

**ADMINISTRATIVE APPEAL DECISION  
SOLID WASTE MANAGMENT COMMISSION OF MARSHALL COUNTY  
APPROVED JURISDICTIONAL DETERMINATION  
ROCK ISLAND DISTRICT  
CEMVR-RD-2022-00722**

**Division Engineer:** MAJOR GENERAL KIMBERLY A. PEEPLES, MISSISSIPPI VALLEY DIVISION<sup>1</sup>

**Review Officer:** ANDREW DANGLER, NORTH ATLANTIC DIVISION

**Appellant/Applicant:** THE SOLID WASTE MANAGEMENT COMMISSION OF MARSHALL COUNTY

**Regulatory Authority:** SECTION 404 OF THE CLEAN WATER ACT (33 USC § 1344)

**Date Acceptable Request for Appeal Received:** APRIL 23, 2024

**Date of Appeal Meeting:** JULY 2, 2024

**Date of Site Visit:** N/A

**Summary of Appeal Decision:** The Solid Waste Management Commission of Marshall County (Appellant), represented by its agent, Emmons & Oliver Resources, Inc., is appealing a U.S. Army Corps of Engineers, Rock Island District, (District), approved jurisdictional determination issued for an approximately 415.6-acre site located at Sections 31-32, Township 84 North, Range 18 West and Sections 5-6, Township 83 North, Range 18 West, Marshall County, Iowa (U.S. Army Corps of Engineers file number CEMVR-RD-2022-00722).<sup>2</sup> Within the Request for Appeal, the Appellant submitted the following two (2) reasons for appeal: Reason 1) the District incorrectly applied law, regulation, or officially promulgated policy when it determined that Unnamed Tributary B has a contiguous hydrologic connection with nearest downstream traditional navigable water the Iowa River, and therefore identified Unnamed Tributary B as a water of the United States (U.S.), subject to jurisdiction under Section 404 of the Clean Water Act; and Reason 2) the District incorrectly applied law, regulation, or officially promulgated policy when it determined that Unnamed Tributary C has a contiguous hydrologic connection with nearest downstream traditional navigable water, the Iowa River, and is therefore identified Unnamed Tributary C as a water of U.S., subject to jurisdiction under Section 404 of the Clean Water Act. As detailed below, I find that reasons 1 and 2 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).

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<sup>1</sup> 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.

<sup>2</sup> Administrative Record 015-016.

**Background Information:** The Appellant's property is located at 2013 Marshalltown Boulevard in Ankeny, Marshall County, Iowa, 42.029625 Latitude, -92.982519 Longitude. On May 17, 2022, the District received a request for an approved jurisdictional determination from the Appellant for the subject site.<sup>3</sup> The request included the report entitled: "A Wetland Delineation Report for Proposed Development of a Solid Waste Management Commission of Marshall County Property in Marshall County, Iowa", dated May 2022, and prepared by Rolling Hills Consulting Services, L.L.C.<sup>4</sup> On December 8, 2022, the District sent a request for information to the Appellant's agent, Rolling Hills Consulting Services, L.L.C, requesting that additional sampling be conducted at the site to support the findings of the delineation report. Further, within its request, the District stated that the streams present on the site will most likely be jurisdictional.<sup>5</sup> In response to the District's request, the Rolling Hills Consulting Services, L.L.C provided a correspondence dated December 23, 2022, which provided further detail of the sampling methodology they utilized and provided additional information on the existing conditions of the 1,051 linear foot reach of Linn Creek that is present within the site. Specifically, the correspondence states that "unlike the other drainageways (artificial or natural), this creek appears to have a defined bed, bank, ordinary water marks, and sorts sediment during heavy rainfall".<sup>6</sup> On July 10, 2023, the Appellant provided the report entitled: "A Wetland Delineation Report for Proposed Development of a Solid Waste Management Commission of Marshall County Property in Marshall County, Iowa", dated June 2023, and prepared by Rolling Hills Consulting Services, L.L.C (wetland delineation report).<sup>7</sup> On August 31, 2023, the District conducted a site visit at the subject property. On February 8, 2024, the District conducted the required local level draft approved jurisdictional determination coordination in accordance with the September 27, 2023, Army/EPA Memorandum entitled: "U.S. Department of the Army, U.S. Army Corps of Engineers (Corps) and U.S. Environmental Protection Agency (EPA) Coordination of draft approved jurisdictional determinations under the "pre-2015 regulatory regime" in light of Sackett".<sup>8</sup> The District received no response from the agencies within the 10-day response deadline (February 22, 2024) described in Section II.D of the memorandum and on February 28, 2024, finalize the approved jurisdictional determination. Within the approved jurisdictional determination, the District concluded that the U.S. Army Corps of Engineers has Clean Water Act jurisdiction over a total of 1.81 acres of wetland identified as Emergent Wetlands 1 & 2; 7.11 acres of open water (ponds) identified as Fresh Water Ponds 1, 2, 3 & 4; and 12,708.78 linear feet of stream channel, identified as Linn Creek and Unnamed Tributaries A, B, C & E.

The flow route to the traditional navigable water identified by the District is that Unnamed Tributary B and Unnamed Tributary C flow [independently] into Unnamed Tributary A, which flows to Linn Creek, which flows directly into the Iowa River, a traditionally navigable water, which is located approximately 198 miles from the subject site.<sup>9 10</sup>

The Appellant submitted a request for appeal to the Mississippi Valley Division (Division) on April 23, 2024. On April 24, 2024, MVD requested assistance from the North Atlantic Division

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<sup>3</sup> AR 343.

<sup>4</sup> AR 278-339.

<sup>5</sup> AR 270-271.

<sup>6</sup> AR 272-276.

<sup>7</sup> AR125-262.

<sup>8</sup> [https://epa.gov/system/files/documents/2023-10/2023-joint-coordination-memo-pre-2015-regulatory-regime\\_508c.pdf](https://epa.gov/system/files/documents/2023-10/2023-joint-coordination-memo-pre-2015-regulatory-regime_508c.pdf).

<sup>9</sup> AR 033.

<sup>10</sup> AR 078.

(NAD) in review of the subject appeal. NAD accepted the request for assistance, and the request for appeal was deemed complete and was accepted on May 23, 2024.

**Information Received and its Disposition During the Appeal Review:** The Administrative Record is limited to information contained in the record as of the date of the Notification of Administrative Appeal Options and Process (NAO/NAP) form, which is February 28, 2024. 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 Review Officer may allow the parties to interpret, clarify, or explain issues and information already contained within 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 decision on the approved jurisdictional determination. However, in accordance with 33 CFR § 331.7(f), 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 reasons for appeal were evaluated based on the District's Administrative Record and the Appellant's Request for Appeal. The Administrative Record is limited to information contained in the Administrative Record as of the date of the February 28, 2024, approved jurisdictional determination.

The information received during this appeal review and its disposition is as follows:

1. The Request for Appeal submitted by the Appellant's agent, Kevin Griggs, of Emmons & Oliver Resources, Inc, to the Mississippi Valley Division via an email correspondence dated April 23, 2024.
2. By email correspondence dated April 26, 2024, the Review Officer forwarded the Request for Appeal to the District and requested that the District review the Request for Appeal to determine if it contained any new information, confirm that the subject approved jurisdictional determination is not part of a pending enforcement action, and provide the Review Officer with a complete copy of the approved jurisdictional determination decision. By email correspondence dated May 3, 2024, the District provided the Review Officer with a complete copy of the approved jurisdictional determination decision, confirmed that the Request for Appeal did not contain any new information and confirmed that the subject approved jurisdictional determination is not associated with any pending enforcement actions.
3. By letter dated May 23, 2023, the Review Officer informed the Appellant and the District that the appeal had been accepted. By email correspondence dated May 24, 2024, the Review Officer requested that the District provided the Review Officer and the Appellant with a complete copy of the Administrative Record.
4. The District provided a copy of the Administrative Record to the Review Officer, the Appellant and the Appellant's agent on June 11, 2024. The Administrative Record is limited to information contained within the record prior to the date of the approved jurisdictional determination and NAO/NAP form. In this case, that date is February 28, 2024.
5. An informal appeal meeting was held on July 12, 2024. The meeting followed the agenda provided to the District and the Appellant by the Review Officer via email on July 2, 2024. The goal of the meeting was to summarize and clarify the Appellant's and the District's positions as they relate to the appeal. Topics discussed at the appeal meeting are summarized

in the document titled "Memorandum for Record of 12 July 2024 Appeal Meeting for the Solid Waste Management Commission of Marshall County Appeal of Approved Jurisdictional Determination - File Number CEMVR-2022-00722". A draft of this document was circulated to the appeal meeting attendees for review on July 16, 2024, and was finalized on July 22, 2024.

6. In response to the questions from the Review Officer, the District provided an email correspondence dated July 15, 2024, which included one (1) attached document that consolidated all the emails related to the August 31, 2023, site visit. These emails were inadvertently left out when the District transmitted the Administrative Record to the Appellant and Review Officer. These documents were appended to the Administrative Record on July 15, 2024, and consist of the following bates numbered pages: Pages 117A through 117G.

**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*, 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 regime<sup>11</sup> is in effect. Under both regimes, the EPA, and the Department of the Army ("the agencies") are interpreting "waters of the United States" consistent with the Supreme Court's decision in *Sackett*.<sup>12</sup> The subject approved jurisdictional determination appeal is located within 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.<sup>13</sup>

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

The reasons for appeal described below are based on the Appellant's Request for Appeal but have been rephrased to clearly describe the findings that must be made regarding this appeal. The review is limited to whether the District examined the relevant data and articulated a satisfactory explanation for its action including a rational connection between the facts found and the decision made.

**Reason for Appeal 1:** The District incorrectly applied law, regulation, or officially promulgated policy when it determined that Unnamed Tributary B has a defined continuous hydrologic connection to the nearest downstream traditional navigable water, the Iowa River, and therefore erroneously identified Unnamed Tributary B as a water of the U.S., subject to U.S. Army Corps of Engineers jurisdiction under Section 404 of the Clean Water Act.

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

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<sup>11</sup> 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.

<sup>12</sup> 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 (EPA); corrected version, April 30, 2024; [https://www.epa.gov/system/files/documents/2024-04/ajdcoordinationupdatereport\\_april2024.pdf](https://www.epa.gov/system/files/documents/2024-04/ajdcoordinationupdatereport_april2024.pdf).

<sup>13</sup> See: <https://www.epa.gov/wotus/definition-waters-united-states-rule-status-and-litigation-update>

**Action:** The approved jurisdictional determination is remanded to the Rock Island District Engineer for reconsideration, additional evaluation, and documentation sufficient to support the decision. Specifically, the District must re-evaluate the status of UT B and provide a complete and detailed rationale supporting its conclusions, in accordance with applicable laws, regulation, and policy. The District must ensure that its conclusions of the reconsidered approved jurisdictional determination are supported by substantial evidence in the Administrative Record. More information is provided below.

**Discussion:** The Request for Appeal disputes that Unnamed Tributary B has a defined hydrologic connection to Unnamed Tributary A, and therefore has no continuous hydrologic connection to the nearest downstream traditional navigable water (Iowa River), as described by the District within the approved jurisdictional determination, thus rendering it non-jurisdictional. The Appellant notes that the upper reach of Unnamed Tributary B exhibit traditional stream characteristics but asserts that the downstream reach of Unnamed Tributary B, located within the vicinity of any potential downstream confluence with Unnamed Tributary A, does not exhibit any of these characteristics. Specifically, the Appellant notes that the topography within this area flattens, and Unnamed Tributary B no longer exhibits a bed or banks, an ordinary high-water mark, a defined channel, or evidence of sediment sorting. The Appellant concludes that the absence of these characteristics and lack of a defined connection to Unnamed Tributary A, sheds doubt on the jurisdiction of Unnamed Tributary B.

The Rapanos guidance describes tributaries as including “natural, man-altered, or man-made water bodies that carry flow directly or indirectly into a traditional navigable water”<sup>14</sup> 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.<sup>15</sup>

The U.S. Army Corps of Engineers is responsible for performing jurisdictional determinations in a Clean Water Act Section 404 context and documenting the basis of the jurisdictional determination as defined in 33 C.R.F. 331.2. Staff are expected to exercise appropriate judgment and use appropriate information when making jurisdictional determinations.<sup>16</sup>

Additional documentation and processing guidance for approved jurisdictional determinations is provided in Regulatory Guidance Letter (RGL) 16-01. Importantly, the RGL explains that “[d]istricts should ensure the documentation used to support the approved jurisdictional determination addresses any objections from approved jurisdictional determination requestors and/or consultants [and] [i]f the requestor submits materials with which the districts do not agree or do not concur (e.g., wetland delineation report), the districts should clearly document the reasons for reaching a contrary conclusion.”<sup>17</sup>

Regulatory Guidance Letter 05-05 (RGL 05-05) provides guidance specific to identifying and documenting the limits of non-tidal and non-wetland waters based on the OHWM within jurisdictional determinations under Section 404 of the Clean Water Act and under Sections 9

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<sup>14</sup> Rapanos Guidance; p. 6, footnote 24.

<sup>15</sup> Rapanos Guidance; p.6-7.

<sup>16</sup> Questions and Answers for RGL 16-01, #4, available at: <https://usace.contentdm.oclc.org/utils/getfile/collection/p16021coll9/id/1256>.

<sup>17</sup> Questions and Answers for RGL 16-01, #8.

and 10 of the Rivers and Harbors Act of 1899.<sup>18</sup> RGL 05-05 states “Districts will document in writing the physical characteristics used to establish the ordinary high-water mark for Clean Water Act and/or Rivers and Harbors Act of 1899 jurisdiction. If physical characteristics are inconclusive, misleading, unreliable, or not evident, the Districts’ written documentation will include information about the physical characteristics (or lack thereof) and other appropriate means that consider the characteristics of the surrounding areas, which it used to determine the ordinary high-water mark”.<sup>19</sup> Further, RGL 05-05 states that “documentation within the Administrative Record will allow for reasonably accurate replication of the determination at a future date. In this regard, documentation normally includes information such as data sheets, site visit memoranda, maps, sketches, and, in some cases, surveys and photographs documenting the ordinary high-water mark”.<sup>20</sup>

Within its “Memorandum for Record, Subject: US Army Corps of Engineers (Corps) Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), CEMVR-RD-2022-0722” (AJD MFR),<sup>21</sup> dated February 8, 2024, the District describes UT B as a 1016 foot long, relatively permanent water, with a defined bed, bank, and ordinary high-water mark.<sup>22</sup> Within Section 5 of the AJD MFR, the District describes the flow path of all the on-site unnamed tributaries, including Unnamed Tributary B, as follows: the unnamed tributaries drain south to Linn Creek, which drains north and east for approximately 198 miles to the Iowa River, which is a traditional navigable water.<sup>23 24</sup>

In Section 9 of the AJD MFR entitled “Data Sources”<sup>25</sup>, the District lists the resources they relied on to support the approved jurisdictional determination: the observations made during the August 31, 2023, site inspection and on the information provided within the wetland delineation report. However, the Administrative Record does not include a site inspection report or field notes that document the observations made during the site visit, but does include a total of 13 photographs taken during the site inspection, none of which are of Unnamed Tributary B.<sup>26</sup> During the appeal meeting, the District clarified that they did not inspect Unnamed Tributary B during the site visit due to thick vegetation that surrounds the area and that the primary purpose of the visit focused on confirming the extent of the on-site wetlands. The District stated that that they relied upon the photographs included on Page 172 of the Administrative Record. The District noted that within one of the photographs, water was present in the channel. However, based on the general directions provided in the labeling of the photographs, the photograph of the channel with water within it is not a photograph of Unnamed Tributary B but rather of Unnamed Tributary A. Specifically, Unnamed Tributary A is located to the north of the pond, not Unnamed Tributary B, which is located to the west of the pond. No evidence of a channel, such as the presence of bed and banks, indicators of an ordinary high-water mark, or confined flow are shown within the photograph facing west. Responding to a question posed by the RO during

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<sup>18</sup> Regulatory Guidance Letter (RGL) 05-05, SUBJECT: Ordinary High Water Mark Identification, dated 7 December 2005. RGLs are developed by Corps Headquarters to organize and track written guidance issued to the field offices and are intended to promote program consistency and efficiency across the nation. RGLs only interpret or clarify Regulatory Program policy or procedures; they do not change how to determine whether an aquatic resource is jurisdictional.

<sup>19</sup> RGL 05-05, 3(e)

<sup>20</sup> RGL 05-05, 3(f)

<sup>21</sup> AR 030-058.

<sup>22</sup> AR 031-032.

<sup>23</sup> AR 033.

<sup>24</sup> AR 078.

<sup>25</sup> AR 039.

<sup>26</sup> AR 114-117.

the appeal meeting, the Appellant confirmed that the Administrative Record does not contain any on-site photographs of Unnamed Tributary B's channel and/or its confluence with Unnamed Tributary A.

The section entitled "Other Waters of the U.S." within the wetland delineation report indicates that approximately 1,051 linear feet of Linn Creek intersects the southwest portion of the project area.<sup>27</sup> This section states that "the creek appears to have a defined bed, bank, and ordinary water mark and sorts sediment during heavy rainfall". This section also indicates that "several intermittent artificial and natural drainages also occur within the project area". This section provides a general statement which describes the intermittent drainages as shallow and narrow, with well-established channels. The section of the report entitled "Conclusions and Recommendations" indicates that approximately 1,051 linear feet of Linn Creek meanders through the southwest portion of the project area as well as artificial and natural drainage. Beyond this general information, the wetland delineation report does not provide specific information regarding the presence of a bed and banks, ordinary high-water marks or evidence of confined flow within any of the other on-site drainage channels, including Unnamed Tributary B. The December 23, 2022, correspondence from Rolling Hills Consulting Services, L.L.C. provides further detail on the condition of Linn Creek by specifically stating that "unlike the other drainageways (artificial or natural), this creek appears to have a defined bed, banks, and ordinary water marks, and sorts sediment during heavy rainfall".

Within the AJD MFR, the District provides five (5) undated images depicting the area within the confluence of Unnamed Tributary A and Unnamed Tributary B. The District notes that Unnamed Tributary B "appears to lose connection, however, from the aerial image from 1994, does appear to be connected".<sup>28</sup> During the appeal meeting the District clarified that it relied upon the information the Appellant provided in the wetland delineation report. Specifically, the District referenced the description of the area on Pages 134 and 136 of the Administrative Record to document the conditions of the on-site tributaries. The District stated that this information was further supported by the aerial photographs contained on Page 046 of the Administrative Record, which show a direct connection between Unnamed Tributary B and Unnamed Tributary A. As discussed above, this section of the wetland delineation report referenced by the District does not provide information which adequately documents the presence or absence of a bed and banks, ordinary high-water marks or evidence of confined flow within any of the on-site drainage channels, including Unnamed Tributary B.

Regulatory Guidance Letter 16-01,<sup>29</sup> 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.

By providing an approved jurisdictional determination, the District is providing a "definitive, official determination that there are, or there are not, jurisdictional aquatic resources on a

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<sup>27</sup> AR 136.

<sup>28</sup> AR 046

<sup>29</sup> [https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/juris\\_info/](https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/juris_info/)

parcel”,<sup>30</sup> including the correct limits of that jurisdiction. If a consultant’s delineation did not identify ordinary high-water marks in the project area, the District is required to ensure that all limits of jurisdiction and types of jurisdictional waters are correctly identified. The District’s conclusion within the approved jurisdictional determination that Unnamed Tributary B has a continuous hydrologic connection to the Iowa River is not supported by sufficient information or analysis and therefore are inconsistent with Corps regulation, policy, and guidance. For these reasons, the Appellant’s Reason for Appeal 1 is found to have merit.

**Reason for Appeal 2:** The District incorrectly applied law, regulation, or officially promulgated policy when it determined that Unnamed Tributary C has a defined, continuous hydrologic connection to the nearest downstream traditional navigable water, the Iowa River, and therefore identified Unnamed Tributary C as a water of the U.S., subject to U.S. Army Corps of Engineers jurisdiction under Section 404 of the Clean Water Act.

The Appellant asserts that Unnamed Tributary C is a constructed channelized surface drainage (ditch) of the upland active face of the landfill operation and routed along the access road’s north ditch. The Appellant states that the stream is regularly maintained via mechanical removal of accumulating sediment from the highly erosive landfill face. The Appellant indicated that an inspection of Unnamed Tributary C did not identify a defined bed and bank, an ordinary high-water mark, or evidence of sediment sorting due to recent excavation within the channel. Within this reason for appeal, the Appellant states that slight surface flow was observed within the channel of Unnamed Tributary C. However, as clarified during the appeal meeting, this information was obtained by the Appellant’s agent, Emmons & Oliver Resources, Inc, after the date of the Request for Appeal and is therefore considered to be new information. As this new information was not available to the District at the time it issued the approved jurisdictional determination, it is not being considered as part of this appeal.

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

**Action:** The approved jurisdictional determination is remanded to the Rock Island District Engineer for reconsideration, additional evaluation, and documentation sufficient to support the decision. Specifically, the District must re-evaluate the status of Unnamed Tributary C and provide complete and detailed rationale supporting its conclusions, in accordance with the Corps regulation, policy, and guidance. The District must ensure that its conclusions of the reconsidered approved jurisdictional determination are supported by substantial evidence in the Administrative Record. More information is provided below.

**Discussion:** Within its AJD MFR, the District describes Unnamed Tributary C as a 2,297.38 linear foot long relatively permanent water, with defined bed, bank, and an ordinary high-water mark.<sup>31</sup> Further, the District indicates that Unnamed Tributary C flows south and east through multiple culverts, to meet up with an Unnamed Tributary A to Linn Creek A (relatively permanent water). As stated above, the Request for Appeal indicates that Unnamed Tributary C is a constructed channelized surface drainage that is subject to regular maintenance which involves mechanical removal of accumulated sediment from within its channel. The Administrative Record contains no discussion or other documentation related to the natural or man-made

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<sup>30</sup> RGL 16-01, SUBJECT: Jurisdictional Determinations, dated October 2016

<sup>31</sup> AR 032.



nature of Unnamed Tributary C, any past or current maintenance activities that have occurred within the channel, nor what affect, if any, the maintenance activities have had upon the channel conditions or characteristics of Unnamed Tributary C. As noted above, per the Rapanos guidance, man-made or altered waterbodies that carry flow directly or indirectly to a traditional navigable water can be considered a tributary. The fact that Unnamed Tributary C is potentially man-made and/or has been altered by past landfill operations, including regular maintenance, would not exclude it from being considered a tributary, subject to Clean Water Act jurisdiction. However, as discussed above, it is incumbent upon the District to ensure that all limits of jurisdiction and types of jurisdictional waters are correctly identified and sufficiently documented within the Administrative Record to support conclusions of its approved jurisdictional determination. The District's conclusion within the approved jurisdictional determination that Unnamed Tributary C has a continuous hydrologic connection to the Iowa River is not supported by sufficient information or analysis and therefore are inconsistent with Corps regulation, policy, and guidance. For these reasons, the Appellant's Reason for Appeal 2 is found to have merit.

**Conclusion:** After reviewing and evaluating the Request for Appeal, the District's Administrative Record, and recommendation of the Review Officer, I find that the appeal has merit for the reasons stated above. Therefore, the approved jurisdictional determination is remanded to the Rock Island District Engineer for further analysis and documentation in accordance with 33 C.F.R. § 331.1(b). The Administrative Record must be supplemented accordingly to document and reflect any additional information or data considered in this analysis. This documentation should include a revised MFR that captures the rationale of the District's reconsidered decision. Authority to make the final U.S. Army Corps of Engineers decision on the jurisdictional determination resides with the Rock Island District Engineer pursuant to this remand. This concludes the Administrative Appeals Process.

24 OCT 2024

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DATE



KIMBERLY A. PEEPLES  
Major General, USA  
Commanding