

**ADMINISTRATIVE APPEAL DECISION  
CLEAN WATER ACT  
DEARMAN GRAY, LLC - FILE NO. MVN-2020-01201-SG  
NEW ORLEANS DISTRICT**

**Division Engineer:** Diana M. Holland, Major General, U.S. Army Corps of Engineers (Corps), Mississippi Valley Division, Vicksburg, Mississippi<sup>1</sup>

**Review Officer (RO):** Brian Oberlies, U.S. Army Corps of Engineers, Mississippi Valley Division, Vicksburg, Mississippi

**Appellant:** Dearman Gray LLC, represented by Mary Field, Compliance Consultants, Inc.

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

**Receipt of Request for Appeal:** November 1, 2021

**Site Investigation and Appeal Meeting:** June 23, 2022

**Summary:** Dearman Gray, LLC (Appellant) is appealing the New Orleans District's (District) approved jurisdictional determination (AJD) which concludes that the Corps has Clean Water Act (CWA) jurisdiction over approximately 23.3 acres of wetlands and 900 feet of tributary waters located on approximately 52 acres north of Springfield Road (LA Hwy 1019) and east of Fore Road (LA Hwy 1022), in Watson, Livingston Parish, Louisiana (Site).

For reasons detailed in this appeal decision, I find two reasons for appeal have merit and two reasons for appeal do not have merit. The AJD is remanded to the District for reconsideration consistent with this decision and documentation of its determination that on-site aquatic resources are subject to jurisdiction under the CWA pursuant to 33 C.F.R. 331.10(b). A final decision will be made by the New Orleans District Engineer.

**Background Information:** On November 2, 2020, the District received a Request for Corps Jurisdictional Determination from Ms. Mary Field of Compliance Consultants, Inc. (CCI), an agent acting on behalf of the Appellant.<sup>2</sup> The District cancelled the request because it was inadequate and did not follow District requirements for consultant submitted reports.<sup>3</sup> On March 15, 2021, the District received a revised report titled

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<sup>1</sup> Pursuant to 33 C.F.R. 331.3(a)(1), the Division Engineer has the authority and responsibility for administering the administrative appeal process. By letter dated January 21, 2022, the Division Engineer accepted the request for appeal and identified the Mississippi Valley Division (MVD) as the decision authority of the final appeal decision. The Division Engineer delegated the review of this AJD to the Mississippi Valley Division Review Officer. The MVD Division Engineer retains overall responsibility for the administrative appeal process. The New Orleans District Engineer retains the final Corps decision-making authority for the AJD.

<sup>2</sup> Administrative Record (AR), pages 068-094

<sup>3</sup> AR, page 066

“Wetlands Assessment Report” (Delineation Report) prepared by CCI.<sup>4</sup> The Delineation Report identified and documented the presence of wetlands in accordance with the 1987 Manual<sup>5</sup> and the Regional Supplement.<sup>6</sup> The District completed its AJD on September 8, 2021, which includes a transmittal letter, a map depicting the jurisdictional wetlands/waters, a Notification of Administrative Appeal Options and Process and Request for Appeal Form, and an Approved Jurisdictional Determination Form (AJD Form)<sup>7</sup> to record the basis of the AJD.<sup>8</sup>

The U.S. Army Corps of Engineers, Mississippi Valley Division received the Appellant’s Request for Appeal (RFA), submitted on behalf of Dearman Gray, LLC, on November 1, 2021. By letter dated January 21, 2022, the Appellant was notified that the RFA was accepted and met the criteria for 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 signed date of the Notification of Administrative Appeal Options and Process Form. Pursuant to 33 C.F.R. 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 AJD. However, in accordance with 33 C.F.R. 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. On March 4, 2022, the District provided copies of the AR to the RO and the Appellant via email (two out of three emails). On June 9, 2022, the District provided all parties a copy of a portion of the AR that was inadvertently omitted (the third of the three emails). The AR is limited to information contained in the record by the date of the NAO/NAP form. In this case, that date is September 8, 2021.
2. In accordance with 33 C.F.R. 331.7(e), the RO held a site investigation and appeal meeting on June 23, 2022. The appeal meeting topics were summarized and

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<sup>4</sup> AR, pages, 021-067

<sup>5</sup> U.S. Army Corps of Engineers, *Corps of Engineers Wetlands Delineation Manual, Technical Report Y-87-1*, January 1987 (1987 Manual).

<sup>6</sup> U.S. Army Corps of Engineers, *Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Atlantic and Gulf Coastal Plain Region (Version 2.0)*, November 2010 (Regional Supplement).

<sup>7</sup> Implementation of the *Rapanos* decision requires the Corps to strive for more thoroughness and consistency in the documentation of jurisdiction with an AJD. To meet this requirement, the Corps uses a standardized form (AJD Form). The *U.S. Army Corps of Engineers Jurisdictional Form Instructional Guidebook* (May 30, 2017) (JD Guidebook) describes a method to conduct and document an AJD, provides instructions to complete the AJD Form, clarifies terms commonly used in the form, presents an overview on jurisdictional practices, and supplements the AJD Form instructions.

<sup>8</sup> AR, pages 004-016.

documented by the RO in a draft Memorandum for Record (MFR) and provided to both parties via email on July 20, 2022. The District responded on July 21, 2022, that the draft MFR accurately captured the topics discussed in the appeal meeting. The Appellant did not provide comments on the draft MFR. The final MFR was transmitted to both parties via email on August 22, 2022.

### **Evaluation of the Appellant’s Reasons for Appeal, Findings, and Instructions to the District Engineer**

**Appeal Reason 1:** The District failed to adequately support their conclusions that the on-site tributary is a jurisdictional water of the U.S. on the AJD Form.<sup>9</sup>

- a. The District failed to identify an RPW on the subject Site by name, flow, and direction, as well as provide rationale that the RPW exhibits year-round flow.<sup>10</sup>

**Finding:** This reason for appeal has merit.

**Discussion:** In the RFA, the Appellant argues that the District failed to “identify or ascribe an RPW on the Site. Nor does the Corps specifically state the connection between an RPW to a TNW by name, flow, or direction.”<sup>11</sup> on the AJD Form. Additionally, the Appellant asserts “the Corps presents no rationale indicating that the tributary is perennial” in Section III.D.2 of the AJD Form.<sup>12</sup>

Implementing regulations found at 33 C.F.R. 328 define the Corps’ CWA jurisdiction. Following the U.S. Supreme Court *Rapanos* decision,<sup>13</sup> the U.S. Environmental Protection Agency (EPA) and the Corps jointly issued a memorandum on June 5, 2007 providing guidance on implementing the decision. A revised memorandum, *Clean Water Act Jurisdiction Following the U.S. Supreme Court Decision in Rapanos v. United States & Carabell v. United States* (Rapanos Guidance), was issued on December 2, 2008, to ensure that jurisdictional determinations, permit actions, and other relevant actions are consistent with the *Rapanos* decision and supported by the AR.

The Rapanos Guidance includes two standards that the Corps uses to determine whether a wetland is jurisdictional. If either standard is met, the Corps has jurisdiction over the wetland at issue. The first standard, based on the plurality opinion in the *Rapanos* decision, recognizes regulatory jurisdiction over the following categories of water bodies: (1) traditional navigable waters (TNW), (2) all wetlands adjacent to TNWs, (3) relatively permanent, non-navigable tributaries (i.e., a tributary that flows year-round, or at least “seasonally”) of TNWs (RPW), and (4) wetlands that directly abut RPWs.

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<sup>9</sup> RFA, pages 2-4

<sup>10</sup> RFA, pages 2-3; Because Appeal Reasons 1 and 1.a were so similar, they were combined together and addressed collectively under Appeal Reason 1.

<sup>11</sup> RFA, page 3

<sup>12</sup> AR, page 011

<sup>13</sup> Combined cases of *Rapanos v. United States* and *Carabell v. United States*. 547 U.S. 715 (2006).

The second standard is based on the concurring opinion of Justice Kennedy and requires a case-specific significant nexus analysis to determine whether certain waters and their adjacent wetlands are jurisdictional. Consequently, the agencies may assert jurisdiction over any aquatic feature that is not a TNW or RPW if that water body is determined, based on 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 (non-RPW), (2) wetlands adjacent to non-RPWs, and (3) wetlands that are adjacent to but that do not directly abut RPWs.

As specified in the Rapanos Guidance, agencies will assert regulatory jurisdiction over 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 has continuous flow at least "seasonally" (typically 3 months)) and their adjacent wetlands if the wetlands directly abut such water body.

For consistent documentation, the Corps uses a standardized AJD Form. The *U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook* (JD Guidebook), dated 30 May 2007, establishes standard operating procedures to conduct and document an AJD, provides instructions to complete the AJD Form, clarifies terms commonly used in the Form, presents an overview on jurisdictional practices, and supplements the AJD Form instructions.

As mentioned above, while the Rapanos Guidance states that the Corps will assess jurisdiction over RPWs, the JD Guidebook clarifies that "...an RPW is defined as a tributary that is not a TNW and that typically flows year-round or has continuous flow at least seasonally (e.g., typically 3 months)."<sup>14</sup> Examples of hydrologic information to consider when determining flow are gage data, flood predictions, historic records of water flow, statistical data, and personal observations/records.<sup>15</sup> Examples of physical indicators of flow are the presence and characteristics of a reliable OHWM with a channel defined by bed and banks.<sup>16</sup> Other physical indicators of flow may include shelving, wracking, water staining, sediment sorting, and scour.<sup>17</sup>

During the appeal meeting, the District clarified that the on-site (+/- 900 linear feet) unnamed drainage tributary that extends off-site was a perennial RPW. The District also explained in the meeting that the unnamed perennial RPW flowed southwest into Beaver Creek (depicted as a perennial RPW on the USGS topographic map)<sup>18</sup> and continues southwest into the TNW (Amite River) and was jurisdictional by rule. The flow path of the on-site unnamed tributary was also clarified by the District in the appeal meeting; however, the Appellant's assertion associated with this reason for appeal is

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<sup>14</sup> JD Guidebook, 50, fn.6.

<sup>15</sup> JD Guidebook, 55.

<sup>16</sup> JD Guidebook, 55.

<sup>17</sup> JD Guidebook, 55.

<sup>18</sup> AR, pages 002 and 131

focused on the unnamed tributary flow requirements, particularly flow frequency, which the District was unable to clarify.

While the District did indicate, during the appeal meeting those observations made during the August 2021 site review and the two site reviews in October of 2021 noted flow in the channel, the District did not provide any discussion as to how its observations were used to determine flow frequency, nor was it reflected in the AR. Furthermore, the District specified that the drainage channels along Ray Drive and Highway 1019 appeared to be perennial based on site observations, LiDAR imagery, and multiple historic and contemporary true-color images; however, the District did not provide any discussion in the AR as to how they used this information to support the AJD, particularly how it supported flow frequency (i.e., the District simply referenced the resource without any discussion). The District concluded that all on-site wetlands directly abut RPWs and are therefore jurisdictional by rule.<sup>19</sup> The District explained that the perennial nature of Beaver Creek could be observed from on-site investigation, historic aerial photographs, and data shown on the USGS topographic maps cited in Section IV.A of the AJD Form but did not provide discussion as to how the information was used to support its determination. Finally, the District did specify that "The large, central wetland system continues off-site to the north and is contiguous with a wetland system that directly abuts Beaver Creek. The east/central, linear system includes and abuts a drainage tributary that extends off-site and connects to Beaver Creek. The small southeast corner wetland extends off-site and abuts a drainage channel that extends to the east along Ray Dr and into Hwy 1019, then southwest to Beaver Creek.", in Section III.D.4 of the AJD form,<sup>20</sup> but neglected to provide rationale in Section III.D.2 as required that supported the requisite year-round flow.

The District did not support its decision that the on-site unnamed tributary was a perennial RPW as required in the Rapanos Guidance. Therefore, based on the above discussion, the District did not correctly apply law, regulation, guidance, and policy when it determined that the on-site unnamed tributary was an RPW. Consequently, this reason for appeal has merit.

**Action:** For the reasons discussed above, this AJD is remanded to the District for further evaluation, analysis, and documentation consistent with this decision. The District should re-evaluate its observations and conclusions relative to the jurisdictional status of the aquatic features known as the large central wetland, east/central linear wetland, on-site unnamed drainage tributary, and southeast corner wetland and ensure these observations and conclusions are adequately documented in the AR and the AJD, in accordance with current regulation, policy and guidance in place at the time of the reconsideration.

**Appeal Reason 2:** The District failed to adequately support their conclusions that the on-site wetlands are jurisdictional waters of the U.S. on the AJD Form.<sup>21</sup>

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<sup>19</sup> MFR, page 5

<sup>20</sup> AR, page 011

<sup>21</sup> RFA, pages 2-4

- a. The District failed to document if wetlands were adjacent to or directly abut an RPW.<sup>22</sup>

**Finding:** Appeal reason 2 has merit.

**Discussion:** The Appellant disagrees with the District's AJD and asserts "The Corps has failed to identify whether or not the found wetlands on site are 'adjacent to but does not directly abut an RPW.' Section III.B. states:

'A wetland that is adjacent to but that does not directly abut an RPW requires a significant nexus evaluation. Corps districts and EPA regions will include in the record any available information that documents the existence of a significant nexus between a relatively permanent tributary that is not perennial (and its adjacent wetlands if any) and a traditional navigable water, even though a significant nexus finding is not required as a matter of law.'<sup>23</sup>

In the appeal meeting, the Appellant clarified that this reason for appeal focuses on the lack of documentation within the AR that asserts that the on-site "found wetlands" abutted a RPW either on-site or off-site.

The District stated in Section III.D.4 of the AJD Form that (1) the on-site "large/central wetland system" continues north off-site and directly abuts Beaver Creek (RPW with perennial flow) which flows directly into Amite River (TNW), (2) the "east/central" linear wetland system immediately abuts an unnamed tributary (RPW with perennial flow) that extends off-site and directly connects to Beaver Creek (RPW with perennial flow), and (3) the "southeast corner wetland" extends off-site to the southeast and abuts a small unnamed tributary (RPW with perennial flow).

As discussed in Appeal Reasons 1 and 1.a, the Rapanos Guidance includes two standards that the Corps uses to determine whether a wetland is jurisdictional. If either standard is met, the Corps has jurisdiction over the wetland at issue. The first standard, based on the plurality opinion in the *Rapanos* decision, recognizes regulatory jurisdiction over 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 has continuous flow at least "seasonally" (typically 3 months)) and over wetlands adjacent to such water bodies if the wetlands directly abut the water body.

As part of an AJD, Districts should determine whether a potential tributary is considered an RPW or non-RPW; provide information, data, and rationale, which may include a significant nexus evaluation, to support its determination in the appropriate sections of the AJD Form; and ensure that the documentation and analyses for an AJD are adequately reflected in the AR and demonstrates the District's basis for asserting or

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<sup>22</sup> RFA, pages 2-4; Because Appeal Reasons 2 and 2.a were so similar, they were combined and addressed together under Appeal Reason 2.

<sup>23</sup> RFA, page 3

declining jurisdiction.<sup>24</sup> To determine whether a tributary is an RPW or non-RPW, the Rapanos Guidance states, “The flow characteristics of a particular tributary generally will be evaluated at the farthest downstream limit of such tributary (i.e., the point the tributary enters a higher order stream).”<sup>25</sup> Where the downstream limit of a tributary is not representative of the entire tributary, the flow regime that best characterized the entire tributary should be used.<sup>26</sup>

In this AJD, the District concurred with the Appellant’s findings that there are wetlands on the Site and concluded that those wetlands are subject to CWA jurisdiction because they are directly abutting an RPW, “All on-site wetlands directly abut RPWs either on-site or off-site. On-site RPW and abutting off-site RPWs flow directly into the Amite River (TNW).”<sup>27</sup> The AJD Form states that, “The large, central wetland system continues offsite to the north and is contiguous with a wetland system that directly abuts Beaver Creek. The east/central, linear system includes and abuts a drainage tributary that extends off-site and connects to Beaver Creek. The small southeast corner wetland extends off-site and abuts a drainage channel that extends to the east along Ray Drive and into Hwy 1019, then southwest to Beaver Creek.”<sup>28</sup> Based on this statement, the District asserts in its AJD that all on-site and off-site RPWs exhibit perennial flow, however the AR lacks discussion or evidence as to how the supporting data sources<sup>29</sup> were used to inform its decision.

The evidence in the AR does not support the District’s conclusion regarding its determination of adjacency for the wetlands on the Site. Additionally, the AR does not contain evidence to support the District’s conclusion that the aquatic features to which the wetlands on the Site are adjacent to (i.e., drainage channels that extend east along Ray Drive and into Hwy 1019) has requisite year-round flow to be a perennial RPW as stated in Appeal Reason 1. As discussed above, the term “waters of the United States” is defined by regulations at 33 C.F.R. 328.3(a)(7) to include “[w]etlands adjacent to [jurisdictional] waters.” The term is also defined by regulations at 33 C.F.R. 328.3(a)(5) to also include “[t]ributaries.” Tributaries include “natural, man-altered, or man-made water bodies that carry flow directly or indirectly into a [TNW]”, and “is the entire reach of the stream that is of the same order.”<sup>30</sup>

CCI revised the Wetland Delineation report and submitted a copy to the District, dated February 24, 2021.<sup>31</sup> The report concludes that the Site contains potentially jurisdictional wetlands, characterized as “saturated bottomland hardwood community.”<sup>32</sup> The report further concludes that the nearest receiving water is Beaver Creek, located

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<sup>24</sup> Rapanos Guidance, pages 12-13.

<sup>25</sup> Rapanos Guidance, page 6, fn 24.

<sup>26</sup> Rapanos Guidance, page 6, fn 24.

<sup>27</sup> AR, page 014

<sup>28</sup> AR, page 012

<sup>29</sup> AR, page 013

<sup>30</sup> Rapanos Guidance, page 6, fn 29.

<sup>31</sup> AR, pages 023-064

<sup>32</sup> AR, page 028

north and west of the Site.<sup>33</sup> Beaver Creek drains to the Amite River. The CCI report stated that a LiDAR map was used to depict Site contours and identify lower elevation terrain in the northern portion of the Site. CCI explained that the subject wetlands are not jurisdictional because the “property is not located near a tributary or navigable waterway.”<sup>34</sup> The report does not characterize or delineate any areas outside of the 52-acre property, however an email to the District acknowledged they were able to access adjacent properties to confirm that the southeast corner wetland is connected via “a small ditch that runs from just off Ray Dr. property to 1019 Hwy.”<sup>35</sup>

In both instances, the District asserts that aquatic resources directly abut RPWs with perennial flow. According to the JD Guidebook, wetlands directly abutting RPWs that flow directly or indirectly into TNWs are categorically jurisdictional.<sup>36</sup> However, as stated above in Appeal Reason 1, the District failed to provide rationale that flow characteristics support year-round (perennial) flow. The District should have explained how the information referenced in Section IV.A was considered and used to establish that the aquatic resources abutted the stated perennial RPWs both on-site and off-site.

The District completed a site visit to verify the delineation report and gather additional information for areas on-site and any areas outside of the property boundary that were accessible within public right-of-way in order to complete the AJD. The District identified wetland areas on-site but speculated on potential off-site connections to the northwest and southeast of the property boundary, that flow characteristics of perennial RPW were part of a continuous wetland complex that drains off-site towards the southwest and into unnamed tributaries that flowed into Beaver Creek and then to the Amite River. As mentioned above, the District articulated the flow path of the aquatic resources on the Site in Section III.D.4 of the AJD Form; however, the District neglected to adequately document how the cited resources<sup>37</sup> were used in determining the “large, central wetland system”, “east/central, linear system”, and on-site “drainage tributary” were contiguous with and abutted the stated Beaver Creek (perennial RPW).

The District did not support its decision that the wetlands are adjacent to the RPWs as required in the Rapanos Guidance. Therefore, based on the above discussion, the District did not correctly apply law, regulation, guidance, and policy when it determined that the wetlands are adjacent to the RPWs. Consequently, this reason for appeal has merit.

**Action:** For the reasons discussed above, this AJD is remanded to the District for further evaluation, analysis, and documentation consistent with this decision. The District should re-evaluate its observations and conclusions relative to the jurisdictional status of the aquatic features known as the large central wetland, east/central linear wetland, on-site unnamed drainage tributary, and southeast corner wetland and ensure

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<sup>33</sup> AR, page 025

<sup>34</sup> AR, page 028

<sup>35</sup> AR, page 177

<sup>36</sup> JD Guidebook, page 26

<sup>37</sup> AR, page 013

these observations and conclusions are adequately documented in the AR and the AJD, in accordance with current regulation, policy and guidance in place at the time of the reconsideration.

**Appeal Reason 3:** The District presented no significant nexus analysis assessing flow characteristics and functions that significantly affected the chemical, physical, and biological integrity of a TNW.<sup>38</sup>

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

**Discussion:** In the RFA, the Appellant asserts that the “Corps presents no significant nexus analysis assessing flow characteristics and functions that significantly affected the chemical, physical, and biological integrity of a TNW.” The Appellant argues that “Section III.C. directs the Corps to be guided by the *Rapanos v. United States*, 547 US. 715 (2006) and the Corps Instructional Guidebook in determining RPW/TNW connections.”<sup>39</sup>

In this AJD, the District asserted that the on-site wetlands directly abutted perennial RPWs which flowed directly into the Amite River (TNW). As discussed in the First and Second Reasons for Appeal, the District stated that the wetlands on the Property were part of a large, contiguous wetland system that continued off the Site to the north and south. Next, the District asserted that the contiguous wetland system, of which the on-site wetland is part of, has a direct surface connection to the unnamed tributary to Beaver Creek. Finally, the District asserted that the unnamed tributary to Beaver Creek was a perennial RPW that connects to a TNW, the Amite River.

The Rapanos Guidance states, the “agencies will assert jurisdiction over relatively permanent non-navigable tributaries of traditional navigable waters without a legal obligation to make a significant nexus finding.”<sup>40</sup> The Guidance also states that “the agencies will assert jurisdiction over those adjacent wetlands that have a continuous surface connection with a relatively permanent, non-navigable tributary, without the legal obligation to make a significant nexus finding”, as long as “a continuous surface connection exists between a wetland and a relatively permanent tributary where the wetland directly abuts the tributary (e.g., they are not separated by uplands, a berm, dike, or similar feature).”<sup>41</sup> A case-specific, fact-based significant nexus analysis is only required when determining CWA jurisdiction of non-navigable tributaries that are not relatively permanent, wetlands adjacent to non-navigable tributaries that are not relatively permanent, and wetlands adjacent to but that do not directly abut a relatively permanent non-navigable tributary.<sup>42</sup>

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<sup>38</sup> RFA, page 4

<sup>39</sup> RFA, page 4

<sup>40</sup> Rapanos Guidance, 7.

<sup>41</sup> Rapanos Guidance, 7.

<sup>42</sup> Rapanos Guidance, 1.

The law did not require a significant nexus analysis to be performed because the Corps has the authority to assert CWA jurisdiction over wetlands that directly abut an RPW. The District maintains that the on-site RPW is perennial, therefore, performing a significant nexus would be inconsistent with established policy to not perform significant nexus evaluations in such circumstances because the policy requires Corps districts to include any available information that documents the existence of a significant nexus between a RPW that is not perennial (and its adjacent wetlands, if any) and a TNW. The RPW on the Appellant's Site, however, is asserted by the District to be perennial.

Since the Rapanos Guidance states that the Corps will assert jurisdiction over RPWs and their abutting wetlands without a legal obligation to make a significant nexus finding,<sup>43</sup> a case-specific significant nexus analysis was not required for this AJD. Furthermore, because the RPW was determined to be perennial, a significant nexus finding was not required by law or policy. Therefore, this reason for appeal does not have merit.

**Action:** No further action required.

**Appeal Reason 4:** The District should have reviewed the AJD under the NWPR since it was requested at the time the NWPR was in effect. The District incorrectly applied the pre-2015 rule (1986 Regs) instead of the NWPR.<sup>44</sup>

**Finding:** The appeal reason does not have merit.

**Discussion:** In the RFA, a statement was made "Because the JD application was filed prior to the new 2021 Executive Order for NWPR, Appellant respectfully asks that the JD be evaluated under the NWPR Rule in effect at the time of filing." The Appellant argues that the AJD should have been issued under the NWPR because it was the controlling rule at the time of submission.

The Appellant states the AJD request was "filed prior to the new 2021 Executive Order for NWPR" and asks the AJD "be evaluated under the NWPR Rule in effect at the time of the filing." As a general matter, the agencies' actions are governed by the definition of "waters of the United States" that is in effect at the time the Corps completes an AJD, not by the date of the request for an AJD. According to EPA and Corps guidance, "AJD requests pending on, or received after, the Arizona District Court's vacatur decision should be completed consistent with the pre-2015 regulatory regime."<sup>45</sup>

The EPA and Corps were restricted from implementation of the NWPR rule made after the U.S. District Court for the District of Arizona's August 30, 2021, order vacating and remanding the NWPR Rule in the case of *Pascua Yaqui Tribe v. U.S. Environmental Protection Agency*. In light of this order, the agencies halted implementation of the

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<sup>43</sup> Rapanos Guidance, 12.

<sup>44</sup> RFA, page 4

<sup>45</sup> [Current Implementation of Waters of the United States | US EPA](#), LAST UPDATED ON DECEMBER 20, 2021

NWPR nationwide and are interpreting “waters of the United States” consistent with the pre-2015 regulatory regime until further notice.<sup>46</sup>

Finally, for the reasons discussed above regarding the Arizona’s District Court ruling vacating the NWPR, the District was obligated to issue the AJD under the pre-2015 regulatory regime. Accordingly, this reason for appeal does not have merit.

**Action:** No further action required.

**Conclusion:** For the reasons stated above, I find that Appeal Reasons 1 and 2 have merit and that Appeal Reasons 3 and 4 do not have merit. The AR does not contain sufficient evidence to support the District’s determination that the tributary has the requisite perennial flow and that the wetlands abut RPWs that eventually flow directly or indirectly to the Amite River (TNW). The AJD is being remanded to the New Orleans District Engineer for reconsideration of the decision and additional documentation in accordance with 33 CFR 331.10(b) and consistent with the discussion above. Authority to make the final Corps decision on the AJD resides with the New Orleans District Engineer pursuant to this remand. This concludes the Administrative Appeal Process.

FOR THE COMMANDER:

16 MAR 2023  
(Date)

  
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Brian Oberlies  
Regulatory Appeals Review Officer

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<sup>46</sup> [Current Implementation of Waters of the United States | US EPA](#), LAST UPDATED ON DECEMBER 20, 2021