJD.<sup>13</sup> The District reissued its AJD, and notified the Appellant of its findings on July 7, 2017.

The Appellant disagreed with the District's reissued AJD, and submitted a complete RFA and supporting information to NWD on September 1, 2017. NWD informed the appellant by letter dated September 28, 2017 that the reason presented in the RFA was accepted under this appeal.

**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 July 7, 2017 AJD. 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

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<sup>7</sup> AR, p. 320- 321; MFR, p. 2

<sup>8</sup> AR, p. 315

<sup>9</sup> AR, p. 231

<sup>10</sup> AR, pp. 239- 280

<sup>11</sup> AR, pp. 89- 101

<sup>12</sup> AR, pp. 4- 58

<sup>13</sup> AR, pp. 62- 75

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 October 10, 2017. The AR is limited to information contained in the record prior to July 7, 2017, the date of the District's AJD decision.
2. In accordance with 33 CFR 331.7, the RO held an informal AJD appeal meeting on November 9, 2017. The appeal meeting topics were summarized and documented by the RO in an MFR that was provided to the Appellant and the District on November 28, 2017.

### **APPEAL EVALUATION, FINDINGS, AND INSTRUCTIONS TO THE OMAHA DISTRICT ENGINEER**

**Reason for Appeal:** The Appellant asserts that the wetland on the Site are not subject to Corps jurisdiction because they were formed in dry land "solely through 'construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water'" and "are thus not jurisdictional wetlands pursuant to 33 CFR 328.3(b)(4)(v)."<sup>14</sup>

**Finding:** This reason for appeal does not have merit.

**Action:** No further action

**Discussion:** The Appellant states, "This appeal is not being made on the basis that the 5.43-acre tract on the CT Properties property does not contain wetland characteristics. Instead, the appeal is based on the fact that... any such wetlands were formed solely through 'construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water' are thus not jurisdictional wetlands pursuant to 33 CFR 328.3(b)(4)(v)."<sup>15</sup> The Appellant's reference to 33 CR 328.3(b) in its RFA is found in the June 29, 2015 Federal Register rulemaking titled *Clean Water Act Rule: Definitions of "Waters of the United States"* (CWR).

The CWR became effective on August 28, 2015 and was promulgated to "ensure protection for the nation's public health and aquatic resources, and increase CWA program predictability and consistency by clarifying the scope of 'waters of the United States' protected under the Act."<sup>16</sup> However, these regulations were stayed nationwide by the 6<sup>th</sup> Circuit Court of Appeals by order dated October 9, 2015.<sup>17</sup> In compliance with this nationwide stay, the Corps stopped implementing the CWR and continued utilizing

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<sup>14</sup> RFA, p. 14

<sup>15</sup> RFA, p. 14

<sup>16</sup> Clean Water Rule: Definition of "Waters of the United States", 80 Fed. Reg. 37,054 (June 29, 2015).

<sup>17</sup> *Ohio, et al. v. U.S. Army Corps of Eng'rs, et al.*, No. 15-3799 12 (6th Cir.)

the regulations and guidance in place prior to August 28, 2015 for jurisdictional determinations, as explained above in the Background Information section.<sup>18</sup>

Since the District's AJD was completed after the stay of the CWR, and since the District did not rely on the CWR to complete the AJD, the regulation referenced by the Appellant is not currently and has never been relevant to this AJD. The preamble to the regulations defining Waters of the United States under which the Corps' Regulatory Program is currently operating (1986 Rule) state as follows:

For clarification it should be noted that we generally do not consider the following waters to be "Waters of the United States." However, the Corps reserves the right on a case-by-case basis to determine that a particular waterbody within these categories of waters is a water of the United States... (e) Waterfilled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of waters of the United States (see 33 CFR 328.3(a)).<sup>19</sup>

To summarize the differences between the applicable 1986 Rule and the inapplicable, stayed CWR, water-filled depressions created in dry land incidental to mining or construction activities are not jurisdictional according to the CWR; under the 1986 Rule, water-filled depressions created in dry land incidental to construction activities or pits excavated in dry land are generally not jurisdictional unless the construction or excavation operation is abandoned and the resulting body of water meets the definition of waters of the U.S. Although the CWR regulation referenced by the Appellant is not applicable, I determined that the underlying reason for appeal remains applicable to this AJD because the 1986 Rule contains similar language regarding the Appellant's fundamental reason for appeal.

The term waters of the United States, as referenced above, is defined in the 1986 Rule to include "wetlands adjacent to waters... identified in paragraphs (a)(1)-(6) of this section."<sup>20</sup> Wetlands are defined as "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support prevalence of vegetation typically adapted for life in saturated soil conditions."<sup>21</sup> Normal circumstances is determined based on an area's

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<sup>18</sup> On January 22, 2018, the Supreme Court held that the U.S. Court of Appeals do not have original jurisdiction to review challenges to the CWR. On February 6, 2018, EPA and the U.S. Department of the Army finalized a rule which delayed the applicability of the CWR until February 6, 2020 (83 Fed. Reg. 5,200, 5,201).

<sup>19</sup> The Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,206, 41,217 (November 13, 1986). It should be noted that the preamble to 33 CFR 328.3 serves to clarify regulation.

<sup>20</sup> 33 CFR 328.3(a)

<sup>21</sup> 33 CFR 328.3(b)

characteristics and use, both present, and in the recent past,<sup>22</sup> and involves an evaluation of the extent and relative permanence, as well as the purpose of the physical alteration to the wetland.<sup>23</sup> For example, “if an area is abandoned and over time regains wetland characteristics such that it meets the definition of ‘wetlands’, then the Corps 404 jurisdiction has been restored.”<sup>24</sup>

In the RFA, the Appellant asserts that the wetland on the Site is not subject to Corps jurisdiction because the Site was dry land prior to the excavation activities. Specifically, the Appellant asserts that the Site was “cropland prior to the construction activities”,<sup>25</sup> and provided the following documentation to support this assertion: site photographs from January 31, 2007,<sup>26</sup> aerial photographs from 1993, 1996, and 2006 found in the B2 report,<sup>27</sup> and an affidavit from Mr. Paul B. Virgillito.<sup>28</sup> While the District did consider both the current and pre-construction condition of the Site,<sup>29</sup> it determined that the construction activity at the Site had been abandoned since 2010 and evaluated the extent and permanence of that alteration.<sup>30</sup> In doing so, the District determined that the resulting waterfilled depression on the Site contained wetland characteristics and met the definition of “wetlands” found at 33 CFR 328.3(b) by utilizing remote sensing tools,<sup>31</sup> site visits, and concurring with the B2 Report, which evaluated the Site in accordance with 1987 Manual<sup>32</sup> and the *Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Midwest Region* (Regional Supplement).<sup>33</sup>

Based on remote sensing tools, site inspections on September 20, 2016 and January 13, 2017,<sup>34</sup> and the B2 Report’s findings,<sup>35</sup> the District concluded that the wetland on the Site is part of a larger, contiguous wetland system that continues offsite to the east via a linear wetland that has a continuous surface connection to an unnamed tributary to

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<sup>22</sup> RGL 86-09. It should be noted that, although RGL 86-09 has expired, the RGL remains generally applicable to the Corps Regulatory Program based on RGL 05-06.

<sup>23</sup> 1987 Manual, p. 4

<sup>24</sup> RGL 86-09

<sup>25</sup> RFA, p. 15

<sup>26</sup> RFA, pp. 18- 21. This information is not considered to be new information because it was provided to the District during its reconsideration of the original AJD (see AR, pp. 4- 58).

<sup>27</sup> RFA, pp. 41- 43. This information is not considered to be new information because it was provided to the District during its reconsideration of the original AJD (see AR, pp. 4- 58).

<sup>28</sup> RFA, pp. 66-67. This information is not considered to be new information because it was provided to the District during its reconsideration of the original AJD (see AR, pp. 4- 58).

<sup>29</sup> AR, p. 72

<sup>30</sup> AR, pp. 72- 73, 106- 121, 127- 135, and 178- 183; MFR, p. 3

<sup>31</sup> AR, pp. 67- 68, 72- 73

<sup>32</sup> Environmental Laboratory. 1987. *Corps of Engineers Wetlands Delineation Manual*. U.S. Army Engineer Waterways Experiment Station, Vicksburg, Miss. Technical Report Y-87-1.

<sup>33</sup> U.S. Army Corps of Engineers. 2010. *Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Midwest Region (Version 2.0)*, ed. J. S. Wakeley, R. W. Lichvar, and C. V. Noble. ERDC/EL TR-10-16. Vicksburg, MS: U.S. Army Engineer Research and Development Center.

<sup>34</sup> AR, pp. 190- 216 and 315

<sup>35</sup> AR, p. 245. The B2 report states, “B2E interpreted surface connections of this apparent wetland to Waters of the United States from aerial photographs and site reconnaissance. The aerial photographs and site reconnaissance indicated a surface water connection to other Waters of the United States (Elkhorn River).”

Elkhorn River.<sup>36</sup> Through observations from public rights-of-way,<sup>37</sup> aerial photography, and other remote sensing tools, the District concluded that the tributary is an RPW that has seasonally continuous flow, but not perennial flow.<sup>38</sup>

The Rapanos Guidance states, “the agencies will assert jurisdiction over those adjacent wetlands that have a continuous surface connection with [an RPW] without the legal obligation to make a significant nexus finding”;<sup>39</sup> however, the Rapanos Guidance also states, “As a matter of policy, Corps districts and EPA regions will include in the record 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], even though a significant nexus finding is not required as a matter of law.”<sup>40</sup> In accordance with the Rapanos Guidance, the District’s AR included information that documents the existence of a significant nexus that is substantial and more than speculative between the offsite, seasonal RPW (unnamed tributary to Elkhorn River), its adjacent wetlands (including the wetland on the Site), and the TNW (Elkhorn River).<sup>41</sup> Since the District determined that the wetland on the Site meets the definition of waters of the U.S. found at 33 CFR 328.3(a), the pre-construction condition of the Site is not relevant.

In addition to the supporting documentation provided by the Appellant, the RFA also states that the reason for appeal is supported by the decision of *U.S. v. City of Fort Pierre, S.D. (City of Fort Pierre)* by the U.S. Court of Appeals, 8<sup>th</sup> Circuit.<sup>42</sup> The Appellant asserts that the wetland on the Site should not be jurisdictional because, like the *City of Fort Pierre* case, there were no wetlands or characteristics associated with wetlands on the Site “prior to the actions of man”, and that the District’s assertion of jurisdiction over the wetlands on the Site would “allow the Corps to enlarge its jurisdiction beyond the scope originally intended by Congress.”<sup>43</sup>

As the Appellant specified in the RFA, The *City of Fort Pierre* decision states,

We do not believe the Clean Water Act authorizes the Corps to assert jurisdiction in a situation in which privately owned land, not otherwise within the Corps’ jurisdiction, exhibits wetland characteristics only as an incidental result of unrelated river maintenance. To decide otherwise would allow the Corps to enlarge its jurisdiction beyond the scope originally intended by Congress.

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<sup>36</sup> AR, pp. 67- 68, 70, 73

<sup>37</sup> On page 67 of the AR, the District indicated that the portion of the unnamed tributary to Elkhorn River between 252<sup>nd</sup> Street and the Elkhorn River is located “on private property and not accessible”. During the informal AJD appeal meeting the District confirmed that access was limited to county roads (see MFR, p. 4). The AR demonstrates that the observations made from the available vantage points in the public rights of-way, in combination with aerial photography and remote sensing tools, sufficiently supports the district’s conclusions.

<sup>38</sup> AR, pp. 64- 67, 70

<sup>39</sup> Rapanos Guidance, p. 7

<sup>40</sup> Rapanos Guidance, p. 13

<sup>41</sup> AR, pp. 63- 73

<sup>42</sup> *U.S. v. City of Fort Pierre, S.D.*, 747 F.2d 464 (8<sup>th</sup> Cir. 1984)

<sup>43</sup> RFA, p. 15

Further, to find the [Fort Pierre] Slough as it now exists to be a wetland would be antithetical to the goals Congress sought to achieve in passing the Clean Water Act.

However, the *City of Fort Pierre* decision also states,

Further, our holding does not challenge the Corps' jurisdiction with regard to any other artificially created wetland-type environment. Rather, our holding is limited to the situation in which the Corps, as an unintended byproduct of ordinary river maintenance, inadvertently creates a wetland-type ecological system on private property where no such system previously existed.

The U.S. Court of Appeals, 8<sup>th</sup> Circuit specified that the *City of Fort Pierre* decision does not challenge the Corps' jurisdiction in any situation except one in which the Corps inadvertently creates wetlands as an unintended byproduct of ordinary river maintenance. According to the District and the Appellant, the depression was created from the activities associated with the construction of a storage facility located to the east of the Site.<sup>44</sup> Since the wetland on the Site was created through construction activities completed by the Appellant for the purposes of obtaining fill for a storage facility, and not inadvertently created by the Corps as a byproduct of ordinary river maintenance, this case law is unrelated to this RFA.

In addition to the documents and information supporting the reason for appeal contained in the RFA, the Appellant clarified during the informal AJD appeal meeting that it disagreed with EPA's statement that the "site was a farmed wetland that was abandoned/converted to a borrow pit and over time it reverted back to a wetland",<sup>45</sup> and also indicated that the District's initial coordination with EPA contained a leading question.<sup>46</sup> This correspondence was not required by current EPA and Corps guidance memorandums regarding coordination of AJDs,<sup>47, 48</sup>. Nonetheless, there is nothing improper about the coordination and the request for a second opinion. The EPA is not charged with making the AJD in this case, therefore the manner in which this informal cross-check was accomplished is not consequential. Furthermore, the AR establishes that this coordination with EPA was not an important basis of the District's determination.

The Appellant concludes its RFA by requesting the "AJD be reversed by the [NWD] Division Engineer" and that the "Division Engineer determine that no jurisdictional

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<sup>44</sup> AR, pp. 5 and 241; MFR, p. 3

<sup>45</sup> MFR, p. 3

<sup>46</sup> AR, pp. 141-142. By email dated March 17, 2017, the District asked for EPA's concurrence with its AJD. By email dated March 21, 2017, EPA stated that it concurred with the Corps' determination.

<sup>47</sup> Grumbles, Benjamin H. and John Paul Woodley, Jr. 2007. Coordination on Jurisdictional determinations (JDs) under Clean Water Act (CWA) Section 404 in Light of the *SWANCC* and *Rapanos* Supreme Court Decisions.

<sup>48</sup> Riley, Don T. 2008. Process for Coordinating Jurisdictional Determinations Conducted Pursuant to Section 404 of the Clean water Act in Light of the *Rapanos* and *SWANCC* Supreme Court Decisions.

wetlands exist on [the Site].”<sup>49</sup> Although the Division Engineer does have “the authority to make the final decision on the merits of the appeal”, the Division Engineer does not have “the authority to... make an [AJD].”<sup>50</sup>

Based on the AR and as discussed above, the District made a case-specific determination that the construction operation at the Site had been abandoned, and concluded that the resulting waterfilled depression is a wetland adjacent to a tributary (unnamed tributary to Elkhorn River) of a water that is currently used in interstate commerce (Elkhorn River), thus meeting the definition of Waters of the U.S. found at 33 CFR 328.3(a)(7). The District’s AJD is sufficiently supported by its AR; therefore, this reason for appeal does not have merit.

**Conclusion:** After reviewing and evaluating the RFA, the District’s AR, and the recommendation of the RO, I have determined that the District’s AJD is reasonable, supported by substantial evidence in the AR, and is not contrary to laws, regulations, guidance, executive orders, or officially promulgated policies of the Corps’ Regulatory Program. The RFA does not have merit and remand of the District’s decision is not warranted. The final Corps decision in this case is the Omaha District Engineer’s AJD, dated July 7, 2017.

FOR THE COMMANDER:



Dwane E. Watsek  
Chief, Program Support Division

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<sup>49</sup> RFA, p. 15

<sup>50</sup> 33 CFR 331.3(a)(2)

