



**ADMINISTRATIVE APPEAL DECISION
CLEAN WATER ACT
Martin Marietta
NWO-2018-01201
OMAHA DISTRICT**

December 19, 2019

Review Officer (RO): Melinda M. Larsen, U.S. Army Corps of Engineers, Northwestern Division, Portland, Oregon.

Appellant: Mr. James Sharn, Director, Natural Resources, Martin Marietta Materials, Inc.

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

Receipt of Request for Appeal: November 16, 2018

Site Visit/AJD Appeal Meeting: February 27, 2019

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 61 acres of wetlands and 3.04 acres of other surface waters on property located in Weld County, Colorado. Specifically, the site is located at approximately latitude 40.2789, longitude -104.8567. The Appellant disagrees with the District's determinations on 11 aquatic resources on the site, asserting that the District incorrectly applied law, regulation, or officially promulgated Corps policy. The Appellant submitted five Reasons for Appeal (RFAs).

For reasons detailed in this Decision, the Appellant's RFAs 1, 3, 4, and 5 are found to have merit. The AJD is remanded to the Omaha District Engineer for reconsideration, additional evaluation, and documentation sufficient to support the decision. The final Corps decision regarding jurisdiction in this matter will be made by the Omaha District Engineer.

Background Information: The District completed an AJD on September 17, 2018.¹ Due to some errors in the transmittal letter conveying the decision, the District sent a revised transmittal letter on September 24, 2018 in an effort to correct and clarify it.² The AJD form did not change. The AJD included a summary table, identifying the aquatic resources onsite that were reviewed, and the District's conclusion for each.³ Overall, the District determined that nine wetland areas totaling 61 acres, and five "other waters" were jurisdictional for purposes of the CWA.

¹ AR 0167-0186.

² AR 0187-0206.

³ AR 0196-0197.

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. No new information may be submitted on appeal;⁴ however, 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 AJD. Consistent with Corps regulations, 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.⁵ The information received during this appeal review, and its disposition, is as follows:

- 1) Request for Appeal sent by the Appellant, received by the US Army Corps of Engineers, Northwestern Division (NWD) on November 16, 2018.
- 2) Notice from NWD to the Appellant accepting the Request for Appeal and stating that the Request met the required criteria for an administrative appeal, sent by letter dated December 17, 2018.
- 3) Document submitted by the Appellant titled *Supplement to Jurisdictional Determination Request for Appeal, NWO-2018-01201-DEN, Platteville Mine Project, Weld County, Colorado*, received by NWD on December 18, 2018. The document discusses the proposed revisions to the definition of waters of the United States (WOTUS) published in the Federal Register on December 11, 2018. Upon receipt of this letter, the RO contacted the Appellant and informed him that for the appeal process, the AR is limited to the contents of the record at the time of decision, and the proposed WOTUS rule is not in effect and will have no bearing on the status or analysis of the currently pending appeal.
- 4) The AR, a copy of which the District provided to the RO and the Appellant on December 31, 2019.
- 5) An informal appeal meeting and site visit, in accordance with 33 C.F.R. § 331.7, held by the RO on February 27, 2019. The goal of the meeting was to summarize and clarify the Appellant's and the District's positions as they relate to the appeal. During the appeal meeting, the RO asked Appellant if the intent was to challenge the jurisdictional status of Wetland 11 (WL-11) as non-jurisdictional—the Appellant's RFAs 1, 3, and 4 challenge the District's determinations concerning WL-11.⁶ The Appellant responded at that time that WL-11 was included in error and that where the RFAs mention WL-11, it should be replaced with Open Water 11 (OW-11).

⁴ 33 C.F.R. § 331.2.

⁵ 33 C.F.R. § 331.7(f).

⁶ The AJD discusses WL-11 in section II.B.2. AR 0190. In the AJD, the District concludes that WL-11 does not meet the definition of WOTUS. *Id.*

- 6) On September 30, 2019, the RO communicated with the Appellant and the District by email and confirmed that RFAs referencing WL-11 should be construed as RFAs concerning OW-11.

The five RFAs submitted by the Appellant are provided verbatim below from the Request for Appeal. Pursuant to clarifications provided by the Appellant at the February 27, 2019 meeting and via email response dated October 17, 2019 the RO has replaced WL-11 with OW-11 where appropriate.

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

Appellant's Reasons for Appeal (RFAs):

First Reason for Appeal: WL-1, WL-2, WL-3, WL-10, WL-11,⁷ WL-12, and WL-13 are not "adjacent" to a traditionally navigable water (TNW), because they are separated from the South Platte River by 1,800 feet of upland with no surface or shallow sub-surface connection.

Finding: This RFA has merit.

Action: For the reasons discussed below, the AJD is remanded to the District. On remand, the District should re-evaluate and fully document its determination relative to the jurisdictional status of WL-1, WL-2, WL-3, WL-10, WL-12, WL-13, and OW-11 in accordance with existing regulation, policy, and guidance.

Discussion: The Appellant asserts that WL-1, WL-2, WL-3, WL-10, WL-12, and WL-13 (the WL-1 Complex) and OW-11 are not adjacent to a TNW because of distance, and lack of surface or shallow subsurface connection.

Corps regulations define WOTUS to include adjacent wetlands.⁸ The term "adjacent" means "bordering, contiguous, or neighboring," and "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.'"⁹ Guidance issued by the Corps in 2008, the Rapanos Guidance,¹⁰ further clarifies the regulatory definition of adjacency, stating that wetlands are adjacent if one of the following three criteria are satisfied:

First, there is an unbroken surface or shallow subsurface connection to jurisdictional waters. . . . Second, they are physically separated from

⁷ Pursuant to clarifications provided by the Appellant at the February 27, 2019 meeting and via email response dated October 17, 2019 the RO has replaced WL-11 with OW-11.

⁸ 33 C.F.R. § 328.3(a)(7).

⁹ 33 C.F.R. § 328.3(c).

¹⁰ U.S. Envtl. Prot. Agency & U.S. Army Corps of Eng'rs, *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v United States and Carabell v. United States* (rev'd 2008) [hereinafter Rapanos Guidance].

jurisdictional waters by man-made dikes or barriers, natural river berms, beach dunes, and the like. Or third, their proximity to a jurisdictional water is reasonably close, supporting the science-based inference that such wetlands have an ecological interconnection with jurisdictional waters.¹¹

In section III.A.2 of its AJD, the District concluded that the wetlands encompassed in the WL-1 Complex and the WL-4 Complex (WL-4, WL-5, WL-6) are adjacent to the South Platte River (identified as a TNW) based on the 'reasonably close' criteria, and included the following statement regarding surface or shallow subsurface connection:

In this area, an unusually large amount of hydrology is necessary to support a large, contiguous wetland with highly diverse vegetation communities. This is the case of WL-1, which encompasses 57.49 acre and displays diversity of species. Although it is unclear where the upstream hydrologic connection is, WL-1 nevertheless clearly maintains a significant hydrologic connection to a water source; the only source nearby large enough to account for this advanced hydrology is the South Platte River, a TNW. This is likely provided via a subsurface connection; the upstream edge of WL-1 (offsite) is approximately 1,800 feet from the South Platte River channel.¹²

Adjacency of the WL-1 Complex via Distance

The Appellant's argument that the WL-1 Complex wetlands are not adjacent because they are too distant from the TNW is not supported in regulation or guidance. There is no law, regulation, Executive Order, or officially promulgated Corps policy guidance which assigns a maximum distance under which wetlands can be determined adjacent and therefore jurisdictional under the CWA. The relevance of distance when making a determination of whether a wetland is adjacent to a TNW is based on the case-by-case review of specific facts of the site in question and the best professional judgment of the District.¹³

Adjacency of the WL-1 Complex via a Surface or Shallow Subsurface Connection

The second part of this RFA—that the wetlands in question are not adjacent because they lack a surface or shallow subsurface connection to the TNW—is also not supported in regulation or guidance. The regulation at 33 C.F.R. § 328.3(c) defines adjacent as bordering, contiguous, or neighboring, while the Rapanos Guidance states, "The agencies will assert jurisdiction over wetlands adjacent to traditional navigable waters, including over adjacent wetlands that do not have a continuous surface connection to traditional navigable waters."¹⁴ The Guidance continues, "Finding a continuous surface

¹¹ *Id.* at 5–6.

¹² AR 0190.

¹³ In the RFA, the Appellant provided an additional statement regarding how the wetlands in question may have been treated under the 2015 Clean Water Rule. Request for Appeal at 19. As the Appellant noted, the District was not operating under the 2015 Clean Water Rule at the time of the subject AJD decision. As stated above, the AR is limited to the contents of the record at the time of decision. That decision was based on regulation, policy, and guidance in place on September 24, 2018, the date the AJD issued. Therefore, whether the wetlands could have been jurisdictional under the 2015 rule is not relevant to this appeal.

¹⁴ Rapanos Guidance, *supra* note 10, at 4.

connection is not required to establish adjacency under this definition.” Therefore, lack of a continuous surface connection is not in itself sufficient to determine that a wetland lacks jurisdictional status. Regarding subsurface connections, the regulations and Guidance do not provide specific criteria for identifying a subsurface connection. Therefore, the determination of whether a wetland is adjacent to TNW due to subsurface connection is based on the best professional judgment of the District on a case-by-case basis.

The Rapanos Guidance directs that districts, in documenting their jurisdictional determinations, should:

[E]nsure that the information in the record adequately supports any jurisdictional determination. The record shall, to the maximum extent practicable, explain the rationale for the determination, disclose the data and information relied upon, and, if applicable, explain what data or information received greater or lesser weight, and what professional judgment or assumptions were used in reaching the determination¹⁵.

Although the relevance of physical distance and determination of a subsurface connection are subject to a district’s best professional judgment, the Guidance requires districts to support their conclusions with adequate data and rationale. The District’s statements that “In this area, an unusually large amount of hydrology is necessary to support a large, contiguous wetland with highly diverse vegetation communities” and that a hydrologic connection between the WL-1 Complex and the South Platte River is “likely provided via a subsurface connection” are not supported by sufficient data or analysis in the AR.¹⁶ There are no data or field observations in the AR from the District or the Appellant that address such a connection. Section 3.1.2 of the Wetland Delineation Report¹⁷ (Delineation Report) submitted by the Appellant in support of its request for an AJD discusses hydrology and asserts, “The South Platte River Alluvial Aquifer is also a hydrological driver of current wetland features in the study area.”¹⁸ This section goes on to mention that measurements of groundwater levels within 10 feet of the surface have been observed in some nearby areas. However, the Delineation Report does not mention a shallow subsurface connection with the South Platte River. Because the District did not provide any data or rationale to support its presumption of a shallow subsurface hydrologic connection to the South Platte River for the WL-1 Complex this RFA has merit with respect to the WL-1 Complex.

CWA Jurisdiction of OW-11 by Adjacency

Adjacency criteria are specific to wetlands.¹⁹ No law, regulation, Executive Order, or Corps policy guidance assigns jurisdictional status to an open water or a relatively permanent water (RPW) via adjacency criteria. Thus, if OW-11 is in fact an open water and/or RPW, adjacency would not be an applicable basis for jurisdiction.

¹⁵ Rapanos Guidance, *supra* note 10, at 12.

¹⁶ AR 0190.

¹⁷ AR 0023-0166.

¹⁸ AR 0030.

¹⁹ See 33 C.F.R. § 328.3(a)7.

CWA Jurisdiction of OW-11 via a Surface or Shallow Subsurface Connection

The District listed OW-11 in the summary table located at page 8 of the AJD form, indicating that it is a jurisdictional RPW and referring to section III.D.2 for the District's rationale.²⁰ Section III.D.2 only discusses OW-10, the Western Mutual Ditch. There is no rationale associated with OW-11 in section III.D.2 or anywhere else in the AJD document. Because the District did not provide any rationale for the conclusion that OW-11 is jurisdictional, this RFA has merit with respect to OW-11.

Second Reason for Appeal: WL-4, WL-5, and WL-6 are not "adjacent" to a TNW because they do not abut a TNW; in fact, they are separated from the South Platte River by several hundred feet.

Finding: This RFA does not have merit.

Action: No further action.

Discussion: In this RFA, the Appellant asserts that the WL-4 Complex (WL-4, WL-5 and WL-6) is not adjacent to the TNW because it does not abut the South Platte River. As discussed above in RFA 1, there are multiple criteria that can constitute adjacency under the CWA, Corps regulations, and associated guidance. A demonstration that a wetland directly abuts, or otherwise has a continuous surface connection to a TNW is one of three potential ways that a wetland can be determined adjacent, and thus jurisdictional under the CWA. However, the AR shows that the District did not assert that any of the subject wetlands are adjacent because they directly abut the TNW; instead, the District determined that the WL-4 Complex is adjacent to the South Platte River via the 'reasonably close' standard.²¹ Therefore, this RFA does not have merit.

Third Reason for Appeal: There is no ecological connectivity between the WL-1, WL-2, WL-3, WL-4, WL-5, WL-6, WL-10, WL-11,²² WL-12, WL-13, OW-1, and OW-2 and the South Platte River. There is no data or evidence to support the USACE's conclusion that these waters contribute to the chemical, physical, or biological integrity of the South Platte River such that a "significant nexus" exists.

Finding: This RFA has merit.

Action: For the reasons discussed below, the AJD is remanded to the District. On remand, the District should re-evaluate and fully document its determination relative to the jurisdictional status of WL-1, WL-2, WL-3, WL-4, WL-5, WL-6, WL-10, WL-12, WL-13, and OW-11 in accordance with existing regulation, policy, and guidance.²³

²⁰ AR 0196.

²¹ AR 0190.

²² Pursuant to clarifications provided by the Appellant at the February 27, 2019 meeting, and via email response dated October 17, 2019 the RO has replaced WL-11 with OW-11.

²³ OW-1 and OW-2 are addressed in RFA 5.

Discussion: In this RFA, the Appellant asserts there is no evidence supporting the District's conclusion that there is a significant nexus between the South Platte River and a number of waters listed as jurisdictional in the AJD.

WL-1 Complex and WL-4 Complex

As an initial matter, the District did not determine that the wetlands in the WL-1 Complex (WL-1, WL-2, WL-3, WL-10, WL-12, and WL-13) or the WL-4 Complex (WL-4, WL-5, and WL-6) were jurisdictional based on a finding that there is a significant nexus between the wetlands and the South Platte River. Instead, the District determined that the wetlands were jurisdictional as wetlands that are 'reasonably close' to a TNW. The significant nexus does not apply where the Corps is asserting CWA jurisdiction over wetland that is adjacent to a TNW.²⁴

The Rapanos Guidance provides the following regarding the 'reasonably close' criteria:

[The wetlands] proximity to a jurisdictional water is reasonably close, supporting the science-based inference that such wetlands have an ecological interconnection with jurisdictional waters. 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. For example, species, such as amphibians or anadromous and catadromous fish, move between such waters for spawning and their life stage requirements. Migratory species, however, shall not be used to support an ecologic interconnection. In assessing whether a wetland is reasonably close to a jurisdictional water, the proximity of the wetland (including all parts of a single wetland that has been divided by road crossings, ditches, berms, etc.) in question will be evaluated and shall not be evaluated together with other wetlands in the area.²⁵

These statements indicate that 1) an assessment—non-migratory species related—is necessary in order to determine that a wetland is reasonably close to a jurisdictional water, and 2) that the assessment should only be based on the wetland in question and should not include other wetlands in the area.

The District discusses these wetlands in section III.A.2 of the AJD. The District makes several statements in this section, including but not limited to statements that the wetlands occur within the 100-year floodplain, have abundant hydrology, hydric soils, plant diversity, and historic hydrology.²⁶

²⁴ Rapanos Guidance *supra* note 10, at 8.

²⁵ *Id.* at 6 (footnote omitted).

²⁶ AR 0190-0191.

The District's statement that the wetlands occur within the 100-year floodplain does not support a 'reasonably close' adjacency determination in accordance with regulations and guidance. It does not, by itself, demonstrate ecological connectivity; rather it means that the area may be subject to flooding. There is no law, regulation, Executive Order, or officially promulgated Corps policy guidance that establishes regulatory jurisdiction over an aquatic resource based on its physical presence within a floodplain. Physical location within a floodplain is among the factors that should be considered when analyzing the physical, chemical, and biological relationship between a wetland and a TNW, but it does not itself establish adjacency based on any of the three criteria necessary for that determination.

Likewise, the District appears to equate abundant hydrology, diversity of vegetation, and a statement about subsurface flow to adjacency for jurisdictional purposes. As discussed above, the ecological interconnection supporting a 'reasonably close' determination cannot be speculative or insubstantial and must be assessed for each individual wetland. The District provides no data or analysis supporting these statements, or rationale as to why these statements led to the conclusion that the wetlands in question meet the 'reasonably close' adjacency criteria.

The District's discussion of the presence of hydric soils in the subject wetlands also does not support its conclusion that the wetlands are 'reasonably close'. Hydric soils are one of three required factors used to delineate the boundaries of a wetland in accordance with the *1987 Corps of Engineers Wetlands Delineation Manual (87 Manual)*.²⁷ The presence of hydric soils alone does not demonstrate jurisdictional status. The statements that there are hydric soils present and the presumption that a large amount of hydrology is required to support those soils does not demonstrate that the subject wetlands have the ecological interconnection necessary to support a 'reasonably close' determination.

The District statements about historic hydrology in the area also do not support a 'reasonably close' adjacency determination. The District notes that a previous jurisdictional determination identified a flowing channel in the area that the District speculates would still be connected to the South Platte River if not for the activities associated with gravel mining. The District concludes that this historic hydrologic connection and the presence of WL-1 on historic photos and topographic maps indicates that WL-1 is a jurisdictional adjacent wetland using the 'reasonably close' criteria. The Appellant, in its Delineation Report, also mentions historic hydrology, and relates it to "now defunct irrigation systems."²⁸ While the presence of current and past hydrology are relevant to the delineation of a wetland and may be relevant to a significant nexus analysis, they do not provide enough information to demonstrate ecological interconnectivity that adequately supports a 'reasonably close' adjacency determination.

²⁷ Environmental Laboratory. (1987). "Corps of Engineers Wetlands Delineation Manual," Technical Report Y-87-1, U.S. Army Engineer Waterways Experiment Station, Vicksburg, MS. (1987 Manual).

²⁸ AR 0031.

The District's additional unsupported statements in the remainder of the adjacency rationale also do not equate to jurisdictional status. The statement that WL-2, WL-3, and WL-13 are part of WL-1 does not equate to jurisdictional status, because the District has not adequately demonstrated that WL-1 is jurisdictional. Likewise, the conclusion that WL-4, WL-5, and WL-6 are 'reasonably close' because they are closer to the South Platte River and exhibit the same soil types as WL-1 is not supported by any data or analysis. Further, the conclusion that WL-10 and WL-12 are 'reasonably close' appears to be based only on proximity to the South Platte River. Support of a 'reasonably close' determination requires a demonstration of ecological interconnection, not simply physical proximity.

The District's analysis did not comply with the Rapanos Guidance because it did not adequately "explain the rationale for the determination, disclose the data and information relied upon, and, if applicable, explain what data or information received greater or lesser weight, and what professional judgment or assumptions were used in reaching the determination."²⁹ Further, the District's analysis did not comply with the portion of the Guidance that instructs that wetlands "shall not be evaluated together with other wetlands in the area" when it equated the jurisdictional status of most of the assessed wetlands with that of WL-1³⁰. For the reasons explained above, as it relates to the WL-1 and WL-4 Complexes, this RFA has merit

OW-11

Turning to OW-11, as discussed above in RFA 1, the District provided no rationale whatsoever to support a conclusion that OW-11 is jurisdictional. Therefore, as it relates to OW-11, this RFA has merit because there is no analysis demonstrating jurisdiction via any criteria established by regulation or guidance.

Fourth Reason for Appeal: WL-1, WL-2, WL-3, WL-4, WL-5, WL-6, WL-10, WL-11, WL-12, WL-13, OW-1, and OW-2 are composed of anthropogenic features constructed in uplands that are the result of past mining activity coupled with surrounding irrigation practices, including seepage from surrounding agricultural land uses and irrigation activities.

Finding: This RFA has merit.

Action: For the reasons discussed below, the AJD is remanded to the District. On remand, the District should re-evaluate and fully document its determination relative to the jurisdictional status of the onsite aquatic features in accordance with existing regulation, policy, and guidance.

Discussion: The Appellant asserts that most of the aquatic features, including the WL-1 Complex, the WL-4 Complex, and OW-11³¹ are non-jurisdictional features due to

²⁹ Rapanos Guidance, *supra* note 10, at 6.

³⁰ AR 0190-0191.

³¹ Included here as per discussion in RFA 1.

their man-made nature and their source of hydrology being from agriculture and/or irrigation.³²

The preamble to the 1986 regulations defining WOTUS clarifies that certain categories of waters are generally not considered jurisdictional. Commonly referred to as 'preamble waters,' these waters include:

(a) Non-tidal drainage and irrigation ditches excavated on dry land; (b) Artificially irrigated areas which would revert to upland if the irrigation ceased; (c) Artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins; or rice growing; (d) Artificial reflecting or swimming pools or other small ornamental bodies of water created by excavating and/or diking dry land to retain water for primarily aesthetic reasons; (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)).³³

The preamble further states that Corps and EPA have the right to determine, on a case-by-case basis that a particular feature within these categories is a WOTUS.

The Appellant provided a timeline of historic information in its request for appeal, outlining past farming and irrigation practices, and mining activity.³⁴ As noted above, the AR is limited to information contained in the record as of the date of the Notification of Administrative Appeal Options and Process Form, and no new information may be submitted on appeal.³⁵ The timeline of historic information included data that was not previously in the AR, and therefore is not part of the following discussion.

The Delineation Report identified several features as excavated in upland, stock ponds, or the result of sand and gravel mining activities. These include WL-5, WL-7, WL-11, WL-12, OW-3, OW-4, OW-5, OW-7, OW-8, OW-9, OW-11, and OW-12.³⁶ Outside of the Delineation Report, the AR does not contain any additional information for each of the aquatic resources that might identify them as fitting into one of the preamble categories. The District appears to have agreed with the Appellant's statements regarding most of these features, but asserts jurisdiction over OW-11, WL-5, and WL-12, without discussion of the information provided by the Appellant in the Delineation Report.

³² OW-1 and OW-2 are addressed in RFA 5.

³³ Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41206, 41218 (Nov. 13, 1986).

³⁴ AR 208-223.

³⁵ 33 C.F.R. § 331.2.

³⁶ AR 0031-0039.

The Delineation Report describes OW-11 as “a man-made ditch that drains into a small, excavated pond adjacent to an existing dirt road and oil/gas well pad.”³⁷ WL-5 is identified as “possible this area was dug out in the past to supply sand and gravel for access roads within the study area.”³⁸ The WL-12 description states, “this area was excavated as part of mining activities in the mid-2000s.”³⁹

OW-11

As discussed above in RFAs 1 and 3, the District provides no rationale in the AJD for its determination that OW-11 is jurisdictional. The summary table lists OW-11 with a reference to section III.D.2;⁴⁰ however, section III.D.2 only discusses OW-10, the Western Mutual Ditch. Because the District has provided no rationale or evidence to support its conclusion that OW-11 is a jurisdictional RPW or controvert the Appellant’s characterization of OW-11 as a man-made ditch that does not have downstream connections, this RFA has merit.

The OW-1 and OW-4 complexes, as discussed in RFAs 1 and 3 above, are identified in the District’s AJD as adjacent, using the ‘reasonably close’ criteria, and the District has not provided adequate rationale or data to support this determination. Because the AJD lacks sufficient rationale or data to support the District’s conclusions, this RFA has merit. In its reconsideration of this AJD in response to the remand, the District should fully consider information provided by the Appellant, and in cases where the District’s conclusion differs from the Appellant’s, the District should provide data, observations, and rationale supporting its conclusion.

Fifth Reason for Appeal: The JD provides no basis for the conclusion that OW-1 and OW-2 are jurisdictional and there is no evidence to support such a finding.

Finding: This RFA has merit.

Action: For the reasons discussed below, the AJD is remanded to the District. On remand, the District should re-evaluate its determination relative to the jurisdictional status of OW-1 and OW-2 and provide rationale supporting the determination in accordance with regulations, policy, and guidance.

Discussion: The Appellant asserts that the AJD lacks a basis to conclude that OW-1 and OW-2 are jurisdictional. OW-1 and OW-2 are mentioned only once in the District’s AJD form, in the summary table located in section F, where they are listed as jurisdictional RPWs⁴¹. According to the Delineation Report submitted by the Appellant in support of its AJD request, OW-1 was identified as a 3- to 4-foot-deep ponded area with a surface diameter of about 50 feet, and OW-2 was identified as a ponded area about 45 by 20 feet, which did not have standing water during the consultant’s review.⁴²

³⁷ AR 0039.

³⁸ AR 0033.

³⁹ AR 0036.

⁴⁰ *Id.*

⁴¹ AR 0196-0197.

⁴² AR 0037.

The Rapanos Guidance directs districts to exert jurisdiction over “[r]elatively permanent non-navigable tributaries of traditional navigable waters and wetlands with a continuous surface connection with such tributaries.”⁴³ The Guidance further clarifies that “[a] non-navigable tributary of a traditional navigable water is a non-navigable water body whose waters flow into a traditional navigable water either directly or indirectly by means of other tributaries.”⁴⁴

As discussed above in RFAs 1 and 3, Corps guidance requires the District to provide adequate rationales for its jurisdictional determinations. In the case of OW-1 and OW-2, the District did not provide any data or rationale to demonstrate that OW-1 and OW-2 meet the criteria for RPW, because it did not provide any discussion of “flow into a traditional navigable water.” In fact, the District provided no rationale at all to support its determination regarding OW-1 and OW-2. Therefore, this reason for appeal has merit.

Conclusion: After reviewing and evaluating the RFA, the District’s AR, and recommendation of the RO, I find that the appeal has merit for the reasons stated above. Therefore, the AJD is remanded to the Omaha District Engineer for further analysis and documentation in accordance with 33 C.F.R. § 331.10(b). Authority to make the final Corps decision on the jurisdictional determination resides with the Omaha District Engineer pursuant to this remand. This concludes the Administrative Appeals Process.

FOR THE COMMANDER:



Tony R. Kirk
Chief, Operations and Regulatory

⁴³ Rapanos Guidance, *supra* note 10, at 6.

⁴⁴ *Id.* at 6.