

**ADMINISTRATIVE APPEAL DECISION
DAN CORNELISON
APPROVED JURISDICTIONAL DETERMINATION
ROCK ISLAND DISTRICT
FILE NO. MVR-2021-00208**

Division Engineer: Major General Diana M. Holland, U.S. Army Corps of Engineers, Mississippi Valley Division, Vicksburg, Mississippi¹

Review Officer: Mr. Jamie R. Hyslop, U.S. Army Corps of Engineers, Southwestern Division, Dallas, Texas

Appellant/Applicant: Mr. Dan Cornelison

Regulatory Authority: Section 404 of the Clean Water Act (CWA) (33 U.S.C §1344)

Date Acceptable Request for Appeal Received: July 16, 2021

Appeal Meeting: November 16, 2021

Summary of Appeal Decision: Mr. Dan Cornelison (Appellant) is appealing a U.S. Army Corps of Engineers (Corps) Rock Island District (District) approved jurisdictional determination (AJD) for an approximately 8-acre site located west of the City of Winterset in Madison County, Iowa (U.S. Army Corps of Engineers file number MVR-2021-00208).² In the Request for Appeal (RFA), the Appellant submitted one reason for appeal that asserted that the District incorrectly applied law, regulation, or officially promulgated policy when it determined that I-1 was a water of the United States (U.S.). For reasons detailed in this decision document the reason for appeal has merit. The AJD is remanded to the District for reconsideration.

Background Information: The Appellant's property is located west of the City of Winterset in Madison County, Iowa, Latitude 41.296619° North, Longitude -94.192409° West.³ The District's review included a field visit to the site on May 7, 2021.⁴ In

¹ Pursuant to 33 CFR § 331.3(a)(1), the division engineer has the authority and responsibility for administering the administrative appeal process. The division engineer may delegate the authority and responsibility of the administrative appeal process for approved jurisdictional determinations, including the final appeal decision. The Mississippi Valley Division Engineer was the decision authority regarding the merits of this appeal; however, the administrative review of this specific appeal was delegated to the Southwestern Division review officer. Regardless of this delegation, the Mississippi Valley Division Engineer retains overall responsibility for the administrative appeal process. The district engineer retains the final Corps decision-making authority for the approved jurisdictional determination.

² The AJD for the project site was made pursuant to regulations promulgated on April 21, 2020, at 33 CFR Part 328. All references in this decision document to regulation at 33 CFR Part 328 refer to those promulgated on April 21, 2020.

³ Administrative Record (AR) page 9.

⁴ AR pages 19-28

response to the Appellant's request, the District provided an AJD for the site on May 17, 2021, concluded I-1 was an intermittent tributary that was a water of the U.S., and E-2 had ephemeral flow and was not a water of the U.S.⁵ The Appellant submitted a complete RFA, which was received by the Mississippi Valley Division (Division) office on July 16, 2021. The Appellant disagreed with the District's conclusion that the I-1 feature is a water of the U.S., subject to jurisdiction under Section 404 of the Clean Water Act. The Appellant asserted that I-1 is a non-jurisdictional stream with ephemeral flow. The Appellant was informed by letter dated August 13, 2021 that the appeal was accepted.

Information Received and its Disposition During the Appeal

Title 33 Code of Federal Regulations (CFR) § 331.3(b)(2) states that, upon appeal of the District Engineer's decision, the Review Officer (RO) should conduct an independent review of the District's administrative record (AR) to examine the reasons for appeal cited by the Appellant. The District's AR is limited to information contained in the record as of the date of the Notification of Administrative Appeal Options and Process (NAO/NAP) form. Pursuant to 33 CFR § 331.2, no new information may be submitted on appeal. Neither the Appellant nor the District may present new information to the Division. To assist the Division Engineer in making a decision on the merits of the appeal, the RO may allow the parties to interpret, clarify, or explain issues and information already contained in the District's AR. Such interpretation, clarification, or explanation does not become part of the District's AR, because the District Engineer did not consider it in making the decision on the permit. However, in accordance with 33 CFR § 331.7(f), the Division Engineer may use such interpretation, clarification, or explanation in determining whether the District's AR provides an adequate and reasonable basis to support the District Engineer's decision. The information received during this appeal process and its disposition is as follows:

- A. RFA sent by the Appellant, received by the U.S. Army Corps of Engineers, Mississippi Valley Division (MVD) on July 16, 2021.
- B. Notice from MVD to the Appellant accepting the RFA met the required criteria for an administrative appeal, sent by letter dated August 13, 2021.
- C. The District provided a copy of the AR to the RO and the Appellant. The AR is limited to information contained in the record by the date of the NAO/NAP form. In this case, that date is May 17, 2021.⁶
- D. An appeal meeting was held on November 16, 2021. The meeting followed the agenda provided to the District and the Appellant by the RO via email on November 9, 2021.⁷

⁵ AR pages 6-13.

⁶ During the review of the AR, including the appeal meeting, it was discovered that the AJD form was incorrectly dated May 12, 2021. This date does not align with the May 17, 2021 date found on the NAO/NAP form and the AJD distribution letter. The correct date is May 17, 2021, when the AJD with the NAO/NAP form was sent to the Appellant.

⁷ The agenda was revised and resent to the District and the Appellant to include the Appellant's Consultant, Mr. Matt Castor, at the Appellant's request. Nothing else on the agenda changed.

- E. During the appeal meeting it was discovered there was a pdf error on AR page 65, which included a mapping figure that did not transfer properly to the AR when it was combined. During the appeal meeting the District provided the correct figure to the RO and the Appellant and the correct figure was added to the AR.
- F. For review and comment, on December 17, 2021, the RO emailed the Appellant and the District a draft memorandum for record (MFR) summarizing the topics discussed during the appeal meeting. Neither the Appellant nor the District provided comments on the draft MFR. The RO emailed final MFR to the Appellant and the District on January 7, 2022.

Evaluation of the Appellant's Reason for Appeal

REASON 1: The 720 linear feet of stream (I-1) is not a Water of the U.S. as it does not have intermittent or perennial flow.

FINDING: This reason for appeal has merit.

DISCUSSION: In the RFA, the Appellant stated that, "...the Corps of Engineers does not have jurisdiction of this matter (referring to I-1) because the 720 lineal feet of stream, that is the subject matter, is without a doubt ephemeral and not intermittent" and that it, "... is now a dry stream bed" and that on the May 7, 2021 site visit that "no water was flowing in the stream bed."

During the appeal meeting, the Appellant acknowledged that the I-1 feature occasionally ponds water in limited reaches, but not throughout the entire 720 linear feet. The Appellant stated that I-1 does not carry permanent or seasonal flow and that the feature only flows in direct response to heavy rain, only lasting a short time, is dry most of the year, and is therefore ephemeral (meaning surface water flowing or pooling only in direct response to precipitation⁸). The Appellant also stated during the appeal meeting that the only source of hydrology for I-1 is the upstream pond. The Appellant explained that the existing pond captures and stores most rain events and that only after prolonged heavy rain does the pond discharge water through the primary spillway to the I-1 feature. The Appellant believes that I-1 only has ephemeral flow and therefore is not a water of the U.S.

The District concluded in the AJD that I-1 was jurisdictional as an intermittent tributary.⁹ The Navigable Waters Protection Rule defines intermittent as, "surface water flowing continuously during certain times of the year and more than in direct response to precipitation."¹⁰ Additionally, a jurisdictional tributary must contribute surface water flow to a territorial sea or traditional navigable water (TNW) in a typical year and have perennial or intermittent flow in a typical year.¹¹ The Appellant's assertion associated

⁸ 33 CFR § 328.3(c)(3).

⁹ AR pages 9-11.

¹⁰ 33 CFR § 328.3(c)(5).

¹¹ 33 CFR § 328.3(c)(12).

with this reason for appeal is focused on the tributary flow requirements, particularly flow frequency.

In order to document that a subject water contributes flow to a traditional navigable water in a typical year, the District must describe in the AR the flow path between the subject water and the nearest downstream traditional navigable water, and then discuss how the subject water contributes surface water flow to that traditional navigable water in a typical year.¹² The District stated in the AR that, “this stream flows directly into the Middle River”.¹³ The District acknowledged in the appeal meeting that the Middle River is not a TNW. The District did not describe a flow path between the I-1 feature and the nearest, downstream traditional navigable water in the AJD.¹⁴ The District did provide a statement regarding the hydrology of the site being in normal conditions and not in a drought within the “Typical Year Assessment” section of the AJD form (section III.B.), but did not address how that assessment related to contribution of flow to a downstream traditional navigable water in a typical year.¹⁵ As a result, the AJD lacks any discussion of whether the subject water contributes flow to the nearest, downstream traditional navigable water in a typical year and there is no analysis in the AR that supports this.

In order to document the flow frequency of a subject water, the District must support that the subject water has intermittent or perennial flow and then support that it flows as such in a typical year.¹⁶ During the appeal meeting, the District acknowledged that on the May 7, 2021 field visit they observed flowing water within the I-1 feature but not throughout the entire 720 linear foot reach. The District stated that during the field visit the I-1 feature had weakly flowing water in some areas, standing or ponding water with no flow in some areas, and some areas that were dry. In the AR, the District stated they walked the entire I-1 feature and observed Ordinary High Water Mark indicators and flowing water;¹⁷ however, the District did not provide any discussion as to how they used their observations to determine flow frequency. In addition, the District did reference the USGS topographic maps and Antecedent Precipitation Tool (APT) as supporting information for the AJD;¹⁸ however, the District did not provide any discussion as to how they used this information to support the AJD, particularly how they supported flow frequency (i.e., the District simply referenced the resource without any discussion). Finally, the District stated, “The APT shows that the site is in normal conditions and not in a drought”, in the “Typical Year Assessment” section of the AJD form (section III.B.) but did not address how that assessment supported that the I-1 feature has intermittent flow in a typical year.¹⁹ Based on this discussion, the AR lacks

¹² U.S. Army Corps of Engineers Interim Approved Jurisdictional Determination Form User Manual – Navigable Waters Protection Rule. Revised July 29, 2020. Page 11. The User Manual is found at <https://usace.contentdm.oclc.org/utis/getfile/collection/p16021coll11/id/4655>.

¹³ AR page 9.

¹⁴ AR pages 9.

¹⁵ AR page 10.

¹⁶ U.S. Army Corps of Engineers Interim Approved Jurisdictional Determination Form User Manual – Navigable Waters Protection Rule. Revised July 29, 2020. Page 11.

¹⁷ AR page 11.

¹⁸ AR page 9

¹⁹ AR page 10.

information to support that the feature is intermittent and flows as such in a typical year. Therefore, this reason for appeal has merit.

ACTION: The District shall reconsider its AJD by utilizing current applicable regulation, guidance, and policy to determine whether I-1 is a water of the U.S. If the District concludes I-1 is jurisdictional as a tributary, the AR should clearly document that I-1 satisfies the current definition of a jurisdictional tributary. The AR should be supplemented accordingly to document and reflect any additional information or data considered in this analysis. This documentation should include a revised AJD form that captures the rationale of the District's reconsidered decision.

Conclusion: For the reasons stated above, I have determined that this reason for appeal does have merit. The AJD is remanded to the Rock Island District for reconsideration consistent with the discussion detailed above. The final Corps decision on jurisdiction in this case will be the Rock Island District Engineer's decision made pursuant to this remand.

Date: May 3, 2022


Diana M. Holland
Major General, U.S. Army
Commanding