

**ADMINISTRATIVE APPEAL DECISION
CLEAN WATER ACT
GREG POOR - FILE NO. CEMVR-OD-P-2018-0869
ROCK ISLAND DISTRICT**

Division Engineer: Richard G. Kaiser, Major General, U.S. Army Corps of Engineers, Mississippi Valley Division, Vicksburg, Mississippi

Review Officer (RO): Kyle Gordon, Regulatory Appeals Review Officer, U.S. Army Corps of Engineers, Mississippi Valley Division, Vicksburg, Mississippi¹

Appellant: Greg Poor

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

Receipt of Request for Appeal: November 19, 2018

Site Investigation and Appeal Meeting: February 12, 2019

Summary: Mr. Greg Poor (Appellant) is appealing the Rock Island District's (District) approved jurisdictional determination (AJD) which concluded that the U.S. Army Corps of Engineers (Corps) has Clean Water Act (CWA) jurisdiction over four wetlands totaling 3.791 acres on property located north of 27th Avenue and west of 19th Street in Pottawattamie County, Iowa (Site).

For reasons detailed in this appeal decision, I find that two of the Appellant's reasons for appeal have merit. Therefore, the AJD is remanded to the District for reconsideration and documentation. The final Corps decision on CWA jurisdiction in this case will be made by the Rock Island District Engineer.

Background Information: On July 17, 2018, the District received a Request for Corps Jurisdictional Determination from Mr. Michael Heller of JEO Consulting Group, Inc. (JEO), an agent acting on behalf of the Appellant.² The request received by the District included a report titled "Wetland Delineation Report" (Delineation Report) prepared by JEO. The Delineation Report identified and documented the presence wetlands in accordance with the 1987 Manual³ and the Regional Supplement.⁴ The District

¹ Pursuant to 33 CFR 331.3(a)(1), the Division Engineer has the authority and responsibility for administering the administrative appeal process. By memorandum dated October 31, 2017, the Mississippi Valley Division's (MVD) Division Engineer delegated the decision authority on the merits of appeals of AJDs and associated transmittal letters and memorandum to the MVD Review Officer.

² Administrative Record (AR), pages 21- 66.

³ U.S. Army Corps of Engineers, *Corps of Engineers Wetlands Delineation Manual, Technical Report Y-87-1*, January 1987 (1987 Manual).

⁴ U.S. Army Corps of Engineers, *Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Midwest Region (Version 2.0)*, August 2010 (Regional Supplement).

completed its AJD on September 20, 2018,⁵ which included a transmittal letter, a Notification of Administrative Appeal Options and Process and Request for Appeal Form (Appeal Form), and one Approved Jurisdictional Determination Form (AJD Form)⁶ to record the basis of the AJD.⁷ The District's AJD concluded that four wetlands on the Site are subject to CWA jurisdiction.

MVD received the Appellant's Request for Appeal (RFA) on November 19, 2018.⁸ By letter dated December 6, 2018, MVD notified the Appellant that the RFA was accepted.

Information Received and Its Disposition During the Appeal Review: The AR is limited to information contained in the record as of the date of the Notification of Administrative Appeal Options and Process Form, September 20, 2018. Pursuant to 33 CFR 331.2, no new information may be submitted on appeal. To assist the Division Engineer in making a decision on the appeal, the RO may allow the parties to interpret, clarify, or explain issues and information already contained in the AR. Such interpretation, clarification, or explanation does not become part of the AR, because the District Engineer did not consider it in making the decision on the AJD. However, in accordance with 33 CFR 331.7(f), the Division Engineer may use such interpretation, clarification, or explanation in determining whether the AR provides an adequate and reasonable basis to support the District Engineer's decision. The information received during this appeal review and its disposition is as follows:

1. On December 12, 2018, the District provided copies of the AR to the RO and the Appellant via email. The AR is limited to information contained in the record on or

⁵ The District's Appeal Form was incorrectly dated September 19, 2018. RGL 06-01 states that, "The [Appeal Form] and associated cover letter must be dated with the same date. The date must be the calendar day when those documents are actually mailed to the affected party." In this case, the cover letter associated with this AJD was dated September 20, 2018. During the appeal meeting, the District confirmed that the AJD, Appeal form, and associated cover letter were mailed to the Appellant on September 20, 2018 (see MFR, pages 2- 3). Accordingly, the Appeal Form should have been dated September 20, 2018. As such, the AR is limited to the information contained in the record as of September 20, 2018.

⁶ 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.

⁷ AR, pages 6- 16.

⁸ Regulations at 33 CFR 331.5(a) state, "The RFA must be received by the division engineer within 60 days of the date of the [Appeal Form]." Regulatory Guidance Letter (RGL) 06-01, clarifies that day 1 is the date of the appeal form and day 60 is the 60th calendar day after the date of the appeal form. RGL 06-01 also clarifies that, "when 'day 60' is a traditional non-working day (e.g., a holiday or weekend), the 60 day timeframe is extended to the next business day." Therefore, day one in this case would be September 20, 2018 and day 60 would be Sunday, November 18, 2019. The RFA was received on Monday, November 19, 2019, or day 61. Because day 60 fell on a traditional non-working day (e.g. a weekend), the 60 day timeframe was extended to the next business day which was Monday, November 19, 2019. Therefore, appellant's RFA is considered timely in accordance with 33 CFR 331.5(a) and RGL 06-01.

before September 20, 2018, which is the date the District completed the AJD. The AR provided by the District included the Appellant's RFA.⁹ However, since the RFA was submitted after the date of the District's AJD, it cannot be considered part of the District's AR for the AJD for the purposes of this appeal.

2. In accordance with 33 CFR 331.7, the RO held a site investigation and appeal meeting on February 12, 2019. The appeal meeting topics were summarized and documented by the RO in a draft Memorandum for Record (MFR) that was provided to the Appellant and the District on February 21, 2019. Comments on the MFR, which were received from the District on February 22, 2019 and from the Appellant on March 1, 2019, were used to update the final MFR dated March 4, 2019.

3. According to the RFA, the Appellant is appealing the District's AJD based on the following reasons:¹⁰

Appeal Reason 1: "[T]he AJD does not establish that the wetlands are 'adjacent' to a channel containing 'waters of the United States.'"¹¹

Appeal Reason 2: "[T]he AJD does not provide any documentation to substantiate the Corps' finding that the wetlands have the requisite continuous surface connection to a TNW, nor does this connection exist."¹²

Appeal Reason 3: "The AJD does not establish, and none of the supporting documentation shows that the wetlands on the Property are adjacent to 'navigable-in-fact waters' and, thus, the Corps cannot rely on adjacency as the basis of its assertion of jurisdiction."¹³

Appeal Reason 4: "The AJD also fails to establish, and none of the supporting documentation supports a finding that the wetlands have the required 'significant nexus' to 'waters that are navigable in fact or that could reasonably be so made.'"¹⁴

APPEAL DECISION

Appeal Reason 1: "[T]he AJD does not establish that the wetlands are 'adjacent' to a channel containing 'waters of the United States.'"¹⁵

Finding: This reason for appeal has merit.

⁹ AR, pages 67- 76.

¹⁰ At the February 12, 2019 appeal meeting, the Appellant confirmed that these four reasons for appeal are accurate (MFR, page 2).

¹¹ RFA, page 6.

¹² RFA, page 7.

¹³ RFA, page 7.

¹⁴ RFA, pages 7- 8.

¹⁵ RFA, page 6.

Action: The AJD is remanded to the District Engineer for reconsideration and documentation.

Discussion: The Appellant disagrees with the District's AJD and asserts that "... the AJD does not establish that the wetlands are 'adjacent' to a channel containing 'waters of the United States.'"¹⁶ The Appellant continues by stating, "Ditches bordering the Property do not carry runoff in the direction of a TNW, and no properly functioning sewer intakes were observed in or near the wetlands on the Property."¹⁷

Implementing regulations found at 33 CFR 328 define the Corps' CWA jurisdiction. Following the U.S. Supreme Court *Rapanos* decision,¹⁸ the U.S. Environmental Protection Agency (EPA) and the Corps jointly issued a memorandum on June 5, 2007 providing guidance in 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 requires the application of two standards to support an agency AJD. 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.

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 (on the basis of a fact-specific analysis) to have a significant nexus with a TNW. The classes of water bodies that are subject to CWA jurisdiction, if such a significant nexus is demonstrated, are: (1) non-navigable tributaries that do not typically flow year-round or have a continuous flow at least seasonally (non-RPW), (2) wetlands adjacent to non-RPWs, and (3) wetlands that are adjacent to but that do not directly abut RPWs.

The term "waters of the United States" defines the jurisdictional limits of Corps' authority under the CWA and is defined by regulations at 33 CFR 328.3(a)(7) to include "[w]etlands adjacent to [jurisdictional] waters." Regulations at 33 CFR 328.3(c) define the term "adjacent" as "bordering, contiguous, or neighboring." According to the Rapanos Guidance, wetlands satisfy the definition of "adjacent" if one of the following three criteria is satisfied:

¹⁶ RFA, page 6.

¹⁷ RFA, Page 6.

¹⁸ Combined cases of *Rapanos v. United States* and *Carabell v. United States*. 126 S. Ct. 2208 (2006).

*First, there is an unbroken surface or shallow sub-surface connection to jurisdictional waters... Second, they are physically separated from jurisdictional waters by man-made dikes or barriers, natural river berms, beach dunes, and the like. Or third, their proximity to a jurisdictional water is reasonably close, supporting the science-based inference that such wetlands have an ecological interconnection with jurisdictional waters.*¹⁹

In this AJD, the District concurred with the Delineation Report's findings that there are wetlands on the Site,²⁰ and concluded that those wetlands are subject to CWA jurisdiction because they are adjacent to a non-RPW, "the ditch on the east property line."²¹ The AJD Form states that the wetlands directly abut the ditch, and the flow from the wetland to the ditch is intermittent via confined surface flow.²² The District determined that the ditch is a non-RPW which flows indirectly to the Missouri River via an indirect connection through "a RPW (blue line on topo)."²³

There is insubstantial evidence in the AR to support the District's conclusion regarding its determination of adjacency for the wetlands on the Site. Additionally, the AR does not contain substantial evidence to support the District's conclusion that the aquatic feature to which the wetlands on the Site are adjacent to (i.e. the ditch on the east property line) is a water of the United States. As discussed above, the term "waters of the United States" is defined by regulations at 33 CFR 328.3(a)(7) to include "[w]etlands adjacent to [jurisdictional] waters." The term is also defined by regulations at 33 CFR 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."²⁴

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 their determination in the appropriate sections of the AJD Form; and ensure that the documentation and analyses for an AJD is adequately reflected in the AR and demonstrates the District's basis for asserting or declining jurisdiction.²⁵ 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)."²⁶ Where the downstream limit of a tributary is

¹⁹ Rapanos Guidance, pages 5-6.

²⁰ AR, page 14. The Appellant does not disagree that wetlands, in accordance with the 1987 Manual and Regional Supplement, are present on the Site. See, e.g., RFA, page 9.

²¹ AR, pages 8-14.

²² AR, page 11.

²³ AR, pages 8 and 12. At the February 12, 2019 appeal meeting, the District clarified the discrepancies regarding flow path in the AR by stating that it concluded the wetlands on the Site are adjacent to the ditch, which flows indirectly to the Missouri River through a tributary located adjacent to the interstate, as stated on page 12 of the AR (MFR, pages 4- 5).

²⁴ Rapanos Guidance, page 6, fn 24.

²⁵ Rapanos Guidance, pages 12-13.

²⁶ Rapanos Guidance, page 6, fn 24.

not representative of the entire tributary, the flow regime that best characterized the entire tributary should be used.²⁷

In the case of this AJD, the District did not identify or document the reach of the tributary (i.e. the ditch on the east property line), nor is there substantial evidence in the AR to document an evaluation of flow characteristics of the ditch. Furthermore, since the District concluded that the ditch is a non-RPW, the District was required to document whether the ditch and its adjacent wetlands have a significant nexus with a TNW, "including the physical indicators of flow in a particular case and available information regarding the function of the tributary and any adjacent wetlands."²⁸ As explained in the discussion for Appeal Reason 4, the AR does not contain substantial evidence to support the District's determination that a significant nexus exists between the ditch and its adjacent wetlands, including the wetlands on the Site, and the TNW, the Missouri River.

Accordingly, I find that this reason for appeal has merit. The AR does not contain substantial evidence to support the District's determination that the wetlands are adjacent to the ditch or that the ditch is a water of the United States.

Appeal Reason 2: "[T]he AJD does not provide any documentation to substantiate the Corps' finding that the wetlands have the requisite continuous surface connection to a TNW, nor does this connection exist."²⁹

Finding: This reason for appeal does not have merit.

Action: No further action.

Discussion: The Appellant disagrees with the District's AJD and asserts that "... the AJD does not provide any documentation to substantiate the Corps' finding that the wetlands have the requisite continuous surface connection to a TNW, nor does this connection exist."³⁰

The Appellant's use of the term "continuous surface connection" on page 7 of the RFA is a reference to the plurality standard from the *Rapanos* decision.³¹ There was no majority opinion in the *Rapanos* decision, so controlling legal principles may be derived from the principles espoused by five or more justices. The *Rapanos* Guidance states, "... regulatory jurisdiction under the CWA exists over a water body if either the plurality's or Justice Kennedy's standard is satisfied... Therefore, the agencies have evaluated the *Rapanos* opinions to identify those waters that are subject to CWA jurisdiction under the reasoning of a majority of the justices."³²

²⁷ *Rapanos* Guidance, page 6, fn 24.

²⁸ *Rapanos* Guidance, page 11.

²⁹ RFA, page 7.

³⁰ RFA, page 7.

³¹ MFR, page 5.

³² *Rapanos* Guidance, page 3.

Regarding the plurality standard, the Rapanos Guidance states, “[T]he plurality concluded that the agencies’ regulatory authority should extend only to ‘relatively permanent, standing or continuously flowing bodies of water’ connected to [TNWs], and to ‘wetlands with a continuous surface connection to’ such [RPWs].”³³ The Rapanos Guidance also states, “While all wetlands that meet the agencies’ definitions are considered adjacent wetlands, only those adjacent wetlands that have a continuous surface connection because they directly abut the tributary... are considered jurisdictional under the plurality standard.”³⁴

However, CWA jurisdiction of an aquatic feature exists if either standard, the plurality or Justice Kennedy’s, is satisfied.³⁵ The Rapanos Guidance makes it clear that, “Finding a continuous surface connection is not required to establish adjacency under [the definition of adjacent as found under EPA and Corps regulations].”³⁶ As explained in the discussion for Appeal Reason 1, wetlands satisfy the definition of “adjacent” if one of the following three criteria is satisfied: if there is an unbroken surface or shallow sub-surface connection to jurisdictional waters, they are physically separated from jurisdictional waters by dike, barriers, berms, dunes, or other similar features, or their proximity is reasonably close to a jurisdictional water, supporting an ecological interconnection with jurisdictional waters.³⁷ Therefore, an unbroken surface connection is not the sole requirement for the determination that a wetland is adjacent.

In this AJD, the District concluded that the wetlands on the Site are subject to CWA jurisdiction because they are adjacent to a non-RPW and satisfied Justice Kennedy’s standard. While the District’s AJD is not supported by substantial evidence in the AR (see discussion for Appeal Reasons 1 and 4), nothing in law, regulation, or officially promulgated Corps policy guidance limits the Corps’ assertion of jurisdiction to only those wetlands which satisfy the plurality standard’s requisite continuous surface connection to a TNW. In fact, and as explained above, CWA jurisdiction of an aquatic feature exists if either standard, the plurality or Justice Kennedy’s, is satisfied. Therefore, I find that this reason for appeal does not have merit.

Appeal Reason 3: “The AJD does not establish, and none of the supporting documentation shows that the wetlands on the Property are adjacent to ‘navigable-in-fact waters’ and; thus, the Corps cannot rely on adjacency as the basis of its assertion of jurisdiction.”³⁸

Finding: This reason for appeal does not have merit.

Action: No further action.

³³ Rapanos Guidance, page 2.

³⁴ Rapanos Guidance, page 7, fn 29.

³⁵ Rapanos Guidance, page 3.

³⁶ Rapanos Guidance, page 5.

³⁷ Rapanos Guidance, pages 5- 6.

³⁸ RFA, page 7.

Discussion: The Appellant disagrees with the District’s AJD and asserts that “[t]he AJD does not establish, and none of the supporting documentation shows that the wetlands on the Property are adjacent to ‘navigable-in-fact waters’ and, thus, the Corps cannot rely on adjacency as the basis of its assertion of jurisdiction.”³⁹ In the RFA, the Appellant cites the *Rapanos* decision in its RFA by stating, “Justice Kennedy also concluded that if the wetland is adjacent to navigable-in-fact waters, then the Corps may rely on adjacency to establish its jurisdiction.’”⁴⁰

As discussed in this document, the term “waters of the United States” defines the jurisdictional limits of Corps’ authority under the CWA. The term is defined by regulations at 33 CFR 328.3(a)(1) to include “[a]ll waters which are currently used, or were used in the past, or may susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide.”⁴¹ *Rapanos* Guidance specifies that “[t]hese waters are referred to in this guidance as [TNWs]”,⁴² and clarifies that TNWs “... include all of the ‘navigable waters of the United States’, defined in 33 C.F.R. Part 329 and by numerous decisions of the federal courts, plus all other waters that are navigable-in-fact (e.g. the Great Salt Lake, UT and Lake Minnetonka, MN).”⁴³ As explained in the discussion for Appeal Reason 1, regulations at 33 CFR 328.3(a)(7) also define “waters of the United States” to include “[w]etlands adjacent to [jurisdictional] waters.” Furthermore, the *Rapanos* Guidance affirms that “EPA and the Corps will continue to assert jurisdiction over [TNWs]” and “wetlands ‘adjacent’ to [TNWs] as defined in the agencies’ regulations.”⁴⁴

While the RFA is correct in that wetlands adjacent to navigable in-fact waters are jurisdictional, the *Rapanos* Guidance does not limit the assertion of CWA jurisdiction over wetlands adjacent exclusively to navigable-in-fact waters. The *Rapanos* Guidance states that the Corps will assert jurisdiction over wetlands adjacent to TNWs, which includes navigable-in-fact waters (as explained above), and those adjacent wetlands which directly abut RPWs.⁴⁵ The *Rapanos* Guidance also states the Corps will assert jurisdiction over wetlands adjacent to non-RPWs and those wetlands adjacent to, but not directly abutting RPWs, when those wetlands have a significant nexus with a TNW.⁴⁶ Neither regulation nor the *Rapanos* Guidance limits the Corps’ jurisdictional authority to only those wetlands adjacent to navigable-in-fact waters.

In this AJD, the District determined that the wetlands on the Site are adjacent to a non-RPW. While the District’s AJD is not supported by substantial evidence in the AR (see discussion for Appeal Reasons 1 and 4), nothing in law, regulation, or officially promulgated Corps policy guidance limits the Corps’ assertion of CWA jurisdiction to

³⁹ RFA, page 7.

⁴⁰ RFA, page 7.

⁴¹ 33 CFR 328.3(a)(1).

⁴² *Rapanos* Guidance, page 5.

⁴³ *Rapanos* Guidance, page 5, fn 20.

⁴⁴ *Rapanos* Guidance, pages 4- 5.

⁴⁵ *Rapanos* Guidance, pages 5 and 7.

⁴⁶ *Rapanos* Guidance, page 8.

only those wetlands adjacent to navigable-in-fact waters. Therefore, I find that this reason for appeal does not have merit.

Appeal Reason 4: “The AJD also fails to establish, and none of the supporting documentation supports a finding that the wetlands have the required ‘significant nexus’ to ‘waters that are navigable in fact or that could reasonably be so made.’”⁴⁷

Finding: This reason for appeal has merit.

Action: The AJD is remanded to the District Engineer for reconsideration and documentation.

Discussion: The Appellant disagrees with the District’s AJD and asserts that “[t]he AJD also fails to establish, and none of the supporting documentation supports a finding that the wetlands have the required ‘significant nexus’ to ‘waters that are navigable in fact or that could reasonably be so made.’”⁴⁸ The Appellant further explains, “Nothing in the AJD or the cited supporting documentation demonstrates that the wetlands on the Property ‘significantly affect the chemical, physical, and biological integrity’ of a TNW.”⁴⁹

The Rapanos Guidance states that the Corps will assert jurisdiction over wetlands adjacent to non-RPWs when the non-RPW and its adjacent wetlands have a significant nexus to a TNW.⁵⁰ A significant nexus may be found when a tributary, including its adjacent wetlands, has more than a speculative or insubstantial effect on the chemical, physical, and biological integrity of a TNW.⁵¹ The Rapanos Guidance states,

*When performing a significant nexus analysis, the first step is to determine if tributary has any adjacent wetlands... If the tributary has adjacent wetlands, the significant nexus evaluation needs to recognize the ecological relationship between tributaries and their adjacent wetlands, and their closely linked role in protecting the chemical, physical, and biological integrity of downstream [TNWs].*⁵²

Like the Rapanos Guidance, the JD Guidebook also explains that a significant nexus analysis is a fact-specific analysis that assesses flow characteristics and functions of the tributary itself, in combination with all of its adjacent wetlands (collectively referred to as the relevant reach) to determine if they have an effect that is more than speculative or insubstantial on the chemical, physical, and biological integrity of the downstream TNW.⁵³ A significant nexus analysis includes consideration of various hydrologic, ecologic, and relevant contextual factors such as proximity to the TNW, size of the watershed, frequency, volume, duration, and physical indicators of flow, average annual

⁴⁷ RFA, pages 7- 8.

⁴⁸ RFA, pages 7- 8.

⁴⁹ RFA, page 8.

⁵⁰ Rapanos Guidance, page 8.

⁵¹ Rapanos Guidance, page 11.

⁵² Rapanos Guidance, page 10.

⁵³ JD Guidebook, pages 40 and 54- 56.

precipitation, potential of the tributary and adjacent wetlands to carry and/or retain pollutants and flood waters to the TNW, provision of habitat for aquatic species, and the potential of the tributary and its adjacent wetlands to transfer nutrients and organic carbon to support downstream food webs.⁵⁴

After determining the reach of the tributary in accordance with the JD Guidebook,⁵⁵ identifying any adjacent wetlands to the tributary, evaluating the flow characteristics of the tributary, and assessing and evaluating the functions of the tributary and all of its adjacent wetlands, the Rapanos Guidance states that the Corps “will evaluate whether the tributary and its adjacent wetlands are likely to have an effect that is more than speculative or insubstantial on the chemical, physical, and biological integrity of a [TNW].”⁵⁶ The Corps should document the significant nexus analysis and supporting information and documentation in the on the AJD Form and in the AR.⁵⁷

A joint EPA and Corps memorandum following the *Rapanos* decision requires the Corps to coordinate with EPA on certain AJDs prior to finalization of the AJD.⁵⁸ A separate memorandum requires Corps districts to provide draft copies of certain AJDs, including AJDs involving significant nexus determinations, to appropriate EPA regional offices for review.⁵⁹ For AJDs involving significant nexus determinations, this memorandum states that the EPA regional office has 15 calendar days to review the draft AJD provided by the Corps district, and decide whether to take the AJD as a special case under the January 19, 1989, “Memorandum of Agreement Between the Department of the Army and the USEPA Concerning the Determination of Section 404 Program and the Application of Exceptions under Section 404(f) of the Clean Water Act.” The memorandum also states that, if the EPA regional office does not respond to the district within 15 days, the district will finalize the AJD.

In this AJD, the District determined that the wetlands on the Site are adjacent to the ditch on the east property line, which the District concluded is a non-RPW that indirectly flows to the Missouri River.⁶⁰ First, the District’s significant nexus determination is flawed because it did not identify or describe the reach of the tributary (see Discussion for Appeal Reason 1), nor did the District identify or determine if the tributary had any other adjacent wetlands (other than those wetlands on the Site).⁶¹ The District’s AJD also omitted an evaluation of the flow characteristics of the tributary and assessment of

⁵⁴ Rapanos Guidance, page 8- 11; JD Guidebook, pages 15 and 54- 56.

⁵⁵ JD Guidebook, page 40.

⁵⁶ Rapanos Guidance, page 11.

⁵⁷ Rapanos Guidance, pages 11-13.

⁵⁸ Grumbles, Benjamin H. and John Paul Woodley, Jr. 2007. Coordination on Jurisdictional determinations (JDs) under Clean Water Act (CWA) Section 404 in Light of the *SWANCC* and *Rapanos* Supreme Court Decisions.

⁵⁹ Riley, Don T. 2008. Process for Coordinating Jurisdictional Determinations Conducted Pursuant to Section 404 of the Clean water Act in Light of the *Rapanos* and *SWANCC* Supreme Court Decisions.

⁶⁰ AR, pages 12 and 14; MFR, pages 4- 5.

⁶¹ See, e.g., the incomplete section III.B.3. of the District’s AJD form, AR, pages 11- 12. Pages 53 and 58 of the JD Guidebook requires the Corps to complete this section of the AJD Form when a parcel contains wetlands adjacent to non-RPWs that flow directly or indirectly into TNWs.

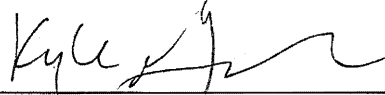
the characteristics and functions of the tributary and its adjacent wetlands.⁶² Furthermore, the AR does not contain substantial evidence to support the District's assessment of the functions performed by wetlands on the Site, nor does the AR contain substantial evidence to support the District's evaluation and subsequent determination that the tributary and its adjacent wetlands are likely to have an effect that is more than speculative or insubstantial on the chemical, physical, and biological integrity of the a TNW, in this case the Missouri River. Additionally, the District failed to provide the appropriate EPA regional office with a copy of the draft AJD for the 15-day coordination and review period.

Based on the discussion above, I find that this reason for appeal has merit. The AR does not contain substantial evidence to support the District's determination that a significant nexus exists between the tributary and its adjacent wetlands, including the wetlands on the Site, and a TNW.

Conclusion: Based upon the discussions of Appeal Reasons 1 and 4, I find that the appeal has merit. Therefore, the AJD is being remanded to the Rock Island District Engineer for reconsideration of the decision and additional documentation in accordance with 33 CFR 331.10(b). Authority to make the final Corps decision on the AJD resides with the Rock Island District Engineer pursuant to this remand. This concludes the Administrative Appeals Process.

FOR THE COMMANDER:

1 APRIL 2019
(Date)



Kyle Gordon
Regulatory Appeals Review Officer

⁶² See, e.g., the incomplete section III.B.1. of the District's AJD form, AR, pages 9- 11. Pages 53 and 58 of the JD Guidebook requires the Corps to complete this section of the AJD Form when a parcel contains wetlands adjacent to non-RPWs that flow directly or indirectly into TNWs.