

ADMINISTRATIVE APPEAL DECISION
Mr. Dan Ward, Genesis 27:3, LLC
APPROVED JURISDICTIONAL DETERMINATION
Rock Island District
MVR-2022-01472

Division Engineer: Major General Kimberly Peeples, Mississippi Valley Division¹

Review Officer: Melinda Larsen, Northwestern Division

Appellant: Mr. Dan Ward, Genesis 27:3, LLC

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

Date Acceptable Request for Appeal Received: February 26, 2024

Date of Appeal Meeting: June 27, 2024

Summary of Appeal Decision: Mr. Dan Ward of Genesis 27:3, LLC (Appellant), is appealing the Approved Jurisdictional Determination, completed by the Rock Island District (District), and dated January 2, 2024. The Appellant submitted three reasons for appeal, asserting that the Approved Jurisdictional Determination is “arbitrary, capricious, an abuse of discretion, not supported by substantial evidence in the administrative record, [and] plainly contrary to a requirement of law.”² As detailed below, I find that reasons 1 and 2 have merit. Reason 3 does not have merit. Therefore, the Approved Jurisdictional Determination decision is being remanded to the Rock Island District Engineer for further analysis and documentation in accordance with 33 C.F.R. § 331.10(b).

Background Information: The review area is located at 30732 Wells Road, with the center of the property being at approximately latitude 40.5961, longitude -93.5816, near the town of Lineville, Decatur County, Iowa. The District received the Appellant’s application dated October 25, 2022 on October 26, 2022, requesting to build a pond on the property. In response to a request for information from the District, the Appellant submitted a delineation report on December 16, 2022. The District visited the site on April 10, 2023, and finalized an Approved Jurisdictional Determination on January 2, 2024. In the Approved Jurisdictional Determination, the District concluded that the U.S. Army Corps of Engineers (Corps) has Clean Water Act jurisdiction over an unnamed tributary to Caleb Creek, consisting of approximately 2,300 linear feet within the review area. The Appellant submitted a request for appeal to the Mississippi Valley Division on

¹ Pursuant to 33 CFR 331.3(a), the division engineer has the authority and responsibility for administering the administrative appeal process. While the review officer served to assist the division engineer in reaching and documenting the division engineer’s decision, the division engineer made the final decision on the merits of this specific appeal. The district engineer retains the final Corps decision-making authority for the Approved Jurisdictional Determination.

² RFA p.2, citing 33 C.F.R. § 331.9(b)

February 26, 2024. On February 27, 2024, Mississippi Valley Division requested assistance from Northwestern Division in review of the subject appeal. Northwestern Division accepted the request for assistance and the request for appeal was deemed complete and was accepted on March 14, 2024.

Information Received and its Disposition During the Appeal: The Administrative Record is limited to information contained in the record as of the date of the Notification of Administrative Appeal Options and Process form, which is January 2, 2024. No new information may be submitted on appeal; however, to assist the Division Engineer in making a decision on the appeal, the Review Officer may allow the parties to interpret, clarify, or explain issues and information already contained in the Administrative Record. Such interpretation, clarification, or explanation does not become part of the Administrative Record because the District Engineer did not consider it in making the Approved Jurisdictional Determination decision. Consistent with Corps regulations, the Division Engineer may use such interpretation, clarification, or explanation in determining whether the Administrative Record 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. Request for Appeal sent by the Appellant's counsel, Mr. Charles Yates, of Pacific Legal Foundation, received by Mississippi Valley Division on February 26, 2024.
2. Notice from Northwestern Division to the Appellant accepting the request for appeal and stating that the request met the required criteria for an administrative appeal, sent by letter dated March 14, 2024.
3. The AR, a copy of which the District provided to Northwestern Division and the Appellant on March 21, 2024.
4. An informal appeal meeting and site visit, in accordance with 33 C.F.R. § 331.7 on June 27, 2024. The goal of the conference was to summarize and clarify the Appellant's and the District's positions as they relate to the appeal. Topics discussed at the appeal conference are summarized in the document titled "Final MFR - MVR-2022-01472 Genesis 27_3 Dan Ward." A draft of this document was circulated to the appeal meeting attendees on July 3, 2024, and finalized on July 16, 2024.
5. In response to questions from the Review Officer, the District identified five documents that were inadvertently left out of the Administrative Record when it was transmitted to the Appellant and the Review Officer. These documents were appended to the Administrative Record on July 12, 2024, and consist of the following bates numbered pages: AR138a, 138b, 140a, 141b, and 141c.

Waters of the United States: Waters of the United States are those waters that are subject to Corps jurisdiction under Section 404 of the Clean Water Act. The final "Revised Definition of 'Waters of the United States'" rule was published in the Federal

Register on January 18, 2023, and took effect on March 20, 2023 (2023 rule). In light of the May 25, 2023, decision in *Sackett v. EPA*, (*Sackett*) the 2023 rule was amended by the conforming rule, which took effect on September 8, 2023. However, due to litigation, the 2023 Rule, as amended, is not currently operative in certain states and for certain parties due to litigation. Where the 2023 rule, as amended, is not operative, the pre-2015 regulatory regime³ is in effect. Under both regimes, the U.S. Environmental Protection Agency and the Department of the Army (the agencies) are interpreting “waters of the United States” consistent with the Supreme Court’s decision in *Sackett*.⁴ The subject Approved Jurisdictional Determination appeal is located in Iowa, which, as of the date of the District’s decision, is one of the states where the pre-2015 regulatory regime is in effect.⁵

The U.S. Environmental Protection Agency, in discussing the effects of *Sackett*, points out that although the 2023 rule was not directly in front of the court, it did consider the jurisdictional standards set forth in that rule:

In *Sackett*, the Court “conclude[d] that the Rapanos plurality was correct: the [Clean Water Act]’s use of ‘waters’ encompasses ‘only those relatively permanent, standing or continuously flowing bodies of water “forming geographic[al] features” that are described in ordinary parlance as “streams, oceans, rivers, and lakes.”’” *Id.* at 1336 (quoting *Rapanos*, 547 U.S. at 739).” The Court also “agree[d] with [the plurality]’s formulation of when wetlands are part of ‘the waters of the United States,’” *id.* at 1340-41: “when wetlands have ‘a continuous surface connection to bodies that are “waters of the United States” in their own right, so that there is no clear demarcation between “waters” and wetlands.”’” *Id.* at 1344 (citing *Rapanos*, 547 U.S. at 742, 755). The Court concluded that the significant nexus standard is inconsistent with the Clean Water Act.^{6,7}

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

³ The “pre-2015 regulatory regime” refers to the agencies’ pre-2015 definition of “waters of the United States,” implemented consistent with relevant case law and longstanding practice, as informed by applicable guidance, training, and experience.

⁴ Coordination Process Update: Joint Coordination Memoranda to the Field Between the U.S. Department of the Army, U.S. Army Corps of Engineers (Corps) and the U.S. Environmental Protection Agency; corrected version, April 30, 2024; [https://www.epa.gov/system/files/documents/2024-04/Approved Jurisdictional Determinationcoordinationupdatereport_april2024.pdf](https://www.epa.gov/system/files/documents/2024-04/Approved_Jurisdictional_Determinationcoordinationupdatereport_april2024.pdf)

⁵ *Operative Definition of “Waters of the United States”* [jpg map image]; Environmental Protection Agency, <https://www.epa.gov/wotus/definition-waters-united-states-rule-status-and-litigation-update>

⁶ *Ibid.*

⁷ The Approved Jurisdictional Determination review area in question does not contain wetlands, so this portion of the *Sackett* decision is not applicable.

REASON FOR APPEAL 1: The unnamed tributary is not a relatively permanent water and the Approved Jurisdictional Determination therefore contravenes *Sackett*'s test for Clean Water Act jurisdiction.

The Appellant asserts that the unnamed tributary is not a relatively permanent water because it does not satisfy the test for Clean Water Act jurisdiction as a relatively permanent water. Specifically, the Appellant points out that "In *Sackett*, the Supreme Court held that the Corps' authority to regulate "waters" "encompasses" (1) "only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic[al] features' that are described in ordinary parlance as 'streams, oceans, rivers, and lakes,'" 598 U.S. at 671 (quoting *Rapanos*, 547 U.S. at 739)."

The Appellant further asserts that the unnamed tributary is typically dry, contains no standing or flowing water, and even after periods of rainfall, only contains isolated pools of standing water. The Appellant states that the District improperly relied on a single day observation of unquantified flow of an unknown duration to conclude that the unnamed tributary is a relatively permanent water.

The Appellant summarizes reason for appeal 1 with the following: "The unnamed tributary does not satisfy *Sackett*'s requirements for Clean Water Act regulation. As a matter of law, it is not a "water of the United States." The District Engineer therefore acted contrary to, and in excess of, the Clean Water Act's grant of authority to regulate only "navigable waters," defined as "the waters of the United States," 33 U.S.C. §§ 1344(a), 1362(7), (12), when it issued the Approved Jurisdictional Determination."

FINDING: This reason for appeal has merit.

ACTION: Reason for appeal 1 is remanded to the Rock Island District Engineer for reconsideration, additional evaluation, and documentation sufficient to support the decision. Specifically, the District should re-evaluate the status of the unnamed tributary and provide complete and detailed rationale supporting its conclusions, in accordance with the current regulatory regime. The District should ensure that its conclusions are supported by substantial evidence in the Administrative Record. More information is provided in the discussion below.

DISCUSSION: The Appellant believes the subject unnamed tributary is not a water of the United States, because it does not meet the definition of a relatively permanent water.

For purposes of identifying a relatively permanent water in accordance with the pre-2015 regulatory regime consistent with *Sackett*, the relevant regulations and guidance

include the 1986 regulations,⁸ the Rapanos guidance,⁹ and implementation materials provided to the agencies by their respective headquarters after the *Sackett* decision¹⁰. The 1986 regulations include tributaries as a jurisdictional category of waters but do not define what a tributary is. The Rapanos guidance indicates that the agencies will assert jurisdiction over non-navigable tributaries of traditional navigable waters that are relatively permanent, where the tributaries typically flow year-round or have continuous flow at least seasonally (e.g., typically three months). The Rapanos guidance also describes tributaries as including “natural, man-altered, or man-made water bodies that carry flow directly or indirectly into a traditional navigable water”¹¹ and states that a non-navigable tributary of a traditional navigable water is a non-navigable water body whose waters flow into a traditional navigable water either directly or indirectly by means of other tributaries.¹² The Rapanos guidance further states that “relatively permanent” waters do not include ephemeral tributaries which flow only in response to precipitation and intermittent streams which do not typically flow year-round or have continuous flow at least seasonally.¹³ The training materials provided to agency staff and the public after the *Sackett* decision reiterate the definitions from the Rapanos guidance and make it clear that non-relatively permanent tributaries that do not fit into another jurisdictional category are no longer jurisdictional.¹⁴

In its “Memorandum for Record, Subject: U.S. Army Corps of Engineers (Corps) Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023) , 2022-1472” (Approved Jurisdictional Determination MFR)¹⁵, the District described the unnamed tributary reach as approximately 3,500 feet in length, with a general channel width of three to five feet, with isolated larger areas. The District stated (in part):

The stream was determined to be a relatively permanent water based on the use of the Antecedent Precipitation Tool and seasonal flow. Attached documentation illustrates that the review area had flow during the normal wet time of the year (seasonally). The exact duration of the flow was not determined, but through the Antecedent Precipitation Tool, it was determined that rainfall prior to the visit was normal. Water was observed in the stream channel for most of the review area. Other photos provided to the Corps were from times of the year when the stream

⁸ Federal Register / Vol. 51, No. 219 / Thursday, November 13, 1986 / Rules and Regulations; p. 41250.

⁹ Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in *Rapanos v. United States* & *Carabell v. United States*, December 2, 2008; p.1. (Rapanos guidance).

¹⁰ Presentation, “Updates for Tribes and States on “Waters of the United States”:
https://www.epa.gov/system/files/documents/2023-11/wotus-overview_tribes-and-states_11-15-23_508.pdf.

¹¹ Rapanos Guidance; p. 6, footnote 24.

¹² Rapanos Guidance; p.6-7.

¹³ Rapanos Guidance; p. 7.

¹⁴ Presentation, “Updates for Tribes and States on “Waters of the United States”:
https://www.epa.gov/system/files/documents/2023-11/wotus-overview_tribes-and-states_11-15-23_508.pdf, Slides 44-45.

¹⁵ AR 012-019.

channel is expected to be dry. According to the Antecedent Precipitation Tool and after matching the photos with the Antecedent Precipitation Tool, it was determined that this area of Iowa had been under drought conditions for most of the summer of 2023.

The channel width varies through the reach area. Generally, it is between 3 to 5 feet wide, with isolated areas larger. Flow in the narrow areas was concentrated and the water width was one to two feet wide. There is evidence on the photos that show scour in the channels during periods of heavier flow with deposition on the inside of the channel. This stream has the ability to move materials of various size.¹⁶

The “attached documentation” referenced in the first paragraph above appears to refer to photos taken by the District on April 10, 2023,¹⁷ photos taken by the Appellant during the subsequent summer of 2023¹⁸, the associated Antecedent Precipitation Tool reports, and some Lidar and infrared images. There is no information in the Administrative Record supporting that the unnamed tributary exhibits “seasonal flow”, outside of photos taken during the site visit. The analysis also lacks context as to what information gleaned from the Lidar and infrared photos contributed to the District’s conclusions. In addition, the District does not make clear what relevance the observations of scour and deposition or “ability to move materials of various sizes” has to the conclusion that the unnamed tributary is a relatively permanent water. The photos are discussed further in reason for appeal 2, below.

In section 10 of the MFR “Other Supporting Information,”¹⁹ the District states that:

The determination of relatively permanent water for this area was made through use many tools and on-site visits. The tributary flows in a seasonal and predictable manner during the spring when groundwater may be present. Using the Guidance provided by the Environmental Protection Agency, the Corps determined that this stream satisfies the relatively permanent standard for streams of this type in this area.

Photos submitted by the Appellant,²⁰ taken during the summer of 2023, and supplemented by the District with Antecedent Precipitation Tool reports, show a dry feature during dryer than normal conditions. Photos submitted by the consultant,²¹ taken in December 2022, also show a lack of standing or flowing water, but are not accompanied by an Antecedent Precipitation Tool report that demonstrates what the precipitation conditions were at that time. Based on the Antecedent Precipitation Tool

¹⁶ AR 042.

¹⁷ AR 053-057

¹⁸ AR 020-024.

¹⁹ AR 045.

²⁰ AR 020-024.

²¹ AR 070-076.

report for April 10, 2023, the District's site visit occurred during a time of normal rainfall conditions. However, this is not enough information to support the District's determination that the unnamed tributary flows in a "seasonal and predictable manner". Because the District's conclusion was not supported by sufficient information or analysis, reason for appeal 1 has merit.

REASON FOR APPEAL 2: The Approved Jurisdictional Determination is arbitrary and capricious and is unsupported by substantial evidence.

The Appellant states that numerous photographs taken between May and August 2022 show no flowing or standing water. These photographs were provided to the District by the Appellant, and the District dismissed them due to "drier than normal conditions". Additional photographs provided by the Appellant were taken in December 2022 which also show no flowing or standing water in the tributary, and the data shows an abnormally large amount of precipitation in November and December 2022. The Appellant asserts that this shows inconsistency in the Administrative Record as to the effect of rainfall on the unnamed tributary, and that the District makes no effort in the Administrative Record to reconcile the inconsistency. Further, the Appellant states that the District relied partially on a determination that "groundwater may be present" in the tributary during the spring, "yet a consultant report submitted to the District Engineer by Appellants concludes—based on site visits conducted during June and December of 2022—that "[n]o groundwater connection appears to be present as indicated by the soil borings, limited flows during rain events, and direct visual observations of the dry drainageway with no seepage from the banks." The Appellant again states that the District failed to acknowledge or reconcile this inconsistency.

FINDING: This reason for appeal has merit.

ACTION: Reason for appeal 2 is remanded to the Rock Island District Engineer for reconsideration, additional evaluation, and documentation sufficient to support the decision. Specifically, the District should re-evaluate the status of the unnamed tributary and provide complete and detailed rationale supporting its conclusions, in accordance with the current regulatory regime. Further, the District should ensure that its conclusions are supported by substantial evidence in the Administrative Record. More information is provided in the discussion below.

DISCUSSION: As discussed above in reason for appeal 1, to constitute a relatively permanent water, the feature must exhibit continuous flow at least seasonally (e.g. typically three months). Although the photos from the District site visit on April 10, 2023²² do show water in the channel, the District does not provide any additional information to demonstrate that the unnamed tributary contains continuous flow at least seasonally. The Antecedent Precipitation Tool report for April 10, 2023²³ shows normal

²² AR 053-057

²³ AR 058

precipitation conditions, but the District provides no other evidence to support the conclusion that the unnamed tributary represents a relatively permanent water. The District even states that “the exact duration of flow was not determined”. Although “exact” duration of flow isn’t necessarily a requirement to conclude a feature is a relatively permanent water, evidence that shows flow “at least seasonally” would be necessary to support that a feature is a relatively permanent water.

Additionally, the statement “in the spring when groundwater may be present” is not supported by any information or analysis in the Administrative Record. The Appellant is correct that information submitted by the consultant contradicts this statement and there is no discussion in the AR supporting the District reaching a different conclusion than the consultant. In the “Waters of the US Delineation Report for Decatur County Pond Design,” dated December 16, 2022, the consultant stated:

Visual observation of the drainageway over the last 4 years indicates that water flows in the channel for very short periods of heavier precipitation and then ceases. No groundwater connection appears to be present as indicated by the soil borings, limited flows during rain events, and direct visual observations of the dry drainageway with no seepage from the banks.²⁴

The District does not offer contradictory data, rather it offers an alternative judgement that is not supported by data in the Administrative Record.

Regulatory Guidance Letter 16-01²⁵, Q&A #8, provides information as to how Approved Jurisdictional Determinations are to be documented, and states, in part:

Corps districts will ensure that the information in the file adequately supports any Approved Jurisdictional Determination. The file shall, to the maximum extent practicable, explain the rationale for the determination, disclose the data and information relied upon, and, if applicable, explain what data or information received greater or lesser weight, and what professional judgment or assumptions were used in reaching the determination.

When a district disagrees with information submitted by a requestor, it should clearly state what information it is disagreeing with, and why, and support its conclusions with additional data. Because the District’s conclusions were not supported by sufficient information or analysis, reason for appeal 2 has merit.

REASON FOR APPEAL 3: The unnamed tributary never has been and never could be, used as a highway of interstate or foreign commerce, and therefore cannot be regulated under the Clean Water Act.

²⁴ AR 067

²⁵ https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/juris_info/

In this reason for appeal, the Appellant points to the commerce clause in the Constitution, and cites several court decisions (most notably, *SWANCC*, *Rapanos*, and *Sackett*), to support an argument that because the District did not provide evidence that the unnamed tributary itself could serve as a highway of interstate or foreign commerce, “the Corps presses its authority to the outer limits of Congress’ power to regulate the channels of interstate commerce and raises serious constitutional federalism questions.”²⁶

FINDING: This reason for appeal does not have merit.

ACTION: No action.

DISCUSSION: Regulations are promulgated by agencies to implement the laws that are passed by Congress. It is not within a District Engineer’s authority or scope of expertise to determine if regulations appropriately interpret Congress’s intent or the Supreme Court’s decisions. District Engineers, and by extension, regulatory staff, apply regulation, guidance, and policy that is promulgated by the agencies in response to such decisions or actions by Congress and the courts. The sufficiency of regulation, guidance, and policy available to a district is also beyond the scope of the administrative appeal process. Administrative appeal reviews determine if District decisions were finalized in accordance with law, regulations, and officially promulgated policy guidance that was in place at the time that the District’s decision was finalized. Administrative appeals are specific to the decision being appealed and the reasons for appeal are limited to, for example, a district’s application of regulation, guidance, or policy specific to that decision. This reason for appeal does not have merit.

CONCLUSION: After reviewing and evaluating the Appellant’s reasons for appeal, the District’s Administrative Record, and recommendation of the Review Officer, and for the reasons stated above, I find that this appeal has merit, as detailed in reasons for appeal 1 and 2, above. Therefore, the Approved Jurisdictional Determination decision is being remanded to the Rock Island District Engineer for further analysis and documentation in accordance with 33 C.F.R. § 331.10(b). The District Engineer’s decision made pursuant to this remand becomes the final Corps permit decision. This concludes the Administrative Appeals Process.

October 1, 2024
[DATE OF APPEAL DECISION]


Major General Kimberly Peoples,
Commander, Mississippi Valley Division

²⁶ Request for Appeal p. 13-14