



**ADMINISTRATIVE APPEAL DECISION
CLEAN WATER ACT**

**Flathead Properties, LLC, Jolene Dugan, Margrit Matter, and Avah Walker
NWO-2014-00418
OMAHA DISTRICT**

April 25, 2017

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

Appellant: Flathead Properties, LLC, Jolene Dugan, Margrit Matter, and Avah Walker (Collectively "Flathead"), represented by Mr. Stephen R. Brown, Attorney, Garlington, Lohn & Robinson.

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

Receipt of Request for Appeal: January 18, 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 jurisdiction over 11.32 acres of a traditionally navigable water (TNW) and 10.75 acres of wetlands adjacent to the TNW. The site is located on five parcels (assessor numbers 0000012073, 0000009964, 0000012072, 0000012071, and 0000002827) in Flathead County, Montana. The Appellant disagrees with the AJD and asserts that the District did not take into account certain information provided by the appellant that would lead to a conclusion that the site in question does not contain jurisdictional Waters of the U.S.

For reasons detailed in this document, the Appellant's reasons for appeal are found to not have merit. The final Corps decision on jurisdiction at this site is the Omaha District Engineer's AJD, dated November 9, 2016.

Background Information:

Federal Clean Water Act (CWA) 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),¹ the *U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook*² (JD Guidebook), 1987 Corps of

¹ Combined cases of *Rapanos v. United States and Carabell v. United States*. 126 S. Ct. 2208 (2006).

² ***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 approved jurisdictional determination (JD) and documenting practices to support an approved JD.

Engineers Wetlands Delineation Manual (87 Manual)³, and Regulatory Guidance Letters (RGLs).⁴ In 2007, as a result of the U.S. Supreme Court *Rapanos* decision, 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 (*Rapanos* guidance) to ensure that jurisdictional determinations, permit actions, and other relevant actions are consistent with the *Rapanos* decision and supported by the Administrative Record (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.⁵

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 (TNWs) 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, 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 Supreme Court 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 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 abuts a relatively permanent, non-navigable tributary. Manipulating the flow pathway of waters of the United States into artificial ditches, channels, culverts, or similar features (i.e., storm sewer pipes) does not sever federal jurisdictional status of the water.⁶

³ 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).

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

⁵ 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.

⁶ *ibid*

Brief Chronology Regarding the Subject Appeal: The Appellant requested an AJD in September of 2016. The District completed the AJD and concluded that Waters of the U.S. are present on the site. The District notified the Appellant of their findings on November 9, 2016, and provided the AJD form, supporting documentation, and a *Notification of Administrative Appeal Options and Process and Request for Appeal* form.

The Appellant submitted a complete Request for Appeal form (RFA) and supporting information to the Northwestern Division (NWD) on January 18, 2016⁷. NWD notified the Appellant by letter dated February 15, 2017 that the reasons presented in the RFA are 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 become part of the AR, because the District Engineer did not consider it in making the decision on the approved JD. 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 February 16, 2017. The AR is limited to information contained in the record prior to November 9, 2016, the date of the District's AJD decision.
- 2) On February 15, 2017, the Appellant submitted a report titled "*Expanded Soil and Aquifer Hydraulic Tests and Groundwater Monitoring Summary*", dated January 26, 2017, to the RO and the District. The RO notified the Appellant by letter dated February 21, 2017 that this new information cannot be included in the AR for this appeal as it is not part of the information considered by the District in issuing the AJD.
- 3) On March 6, 2017, the RO requested that the District provide additional correspondence and records specifically related to the information referenced in the Appellant's #2 reason for appeal and related to prior delineations referenced in the RFA and AJD. The District provided copies of the requested records on April 10, 2017. The RO contacted the Appellant's representative on April 17, 2017, and

⁷ The Appellant's RFA was dated January 6, 2017, and sent to the Division via overnight mail. Due to an address error on the form that was provided to the applicant, and additional weather delays, it was received by the Division beyond the 60-day limit for acceptance of an RFA. The reasons for delay were determined to be beyond the Appellant's control, and the RFA was deemed timely.

advised that additional information was forthcoming. The RO provided the additional information from the District to the Appellant via electronic mail on April 18, 2017 and requested that any interpretation, clarification, or explanation be provided in response to the additional records. The Appellant's representative provided a letter from the Appellant's consultant, Water Source, LLC, which contained interpretation and explanation of information already contained in the AR, specifically a 2002 wetland delineation of the site. This letter was shared with the District prior to the date of this decision. Since this letter provided interpretation of the AR, it was retained in the appeal decision record file and reviewed by the RO. It was not added to the AR as it was not part of the information reviewed by the District in issuing the AJD

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

First Reason for Appeal: "Flathead owns or is affiliated with property in Flathead County, Montana within the Section 35, Township 27 North, Range 20 West."

Finding: This is not an acceptable reason for appeal.

Action: No further action

Discussion: This is a statement regarding the Appellant's property interest, which is not in dispute in this appeal. The parties identified as property owners in the AJD and those listed as appellants in the RFA do not completely match. Therefore, the RO requested that the Appellants' representative confirm whether all parties identified as appellants' are interested parties in the Approved Jurisdictional Determination that is the subject of this appeal. That confirmation was provided by Mr. Stephen Brown to the Northwestern Division on February 14, 2017.

Second Reason for Appeal: "Flathead submitted material to the Corps explaining why the property in question did not meet the criteria of a jurisdictional wetland. These materials are contained in correspondence dated September 25, 2015, October 7, 2015, October 19, 2015 and November 23, 2015, and in the following reports also submitted to the Corps: (a) Eagle Cove Home Owners Association Wetland Delineation dated January 15, 2014, and (b) Supplemental Information and Findings for the Eagle Cove Home Owners Association 2014 Wetland Delineation dated September 11, 2014."

Finding: This is not an acceptable reason for appeal.

Action: No further action.

Discussion: This reason for appeal is not acceptable because it does not contain any specific information regarding a procedural error; an incorrect application of law,

regulation or officially promulgated policy; omission of material fact; incorrect application of current regulatory criteria or guidance, for identifying and delineating wetlands, or use of incorrect data. Nonetheless, the correspondence referenced in this RFA and related records was reviewed during the consideration of this RFA, as described below.

This RFA and the AR demonstrate that the Appellant and the District corresponded several times between January 2014 and November 2016 regarding the jurisdictional status of the property in question, and that correspondence reflects a broad disagreement regarding the jurisdictional status of the site.

The Appellant provided a delineation report dated January 15, 2014, and a permit application March 21, 2014. The District corresponded with the Appellant and advised that a site visit to verify jurisdictional boundaries would need to take place during the growing season. This site visit took place July 17, 2014. During the site visit, and in a subsequent letter dated August 6, 2014, the District advised the Appellant's representative that the wetland delineation report received by the District in January did not apply the relevant procedures and guidelines and was not an accurate reflection of the Corps jurisdiction on the subject property. The letter provided information on the correct methodology for conducting wetland delineations in accordance with Corps regulations and guidance, and requested a revised delineation.

The District received the revised delineation report September 30, 2015 (incorrectly dated September 11, 2014), and after reviewing it and other correspondence from the Appellant, advised the Appellant and their representative by letter dated November 25, 2015, that the District does not agree with the outcome of the revised delineation and that the area contained jurisdictional wetlands. The Appellant and their representatives continued to assert that jurisdictional wetlands did not exist on the property, and were again advised by the District, via letter dated April 7, 2016, of outstanding issues associated with a pending permit application, including the jurisdictional status of the wetlands onsite.

The District is within its authority to not accept a wetland delineation prepared by a project proponent. The national JD form itself provides for such an outcome and it is a standard, necessary practice in the regulatory program whenever privately prepared delineations do not conform to the applicable guidelines and/or have other substantial issues. In this case, when the District did not accept the 2014 delineation it also provided detailed and specific guidance on how to address several specific and material issues so that the delineation could be accepted. The District found that the submitted wetland delineation's methodology continued to not conform to the applicable, required guidance. There is no evidence to suggest, nor reason to believe, the District's evaluation and assessment of the Appellant's submitted wetland delineation and revision was an abuse of discretion or contrary to fact or generally recognized practice. Rather, the District's conclusions and characterizations appear to be reasonable and supported in the record, and fall within the discretion delegated to the District.

Third Reason for Appeal: "The JD is flawed because it failed to take into account numerous factors, including the following:"

Reason for appeal 3.1: There is no hydraulic communication between the site and Flathead Lake. There are no surface water connections; the site is a basin of internal drainage without a large contributing watershed and without any outlets draining the site. Absent a hydraulic connection, the Corps lacks jurisdiction.

Finding: This point does not have merit

Action: No further action

Discussion: This point asserts that the District failed to take into account a lack of hydraulic connection between the site and flathead lake when determining CWA jurisdiction. There is no law, regulation, Executive Order, or officially promulgated Corps policy guidance which requires a hydraulic connection for deciding CWA jurisdiction. Further, watershed size is not a relevant factor for determining CWA jurisdiction.

In the regulations defining Waters of the United States, the definitions section located at 33 CFR § 328.3(c) states that "... adjacent means bordering, contiguous, or neighboring." It also indicates that "Wetlands separated from other waters of the U.S. by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands.'"

The *Rapanos* Guidance⁸, was appropriately relied upon in this AR and the AJD⁹, and further clarifies 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 subsurface 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.

Although only one of the above three criteria is required for an adjacency determination, the District demonstrated in the AR that the wetlands in question met all three criteria: they identified the presence of a non-contiguous man-made berm separating the wetland from the lake; identified the width of the berm as approximately 15-20 feet wide, (i.e. reasonably close to the TNW), and identified an unbroken connection to the lake in at least one location. These determinations are supported in the AR with site photographs and field measurements¹⁰.

⁸ *Supra* note 5.

⁹ AR, p 006

¹⁰ AR, pp 152-207

The District's conclusion that the wetlands are adjacent to a TNW is not contrary to law, regulation or officially promulgated policy guidance. This point does not have merit.

Reason for appeal 3.2: Soils on site do not exhibit hydric characteristics because such soils require hundreds of years to develop (under average temps, longer under cold temps), and that relic soil characteristics that are present are the result of conditions that existed approximately 8,000 years ago. According to Corps guidance, a site is not a wetland if the soils lack hydric characteristics.

Finding: This point does not have merit.

Action: No Action

Discussion: There is no law, regulation, Executive Order, or officially promulgated Corps policy guidance that specifies the age of soil as a criteria for determination of hydric characteristics for CWA jurisdiction. Chapter 3 of the Western Mountains, Valleys, and Coast Region Regional Supplement¹¹, which is the correct regional supplement for this AJD, lists hydric soil indicators for the region. The guidance contained in the Regional Supplement indicates that if one or more of the listed indicators is present in a soil sample, then the soil is hydric. Problematic (relict) hydric soils are also discussed in the Regional Supplement, which recognizes that relict hydric soil features may be difficult to distinguish from contemporary features, but that if indicators of hydrophytic vegetation and wetland hydrology are present, then hydric soil indicators can be assumed to be contemporary. The AJD does not assert jurisdiction over any areas with soils that do not exhibit hydric characteristics, in conformance with the applicable guidance.

The District's Wetland Determination Data Forms (data forms)¹², completed during a site visit on September 13, 2016, show that the District observed hydric soil indicators at 13 of the 15 sample locations across the site. The District concluded the sample points which also contained hydrophytic vegetation and hydrology were within the wetland boundary. The AR adequately reflects the data collected, and the District's application of correct guidance relating to their observations of current soil characteristics on site. Therefore, this point does not have merit.

Reason for appeal 3.3: Soils onsite are very different than old SCS mapping (circa 1946) and that show that "peat and muck" soil do not, and could not exist on site.

Finding: This point does not have merit.

Action: No Action

Discussion: The AJD reflects that the District used existing Natural Resource Conservation Service (NRCS) soil mapping as supporting data for their site analysis,

¹¹ http://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/reg_supp/

¹² AR, pp 152-182

and they included a Soil Survey map dated September 2016 as Figure 3¹³. The AR also contains a copy of the paper version of the 1946 soils survey in the Wetland Delineation Report¹⁴ prepared by Thomas, Dean and Hoskins. Both versions of the map label the soils on site as partially “Alluvial land, poorly drained” and partially “Muck and peat”, while the 2016 version of the map also includes a small area of “Swims silt loam”.

It is important to note that the Corps will generally use soil survey data as a remote sensing tool, usually for reconnaissance prior to a site visit. As discussed above, the District documented their onsite findings in fifteen data forms, dated September 13, 2016. In most of the test sites, the District observed the texture of the soil as “Loamy/Clayey”, and in two instances they observed “Mucky Peat” type soils. This appears to corroborate the appellant’s assertion that onsite soil conditions are different from those indicated on the NRCS soil maps. However, there is no evidence in the AR that the District made their determination based solely on the soil survey data, or otherwise relied on soil survey data in place of onsite observations. In making its determination, the District conducted onsite analysis of soil characteristics, and documented their findings on the data forms¹⁵. This was an appropriate application of the guidance, and the District’s approach was reasonable. This point does not have merit.

Reason for appeal 3.4: Fill material placed as fill on the southern portions of the site during the late 1940's through 1960's consisted of soils from the pre-dam shoreline; those soils would have been muck and other oxygen deficient soils because they would have been subject to longer term inundation and saturation for thousands of years before being used as fill.

Finding: This point does not have merit.

Action: No further action.

Discussion: On July 17, 2014, Mr. Matthew Bilodeau, a project manager with the District visited the site with Mr. Randall Overton, Vice President of RLK Hydro, a consultant for the Appellant. Mr. Bilodeau sent a follow-up letter, dated August 6, 2014, in which he addressed Mr. Overton’s assertion that the site is of “atypical nature”:

In your report and during our discussion in the field, you spend some time describing the atypical nature of the site particularly with regards to the soils on site which you extensively sampled. Technically, it is probably accurate to state the site is atypical in some regards given the fact that Flathead Lake levels were impacted by the construction of Kerr Dam in 1937 and what you researched as historic agricultural practices on site including the removal of Ponderosa Pines and soil disturbances as you documented by your soil

¹³ AR, p 00034

¹⁴ AR, pp 112-113

¹⁵ AR, pp 152-182

sampling. However, even though man influenced by those factors, I believe the site displays what have become the "normal circumstances" for this location.

"Normal Circumstances" is based on an area's characteristics and use, both present and in the recent past,¹⁶ and involves an evaluation of the extent and relative permanence as well as the purpose and cause of the physical alteration to the wetland. A feature that was previously considered a wetland (and a water of the U.S.) may no longer be considered a water of the U.S. subject to Corps' regulatory jurisdiction if that feature experienced a change in use that was extensive enough to cause wetland characteristics to no longer be present. Conversely, a non-wetland feature could, over time, develop (or redevelop) characteristics such that it meets the definition of a wetland thereby establishing Corps' regulatory jurisdiction.¹⁷

In evaluating the extent and relative permanence of the change (i.e. construction of Kerr Dam), it is reasonable that the existence of a major dam since 1938 for hydropower production is considered permanent for the purposes of CWA jurisdiction. There is no evidence to suggest nor reason to believe the District's assessment of onsite conditions as normal circumstances was an abuse of discretion, or plainly contrary to a requirement of law, regulation, Executive Order, or officially promulgated Corps policy guidance. The District's AJD was based on the reasonably available data and application of an appropriate level of professional judgement. This point does not have merit.

Reason for appeal 3.5: Groundwater under the site rises and falls as a function of groundwater in bedrock with no migration of water from or to the lake; groundwater under the site behaves independent of the lake (the recent pair of piezometer nests installed along the shoreline confirm conditions are the same along the shoreline as at the original piezometer nest).

Finding: This point does not have merit

Action: No further action

Discussion: The Corps (*Federal Register* 1982) and the EPA (*Federal Register* 1980) jointly define wetlands 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, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas." This definition does not require a distinction between groundwater and surface water influence. During their site visit, the District investigated hydrology at fifteen different data points on the site, observing wetland characteristics at nine of

¹⁶ RGL 86-09.

¹⁷ RGLS 86-09 and 82-02.

them. The AR adequately reflects the data collected¹⁸, and the District's reasoning in documenting the wetland hydrology is in accordance with existing regulations and the methods described in the 87 Manual. This point does not have merit.

Reason for appeal 3.6: The JD relies on RGL 90-07 for guidance on the phrase "normal circumstances". RGL 90-07 addresses "Clarification of the Phrase "Normal Circumstances" as it Pertains to Cropped Wetlands". RGL 90-07 is not relevant to the normal circumstances issue at Eagle Cove as 90-07 only addresses agricultural lands on former or existing wetlands and is silent on conditions arising from unauthorized flooding of lands.

Finding: This point does not have merit

Action: No further action

Discussion: The term "normal circumstances" is a key part of the regulatory definition of a wetland. Normal circumstances are defined as "the soil and hydrologic conditions that are normally present, without regard to whether the vegetation has been removed." As indicated by Regulatory Guidance Letter (RGL) 90-07, this definition is generally intended for areas such as cropped wetlands, however, Corps guidance found in the *Questions & Answers on 1987 Corps of Engineers Manual*¹⁹ provides some clarification on the applicability of RGL 90-07:

"Although this RGL deals primarily with agricultural activities in wetlands, paragraphs #3 & #4 discuss normal circumstances with respect to all areas potentially subject to 404."

With regard to increased water levels of Flathead Lake from construction of Kerr Dam and their influence on the adjacent wetlands, the continued existence of the Dam does not mean there are not normal circumstances at the site for the purposes of determining jurisdiction.²⁰ Rather, the presence of normal site conditions, which existed at the time the JD was done, is the key factor in regards to whether "normal circumstances" exist. The present day water levels of Flathead Lake are correctly considered normal site conditions.

There is no evidence to suggest nor reason to believe the District's determination that normal circumstances are present on site was an abuse of discretion, or plainly contrary to a requirement of law, regulation, Executive Order, or officially promulgated Corps policy guidance. This point does not have merit.

¹⁸ AR, pp 152-182

¹⁹ Department of the Army. Questions and Answers on the 1987 Corps of Engineers Manual. October 7, 1991 – included in AR pp. 50-56

²⁰ See *U.S. v. Ciampitti*, 583 F.Supp. 483 (D.N.J. 1984) "This court finds that federal jurisdiction is determined by whether the site is presently wetlands and not by how it came to be wetlands". *U.S. v. Ciampitti* 583 F.Supp. 483 (D.N.J. 1984)

Reason for appeal 3.7: In 2013, the Corps explicitly disallowed Flathead. from using or relying on a 2002 wetland delineation conducted by TD&H, because it was over 5 years old and was invalid for wetland determination. Now the Corps impermissibly chose to use the same study for their new JD.

Finding: This point does not have merit.

Action: No further action.

Discussion: There is no evidence in the AR that specifies a 2013 request from the Appellant to rely on a 2002 wetland delineation for current permitting requests. The RO inquired with the District as to whether any instructions were given, at any time, regarding whether the 2002 delineation could be relied on. Based on that request, a 2009 email²¹ is included in the AR, wherein the District explained to the appellants' consultant that the 2002 delineation will need to be revisited, revaluated and updated based on current site conditions before it could be relied upon. The instructions in that email are an accurate reflection of the applicable Corps guidance²².

In addition, the AR includes an internal email, dated December 12, 2013²³, in which a District project manager describes a conversation with the Appellant's representative, Mr. Overton, who indicated that he had performed a wetland delineation on the subject site, and found boundaries that were different than what the Corps had verified in the past. The email also details that the project manager advised Mr. Overton to submit a new wetland delineation and that the District would need to verify the wetland boundary before initiating the permit process.

RGL 05-2, dated June 14, 2005, reaffirms that all approved geographic jurisdictional determinations completed and/or verified by the Corps will remain valid for a period of five years, unless new information warrants revision of the determination before the expiration date, or a District Engineer identifies specific geographic areas with rapidly changing environmental conditions that merit re-verification on a more frequent basis. Therefore, based on the most current guidance, it would not have been appropriate for the District (or the Appellant) to rely on a delineation that was more than five years old until or unless it was re-evaluated and updated.

The 2002 delineation was previously accepted and relied upon for a Jurisdictional Determination issued in 2005 in association with proposed work on the site. The 2002 delineation, submitted on behalf of appellant Flathead Property LLC by Thomas, Dean & Hoskins Inc., identified 12.26 acres of wetlands on the site. . The District included the 2002 delineation in section IV²⁴ of the AJD on appeal here as Supporting Data that was reviewed and again found to be acceptable. The District also reviewed the previous delineation as part of their preliminary data gathering in accordance with part IV, section

²¹ AR addendum, Tab 15, page 1.

²² RGL 05-02, reaffirmed by RGL 16-01

²³ AR addendum, Tab 16, page 1-2.

²⁴ AR. Page 11.

B of the 87 Manual. The District reviewed the delineation in addition to other data, including but not limited to soil surveys, wetland mapping, gage data, and data collected during the onsite investigation conducted September 13-14, 2016. The onsite investigation included observations of the characteristics of vegetation, soils, and the presence or absence of hydrology at 15 locations across the site, resulting in the identification of 10.75 acres of wetlands. There is no evidence to suggest that the District relied on the 2002 delineation with undue weight when making a decision on CWA jurisdiction on the site, or relied on it to the exclusion of an up-to-date field investigation. The District was operating within existing regulations and guidance to the extent they informed the Appellant that the 2002 delineation could not be relied upon to establish CWA jurisdiction or current permitting efforts without being revisited, and when they referred to it as supporting information in the JD along with up-to-date field investigations. This point does not have merit.

Reason for appeal 3.8: The JD cites use of the 1987 Wetland Delineation Manual but only selectively apply the manual to support their position, and ignore those procedures that would support the owners contentions, for example:

1) Section F - Atypical Situations, the section is described as only addressing situations where positive indicators of hydrology, soils, or vegetation could not be found. However, the Corps selectively applies the subsection procedures. The subsection calls for sampling soils under fills, and also consulting soil surveys. Soil Surveys describe the area where the access road (violation) is located as being in muck and peat soils, however, they avoided sampling soils to see what type soil was actually present. Corps explains away the failure to sample by describing the foot thick sand and gravel road fill as compacted. In reality the sands and gravels were not compacted and compaction was not really relevant as it is not difficult or time consuming to dig a hole through a foot of sand and gravel. As an alternative, the Corps could have sampled soils immediately adjacent to the fill which would be the same soils. However, it was quite obvious that the soils are not Muck and Peat, so Corps avoided collecting evidence. The soils in the area were sampled and described in the RLK and Water Source work in detail; the Corps ignored this information.

2) Section F Subsection 4 - Man-Induced Wetlands. Walking through the steps in Subsection 4 leads to "Step 4 - Wetland determination" which emphasizes with a "CAUTION" that if vegetation is maintained only because of "man-induced wetland hydrology" that would no longer exist if the hydrologic alteration were stopped, then the area should not be considered a wetland. The Corps ignored this subsection and its procedures. Had it followed its procedures, the Corps would have concluded that the site was not a jurisdictional wetland.

Finding: This point does not have merit.

Action: No further action.

Discussion: Section F of the 87 Manual, "Atypical Situations" states that "methods described in this section should only be used when a determination has already been made in Section D or E that positive indicators of hydrophytic vegetation, hydric soils, and/or wetland hydrology could not be found due to the effects of recent human activities or natural events." The AR demonstrates that the District applied this section to the fill road only, and did not apply it to the remainder of the site. This was appropriate application of the guidance, since the District did find indicators of all three wetland criteria within the remainder of the wetland area in question.

The District's "Basis of Jurisdictional Determination – Supporting Information" (pp. 27-29) document describes the step-wise process they used in accordance with instructions located at section F of the 87 Manual to evaluate the wetland status of the area now covered by the fill road. This description outlines the methodology used and the results of the field investigation, which did include evaluation of two areas near the fill road at points T2P2 and T2P3²⁵, where they found indicators of all three wetland parameters.

As described above in the discussion associated with the Appellant's 2nd Reason for Appeal, the District reviewed the information submitted by the Appellant in 2014 and 2015, and determined that it was not an acceptable representation of the onsite conditions. There is no evidence to suggest, nor reason to believe, the District's conclusion that the Appellant's submitted wetland delineations were unacceptable was an abuse of discretion or contrary to a requirement of law, regulation, Executive Order, or officially promulgated Corps policy guidance.

The District's application of procedures located in the 87 Manual in their delineation of the onsite wetlands was reasonable and supported in the AR. The District's AJD was based on the reasonably available data and application of the discretion delegated to the District by Corps regulations. This point does not have merit.

Reason for appeal 3.9: Isolated Wetlands - In spite of the Corps interpretation of overall status of the site as wetlands, much of the site should be considered "isolated wetlands" and would be exempt. The driver for defining the site as "isolated wetlands" is hydrology where there must be a surface or "shallow" groundwater connection to a "water." The owners previously provided well developed information that demonstrates that there are no surface or shallow groundwater connections to the lake. Shallow subsurface water moves vertically up and down and not laterally. The only way water can leave the site is by evapotranspiration or by movement in to the deeper (nonregulated) groundwater system, which indicates there is no connection to "waters." Puddled surface water either infiltrates or is removed by evapotranspiration. The Corps has all of the information developed by Water Source that demonstrates the hydrologic performance.

Finding: This point does not have merit.

²⁵ AR, pp 165-168

Action: No further action.

Discussion: The Appellant's concerns regarding adjacency and hydraulic connectivity are addressed previously in this document under reasons for appeal 3.1 and 3.5.

Reason for appeal 3.10: Section III A.2 of the JD form concludes the site is "adjacent" to a traditionally navigable water because there is a small (approximately 20 square feet) area that developed in 2016 that directly abuts the lake, and is a result of the Corps refusal to allow maintenance of the shoreline protection gravel structure or "berm".

1) The Corps includes additional figures/aerials that show in 2009, 2011, and 2013 that the "berm" was continuously present, but eroding (Figures 5a, 5b, 5c). The JD cites a photograph (15:54 on page C-49) and Figure 11B on page C-46²⁶ of the JD package. The photograph shows the area on the west side of the bridge. The area was covered by the gravel shoreline protection or berm that has completely washed inland by storm surge this year.

2) The Corps has refused to allow the owner to repair the permitted protection structure and that is why the gravel no longer is present across the short section of shoreline. The Corps cites Figure 11b which purports to show a 50 to 55 foot wide break in the berm. However, a field examination of the area, as well as the aerials, confirms that the berm is present and continuous across the reach, with the exception of the breach that developed this year.

3) Further, the Corps' Figure 11a maps the entire area along the shoreline a continuous reach of elevated ground or levee between the lake and shoreward. The only area that the Corps treats as directly abutting the lake is the short breach mentioned above. The Corps uses the 2009 LiDAR data converted to NAV 1929 elevations and only then only shows the 2,892' contour. If the unconverted 2009 LiDAR data was used and/or more detailed contours shown, the outline of ancient overbank or crevasse splay deposits along with some storm surge deposits would be evident as an uninterrupted barrier between the lake and areas to the north.

Finding: These points do not have merit.

Action: No Action

Discussion: The Jurisdictional Guidebook (pp 51-52) instructs users what documentation is required to support the determination that a wetland is adjacent to a TNW. First, the District must provide documentation to support that the waterbody is a TNW, then provide a rationale to support that the wetland in question meets the definition of adjacent. The District provided documentation that Flathead Lake is navigable-in-fact (making it a TNW), and provided rationale in section III A.2 that the site

²⁶ sic – Figure 11B is on page 17 of 17 in the AJD figures (AR p. 00047)

meets the definition of adjacent in accordance with 33 CFR 328.3(c). This rationale includes both an unbroken surface connection and a description of the berm separating the wetland from the TNW.

In accordance with 33 CFR 328.3(c), 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.

The District's determination that the berm is non-contiguous is supported in the AR with field notes²⁷, sketches²⁸, and a photograph²⁹. However, as stated above, a wetland is considered adjacent if it is separated from a Water of the U.S. by a berm or barrier. Presence of natural or man-made berms or barriers, even when non-contiguous, do not sever jurisdiction. This point does not have merit. The portion of this RFA regarding the landowner's request to repair the shoreline stabilization structure is outside the scope of the AJD and this appeal and therefore is not accepted.

As explained above in section 3.1., only one of three criteria are required for an adjacency determination, and the District demonstrated in the AR that the wetlands in question meet all three criteria. The District's conclusion that the wetlands are adjacent to a TNW is not contrary to law, regulation or officially promulgated policy guidance. These points do not have merit.

Reason for appeal 3.11: Under "Additional adjacency Information" in the JD document the Corps states that the "manmade berm" is only 15 - 20 feet in width, which is incorrect as it is generally much wider. In addition, all of the berm has been moved by storm surge a significant distance north from its original placement. As part of the movement by storm surge the gravels are mixed with wood fiber (looks like sawdust) and silt rendering the berm low permeability. Ancient natural river levees/crevasse splay deposits exist on the site and generally are parallel with the shore; EPA/Corps claim elsewhere to not consider those deposits (old, not "modern") as "natural river berms" for purposes of 33 CFR 328.3(c) adjacency.

Finding: This point does not have merit.

Action: No further action.

Discussion: The AR reflects that the District measured the berm at two locations during their site visit on September 14, 2016³⁰, and documented their findings in sketches (AR pp 508-510). Cross-sectional sketches 1 and 3 show the width of the berm at 18.7' and 15' feet, respectively. In addition, the March 2014 permit application submitted by RLK Hydro includes photographs and cross section drawings of the berm that appear to support the District's claim that the berm is approximately 15' - 20' wide.

²⁷ AR, p. 501

²⁸ AR, p. 509

²⁹ AR, p. 197

³⁰ AR, pp. 508-510

As described above in sections 3.1. and 3.10, 33 CFR § 328.3(c) states that "Wetlands separated from other waters of the U.S. by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands.'", and the *Rapanos* guidance states that a wetland in "reasonably close" proximity to a jurisdictional water supports a science-based inference that such wetlands have an ecological interconnection with such waters. The presence of the berm, regardless of width, does not sever the jurisdiction of adjacent wetlands.

There is no law, regulation, Executive Order, or officially promulgated Corps policy guidance which addresses the presence or absence of splay deposits, the age of natural or manmade berms, or defines a threshold width for establishing the "reasonably close" criteria when determining adjacency for purposes of CWA jurisdiction that the District failed to properly apply to this analysis. The District also demonstrated that the wetland in question meets additional adjacency criteria by identifying a continuous surface connection with Flathead Lake.

The District's determination was reasonable and within the discretion delegated to the District by Corps Regulations. This reason for appeal does not have merit.

Reason for appeal 3.12: The elevation data and mappings in the JD are problematic. The Corps did not use or convert elevations to a common datum. The Corps uses two different datums for presentation, neither of which are in common use, and neither meet the standard normally used by Federal, State, and Local agencies or surveyors.

- 1) The Corps uses NAV 1929 datum for ground elevations; all NAV 1929 elevations are about 3.6 feet lower than current NAVD 88 elevation data currently in use.
- 2) For lake levels the Corps used what is currently published on line by USGS, which is referenced to "Somers Datum"; the USGS warns that the Somers datum is not the same as either the 1929 or 1988 datums. The lake level based on the Somers datum is 2.77 feet lower than the currently used NAVD 88 datum, but 1.00 feet higher than the 1929 datum the Corps used for ground elevations.
- 3) The 2009 LIDAR elevation data the Corps claims to have used is in NAVD 88 elevations. However, the elevations in Corps figures appears to have been altered and converted to NAV 1929 datum. When elevations sources are cited and converted to some other datum, the fact of conversion is clearly stated on any maps or other uses of the converted data. The Corps was silent about the data conversion, but cites the data source as 2009 Lidar.
- 4) The mixing of elevations provides a misleading result. For example, the Corps reports the average peak lake level as 2,892.71 (Somers datum). However, in Figure 4 and 11a, they map an elevation contour of 2,892 (NAV 1929 datum)

across the site which would be lower than the lake level when in reality, based on current NAVD 1988 datum, the elevation should be at least 3.6 feet higher across the site; the correct elevation for the Corps 2,892 feet elevation is at least 2,895.61 feet. The Corps provides a conversion sheet in Appendix B attached information but without explanation or reference to its use or purpose.

5) The normal process would be to discuss the fact of mixed elevation datums and the need for elevation conversion to a common datum, and then explain why the specific datum was chosen as the standard.

Finding: This point does not have merit.

Action: No further action.

Discussion: The AR contains multiple references to elevation data, generally associated with outside sources such as USGS (NGVD 29 and Somers Datum), FEMA (NAVD 88), and the 2002 wetland delineation report conducted by Thomas, Dean and Hoskins (Somers Datum and NGVD 27³¹). The District consulted these various data sources and remote sensing tools during their preliminary data gathering phase³² in accordance with the 87 Manual.

There is no law, regulation, Executive Order, or officially promulgated Corps policy guidance which establishes elevation as a determining factor when evaluating wetlands for CWA jurisdiction, and there is no evidence to suggest nor reason to believe the District equated any particular elevation with CWA jurisdiction on the site. The failure to establish a common elevation datum does not represent a material flaw in the AJD. Further, the District acknowledged in the AR³³, and demonstrated that they understood the difference between the various elevation datums presented. The District's preliminary evaluation of reasonably available data associated with the site, and their final determination following an onsite investigation of current site conditions was reasonable, and an appropriate application of current guidance. It was not an abuse of discretion, or plainly contrary to a requirement of law, regulation, Executive Order, or officially promulgated Corps policy guidance. This point does not have merit.

Reason for appeal 3.13: The Corps includes Winginaw soils (organic matter over alluvium) as being mapped on site by the NRCS. However, Winginaw soils have never been mapped on site. Presumably, the Corps included the description because of the fill material (organic rich soils from the original shoreline) that were spread over the native soils at the south part of the property, which are silts and silt loams.

Finding: This point does not have merit.

Action: No Action

³¹ sic – refers to NAD 27

³² AR. Pp 00018-00024

³³ AR. Pp 15-30

Discussion: The District references Winginaw Soils in the AR as a component of one of the mapped soil units (muck and peat). The NRCS soil survey includes map units, which are defined by a unique combination of soil components. According to the NRCS Map Unit Description (AR p 76):

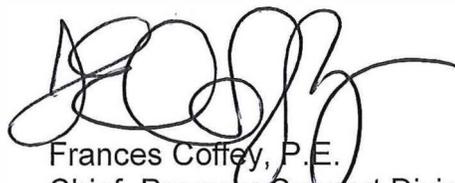
“...every map unit is made up of the soils or miscellaneous areas for which it is named and some minor components that belong to taxonomic classes other than those of the major soils.”

In other words, even though Winginaw soils are not specifically labeled on the soil survey maps, they could be present as a component of another mapped unit. As indicated above in 3.3., soil surveys are generally consulted during reconnaissance prior to a site visit,

There is no evidence in the AR that the District inappropriately relied upon, or gave undue weight to the reference to Winginaw soils in the NRCS soil surveys, when determining whether hydric soils were present on site. This point does not have merit. During their onsite investigation, the District did not identify any of the soil types encountered by name, rather they recorded a description of soil characteristics observed, as is called for on the data forms³⁴.

Conclusion: After reviewing and evaluating the RFA, the District’s AR, and recommendation of the RO, I have determined that the District’s conclusion regarding the jurisdictional determination is reasonable, supported by the AR, and does not conflict with laws, regulations, 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 on jurisdiction in this case is the Omaha District Engineer’s AJD, dated November 9, 2016.

FOR THE COMMANDER:



Frances Coffey, P.E.
Chief, Program Support Division

³⁴ AR, pp. 152-182