

ATTACHMENT A: APPEAL DECISION DOCUMENT

**ADMINISTRATIVE APPEAL DECISION
LONE STAR SAND & GRAVEL
APPROVED JURISDICTIONAL DETERMINATION
VICKSBURG District
MVK-2022-00839**

Division Engineer: Major General Kimberly A. Peebles, Mississippi Valley Division¹

Review Officer: Travis Morse, South Pacific Division

Appellant Randy Allen, Lone Star Sand

Regulatory Authority: Section 404 of the Clean Water Act (33 USC 1344 *et seq.*)/Section 10 of the Rivers and Harbors Act of 1899 (USC 403)

Date Acceptable Request for Appeal Received: January 24, 2024

Date of Appeal [Meeting or Conference]: July 11, 2024

Summary of Appeal Decision: This appeal concerns the scope of regulatory jurisdiction of the U.S. Army Corps of Engineers (Corps) over “navigable waters of the United States” as defined under the regulations implementing the Rivers and Harbors Appropriations Act of 1899 (RHA), and over "waters of the United States" as defined in the regulations implementing the Clean Water Act (CWA). Title 33 of the Code of Federal Regulations (CFR), parts 328 and 329, provide the definitions of 'waters of the United States' for purposes of Section 404 of the CWA, and 'navigable waters of the United States' regulated under Section 10 of the RHA, respectively.

The Appellant challenged the Approved Jurisdictional Determination (AJD) on the basis that the Vicksburg District (District) incorrectly applied the decision in *Sackett v. EPA*,² misapplied the regulatory definition of what constitutes a “relatively permanent water,” and did not follow Corps’ policy when identifying federal jurisdiction. The dispute is specific to the jurisdictional status of two aquatic features: an oxbow lake referred to as “Holm Lake” and a linear drain referred to as “Stream 2” which connects Holm Lake to the Red River.

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 *Sackett v. EPA*, 566 U.S. 120 (2023).

A review of the Administrative Record (AR) found that the District did not adequately document support of the AJD or compliance with applicable policy, regulations, and guidance. The District did not support its observations or explain the methodology used to identify the extent of federal jurisdiction. Additionally, the District said that the AR does not contain all the information that was relied on to make the AJD. For these reasons, the appeal has merit, and the decision is remanded to the Vicksburg District Engineer for reconsideration.

This decision is considering only the AJD issued by the District based on the regulations applicable at the time of the determination. The District's actions are governed by the definition of "waters of the United States" that is in effect at the time the AJD is completed, not by the date of the request for an AJD. On remand, the District's reconsideration will consider relevant law, regulation, policy, and guidance. The District must document its evaluation and ensure that the AJD resulting from reevaluation, supports its determination.

Background Information: On October 13, 2022 (and later amended on December 12, 2022), the Appellant submitted a request for an AJD to identify the extent of federally jurisdictional waters on a 1,134-acre property in Caddo Parish, Louisiana. On December 4, 2023, the District determined that certain areas within the property are subject to regulatory jurisdiction under Section 404 of the CWA and Section 10 of the RHA.

On January 24, 2024, the Mississippi Valley Division (MVD) received a Notification of Administrative Appeal Options and Process and Request for Appeal (NAO/NAP) form that Alliance Technical Group (the Agent) had completed on behalf of the Appellant, challenging the AJD. As supporting information, the NAO/NAP includes photographs and a timeline of its interaction with the District. The request for an administrative review of the action through the appeal process, as established in 33 CFR 331 outlining its reasons for appeal is collectively referred to as the Request for Appeal (RFA).

On February 14, 2024, MVD notified the Appellant that the RFA was complete and contained acceptable reasons for appeal. The notification also requested that the District provide identical copies of the AR to MVD and the Appellant. Review of the administrative appeal was transferred from the MVD Review Officer to the South Pacific Division Review Officer on February 23, 2024, due to workload constraints. On July 11, 2024, an informal appeal meeting was held at the Property and included a site visit. The Appellant, Agent, District, and Review Officer were in attendance.

Information Received and its Disposition During the Appeal

The administrative appeal was evaluated based on the District's AR, the Appellant's RFA, and discussions at the appeal meeting with the Appellant and the District. The AR is limited to information contained in the record as of the date of the Notification of Administrative Appeal Options and Process form (*i.e.*, December 4, 2023).³ Pursuant to

³ AR 4-5.

33 CFR 331.2, no new information may be submitted to support an RFA and, therefore, neither the Appellant nor the District may present new information to the Appeal Review Officer (RO). To assist the Division Engineer in rendering 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.

A general account of the timeline and information received during this appeal review and its disposition is as follows:

1. The RFA consisting of a completed NAO/NAP form, supporting photographs, and a timeline were received by MVD on January 24, 2024.
2. On February 14, 2024, notice from MVD was provided to the Appellant accepting the RFA and stating that the RFA met the required criteria for an administrative appeal.
3. On February 14, 2024, the MVD requested that the AR be provided to all parties no later than March 1, 2024. An extension to providing the AR was approved.
4. On February 23, 2024, MVD transferred the appeal to the South Pacific Division RO.
5. On March 5, 2024, the District provided a copy of the AR to the RO and the Appellant.
6. The AR is limited to information contained in the record by the date of the NAO/NAP form. In this case, that date is December 4, 2023.
7. A site visit and informal appeal meeting was held on July 11, 2024. During the meeting, the District provided information not contained in the AR. Review of the reasons for appeal did not consider the materials because the District did not consider that information in making the AJD decision.
8. 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 June 11, 2024. Comments on the draft MFR received from the District and the Appellant, were used to update the final MFR, dated August 8, 2024.
9. On June 22, 2024, the District provided water elevation data on the Red River after the appeal meeting. Review of the appeal did not consider the data because it is not part of the AR, and the District did not consider that information in making the AJD decision.

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

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

REASONS FOR APPEAL 1: Holm Lake and Stream 2 are not jurisdictional under Section 10 of the RHA.

FINDING: This reason for appeal has merit.

DISCUSSION: The RFA challenges RHA jurisdiction in this instance because (1) Holm Lake and Stream 2 are not navigable, (2) Holm Lake and Stream 2 are not covered by ordinary flows of the Red River; (3) Holm Lake and Stream 2 are privately owned without public access; and (4) Stream 2 was constructed and is not navigable due to unpredictable flows and the presence of a culvert. The Appellant did not directly challenge the overall jurisdictional status of the Red River as a Section 10 RHA water, only the District's identification of the lateral limits of jurisdiction of the River extending to Holm Lake through Stream 2.

The Appellant said navigation is not currently possible on Holm Lake or Stream 2 and that reliance on historical navigability is insufficient to assert RHA jurisdiction. According to the Appellant, the Red River moved and created Holm Lake around 1948. The Appellant said that it told the District the same and that Stream 2 was either constructed or improved after 1948, but that it was not built or used for navigation. The Appellant contends that for a water to be covered by the RHA it must, in part, be truly navigable, meaning the connection between the Red River and Holm Lake provided by Stream 2, must also be navigable.⁴

As evidence that Holm Lake is higher in elevation than the Red River, the Appellant cited photographs in the AR depicting a grade change between the bottom of an on-channel culvert and the streambed. This visual observation forms the basis for the Appellant's belief that Holm Lake and Stream 2 sit above the Red River.⁵ According to the Appellant's interpretation, these photographs also document evidence of infrequent flows by the amount of herbaceous vegetation growing across Stream 2, and an on-channel culvert, flood gate, and debris screen that prevent navigation of Stream 2 between the Red River and Holm Lake.

The District and the Appellant hold differing observations regarding the presence and extent of flow in Stream 2. While District staff reported witnessing flow on two separate

⁴ AR 43.

⁵ AR 84-87.

evaluations, the Appellant and its Agent maintain that the stream was dry during their site evaluations, with photographs in the AR and duplicated in its RFA provided as contradictory evidence. This discrepancy is a contentious point in the appeal process. However, under the RHA, case law indicates that navigation need not be open during all seasons or stages of water,⁶ so the flow regime of Stream 2 will be discussed in the context of the Appellant's challenge against CWA jurisdiction in the following reason for appeal.

The AJD declares jurisdiction over Holm Lake and Stream 2.⁷ The District's basis for the AJD is attached to the AJD letter, dated December 4, 2023, in the form of a memorandum for record (MFR) dated November 13, 2023. The MFR includes a summary of conclusions and identifies the aquatic resources reviewed, the District's respective assessment for jurisdiction, and provides a rationale for its findings.⁸ The MFR references but does not identify the relevance of the Appellant's reports and data points or explain any instance where the District only partially relied on these sources.⁹ With the AJD letter and MFR, the District provided a location map and a figure of an aerial photograph of the Property overlain with boundaries and the geographic extent of the Corps' jurisdiction under the CWA and the RHA.¹⁰ The District's assertion in this instance is based on its statement that Holm Lake sits below the ordinary high water mark (OHWM) of the Red River and that the Red River is a jurisdictional navigable water of the U.S.

The District said that no study or determination of navigability was conducted or required for Holm Lake or Stream 2 because these features are part of the Red River. The District explained that it relies on a list of navigable waters maintained on its webpage, which names the Red River, and that Stream 2 extends the lateral reach of the OHWM of the Red River to encompass Holm Lake.¹¹ According to the record, the District determined that the connection between Holm Lake and the Red River via Stream 2 and placement below the ordinary high water (OHW) elevation of the Red River are sufficient to classify Holm Lake and Stream 2 as navigable waters under the RHA, stating that assertion is due to a "direct connection with the Red River through Stream 2 below the [ordinary high water] of 173.5 feet[.]"¹² The basis for jurisdiction does not reference a navigability determination for the Red River nor does the AR contain evidence of factors usually considered in determining the presence or absence of an OHWM.

Prior to issuing the AJD, the District conducted a desktop survey and two separate site evaluations to assess the jurisdictional status of the property. The information listed by

⁶ *Economy Light & Power Co. v U.S.*, 256 U.S. 113, 122 (1921), the court determined that a waterbody is navigable even if it is not navigable "at all seasons . . . or at all stages of the water."

⁷ AR 3-18.

⁸ AR 10-18.

⁹ AR 18.

¹⁰ AR 6-7.

¹¹ Available online at: http://www.mvk.usace.army.mil/Portals/58/docs/regulatory/vxd_nav_str.pdf

¹² AR 16.

the AJD MFR as data sources are not part of the AR.¹³ The AJD MFR explains that the OHW elevation of the Red River was determined by the Vicksburg District Hydraulics Branch.¹⁴ The District said at the appeal meeting that this measurement is equivalent to the regulatory defined OHWM.¹⁵ The District said that it had surveyed the relative elevation of the OHW elevation of the Red River and locations along Stream 2 and that two separate site evaluations resulted in supporting documentation (i.e., photographs, site visit notes, specific data points, survey data). However, such documentation is not specifically referenced by the AJD or included in the AR.

In response to questions from the Review Officer, the District maintained that Holm Lake and Stream 2 were used for commerce before being removed from the mainstem of the Red River and that private land ownership has no bearing to the AJD. The District referred to the Corps' authority to regulate navigable waters of the U.S. and argued that a water does not lose its navigability even if it is not currently used for commerce.¹⁶ The District explained that Holm Lake is an oxbow lake that was at some point in time part of the main channel of the Red River and due to the potential for navigation to occur at Holm Lake, its historic alignment still falls under the scope of the navigability determination made for the Red River. The District believes that contemporary navigation does not matter because Holm Lake was part of the Red River when it was determined to be a navigable water of the U.S. and that these non-tidal waters retain legal status as "navigable in law" despite changed conditions.¹⁷

The AR shows the District relied on the relative position of the OHW elevation obtained from its Hydraulics Branch to say that Holm Lake and Stream 2 are part of the Red River. The AR does not indicate when Holm Lake or Stream 2 was created or whether that was a gradual process or a sudden occurrence. The AR does not indicate consideration of whether Stream 2 is constructed, whether the culvert is an impediment to navigation, whether Holm Lake is currently navigable, nor include an assessment of the potential susceptibility to interstate or foreign commerce, or any of the other factors listed by regulation.

In response to the RO's request for the District's tabulated list of navigable waters of the U.S., the District provided a list framed on the side of a map that illustrates a precise location for the head of navigation for each stream listed. The list, titled "Navigable Streams," does not indicate whether the list includes navigable waters of the U.S. under the RHA interpreted at 33 CFR 329.4, and/or traditionally navigable waters under the CWA interpreted at 33 CFR 328.3(a)(1). The map depicts the head of navigation for the Red River, upstream of the Property, at the Texas-Arkansas state line, and extending

¹³ AR 18.

¹⁴ AR 18. See paragraph 7.f.; See *also* AR 35, 38-42.

¹⁵ See 33 CFR 329.11(a)(1), "The [OHWM] on non-tidal rivers is the line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank; shelving; changes in the character of soil; destruction of terrestrial vegetation; the presence of litter and debris; or other appropriate means that consider the characteristics of the surrounding areas." *C.f.* 33 CFR 328.3(e).

¹⁶ See 33 CFR 329.9 and 329.13.

¹⁷ 33 CFR 329.4.

downstream of the Property. Holm Lake and Stream 2 are not identified on the map of navigable streams; the Red River is.¹⁸ The District was unable to explain whether the list of navigable streams also includes CWA traditional *navigable* waters or is limited solely to RHA *navigable* waters, or identify the date that the subject reach of the Red River was determined to be a navigable water of the U.S.

When posed with evaluating and determining the jurisdictional status of a particular feature, the District is required to interpret and apply regulation, guidance, and policy. The *Standard Operating Procedures for the U.S. Army Corps of Engineers Regulatory Program* instruct staff to provide supportive rationale in the AR, 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.¹⁹ Documentation must provide a comprehensible foundation for the decision, explain gaps in the AR, and include logical argument to address inconsistent information.²⁰ The District is to note which specific aspect(s) of a submittal are not relied upon, state the reason why any such aspects were not relied upon, address objections from the requestor, and “clearly document the reasons for reaching a contrary conclusion.”²¹

The term, “navigable waters of the U.S.,” is defined to include non-tidal waters that have been used in the past, are now used, or are susceptible to use as a means to transport interstate commerce landward to their OHWM and up to the head of navigation.²² 33 CFR 329.5 explains that several factors must be examined when making a determination whether a water is a navigable water of the U.S. including, but not limited to, (a) past, present, or potential presence of interstate or foreign commerce; (b) physical capabilities for use by commerce; and (c) the defined geographic limits of the waterbody. Other relevant considerations to evaluating RHA jurisdiction include whether the subject water is named on the District’s list of navigable waters of the U.S., is a navigable water of the U.S. pursuant to 33 CFR 329.14 or qualifies as a navigable water of the U.S. under any of the tests set forth in 33 CFR 329.²³

33 CFR 329.11 identifies the geographic and jurisdictional limits of non-tidal rivers and lakes. Paragraph (a) states that RHA jurisdiction extends “laterally to the entire water surface and bed of a navigable waterbody, which includes all the land and waters below the OHWM.” The regulation ties the lateral extent of RHA jurisdiction in non-tidal waters to diagnostic physical features indicative of an OHWM, like a line on the bank, soil

¹⁸ 33 CFR 329.16(b). Note that absence from the list does not mean that they are not navigable.

¹⁹ See *Standard Operating Procedures for the U.S. Army Corps of Engineers Regulatory Program*, p. 9.

²⁰ U.S. Army Corps of Engineers. 2016. Regulatory Guidance Letter, Subject: Jurisdictional Determinations. RGL 16-01. Department of the Army, Washington, D.C. See Questions and Answers #8.

²¹ *Id.*

²² 33 CFR 329.4.

²³ See 33 CFR 329.16(a). Tabulated lists of navigable waters of the U.S. are to be maintained and updated according to applicable court decisions, jurisdictional inquiries, or other changed conditions.

changes, or vegetation destruction.²⁴ Regulatory Guidance Letter 05-05 directs Corps' districts to document the physical characteristics forming the OHWM "unless inconclusive, unreliable, or not evident."²⁵ If physical characteristics are not relied upon, districts must document other means used to determine the OHWM.²⁶ Documentation of the physical characteristics or other means used to establish the OHWM must be sufficient to allow for accurate replication in the future (e.g., data sheets, site visit memos, maps, sketches, surveys, photos).²⁷

While stream channel movement and meander cut-offs can occur in a single event, the natural flood processes to create these types of features may take several years. 33 CFR 329.13 provides that permanent changes in shoreline configuration result in similar alterations of the boundaries of the navigable water, so that an area within a waterbody remains "navigable" even though it may no longer be covered in water when the change occurs suddenly or is caused by artificial forces intended to produce the change. Whereas gradual changes due to natural causes, and perceptible over some period, constitute changes in the waterbody which also changes the boundaries of navigable waters.²⁸ Therefore, understanding how Holm Lake and Stream 2 formed are important to determining jurisdiction.

During the appeal meeting, the District cited 33 CFR 329.9 and 329.13 and said that all portions of a navigable water are navigable in law when incapable of a commercial use because of changed conditions or the presence of an obstruction.²⁹ The District explained that changes to a water or its navigable capacity do not alter the extent of RHA jurisdiction, and thus the area occupied or formerly occupied by that water will always be subject to RHA jurisdiction even when the area is no longer a water. This principle is incorporated in the definition of navigable waters of the U.S. and is applicable to areas covered by an RHA water determination exists.³⁰ In other words, jurisdiction extends throughout waterbodies that are subject to tidal action, but for

²⁴ The definition of OHWM for navigable waters of the U.S. at 33 CFR 329.11(a)(1) is the same as the definition of OHWM for waters of the United States at 33 CFR 328.3(e).

²⁵ Regulatory Guidance Letter 05-05, Ordinary High Water Mark.

²⁶ *Id.*; See, e.g., U.S. Army Corps of Engineers, Engineer Research and Development Center. 2022. National Ordinary High Water Mark Field Delineation Manual for Rivers and Streams, Interim Version.

²⁷ Regulatory Guidance Letter 05-05, Ordinary High Water Mark.

²⁸ 33 CFR 329.13, "Permanent changes of the shoreline configuration result in similar alterations of the boundaries of the navigable waters of the United States. Thus, gradual changes which are due to natural causes and are perceptible only over some period of time constitute changes in the bed of a waterbody which also change the shoreline boundaries of the navigable waters of the United States. However, an area will remain navigable in law, even though no longer covered with water, whenever the change has occurred suddenly, or was caused by artificial forces intended to produce that change. For example, shifting sand bars within a river or estuary remain part of the navigable water of the United States, regardless that they may be dry at a particular point in time."

²⁹ *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 408 (1940). See "rule of indelible navigability."

³⁰ 33 CFR 329.4: "A determination of navigability, once made, applies laterally over the entire surface of the water body, and is not extinguished by later actions or events which may impede or destroy navigable capacity." The rule is expanded upon in 33 CFR 329.9 and 329.13: "an area will remain 'navigable in law,' even though no longer covered with water, whenever the change has occurred suddenly, or was caused by artificial forces intended to produce that change."

waters that are not subject to tidal action, a determination of navigability is required to establish RHA jurisdiction.³¹

Per the governing regulation, “private ownership of the underlying lands has no bearing on the existence or extent of the dominant Federal jurisdiction over a navigable waterbody.”³² The District’s authority to exert RHA jurisdiction over private lands, including constructed or improved features is discussed at 33 CFR parts 322.5(g), 329.6(a) and 329.8, as follows:

- Part 322.5(g) states: "A canal or similar artificial waterway is subject to the regulatory authorities discussed in 322.3, of this Part, if it constitutes a navigable water of the United States, or if it is connected to navigable waters of the United States in a manner which affects their course, location, condition, or capacity, or if at some point in its construction or operation it results in an effect on the course, location, condition, or capacity of navigable waters of the United States."
- Part 329.8 states: “Determinations are not limited to the natural or original condition of the waterbody.”
- Part 329.8(a) states: "An artificial channel may often constitute a navigable water of the United States, even though it has been privately developed and maintained, or passes through private property."
- Part 329.8(a)(3) states: "Private ownership of the lands underlying the waterbody, or of the lands through which it runs, does not preclude a finding of navigability. Ownership does become a controlling factor if a privately constructed and operated canal is not used to transport interstate commerce nor used by the public; it is then not considered to be a navigable water of the United States."

RHA jurisdiction extends throughout waters that are subject to tidal action, but for waters that are not subject to tidal action, such as in this instance, a determination of navigability is required.³³ Although there is not a regulatory standard for lists of navigable waters of the U.S., lists must specify the presence of waters covered by the RHA. The term “navigable streams” creates confusion between *navigable waters of the U.S.* defined under the RHA and *traditional navigable waters* defined under the CWA. Due to specific characteristics, many navigable streams are regulated under both the RHA and the CWA; however, the jurisdictional boundaries under each statute can sometimes differ. For example, when the waterbody in question does not meet the specific navigability criteria under the RHA but has been determined “navigable in fact” or the area is no longer a CWA water of the U.S. but qualifies as jurisdictional under the RHA by qualifying as navigable by law.

In addition to having an appropriate basis for asserting jurisdiction, the AR must contain sufficient evidence to establish an OHWM. The District has the burden of substantiating

³¹ See 33 CFR 329.12(b) and 33 CFR 329.14(b)

³² 33 CFR 329.11(a)(2).

³³ See 33 CFR 329.4. *C.f.* 329.12(b), 329.14(b), and 329.15(c). As stated in 33 CFR 329.16, court decisions may also result in updates to lists of determinations.

the lateral extent of waters measured by an OHWM to assert RHA jurisdiction. In this instance, the AR does not contain sufficient evidence to establish that Holm Lake is part of, and entirely below the OHWM of, the Red River. Notably, while the District cites data placing Holm Lake and Stream 2 below the Red River's OHW elevation, no supporting data is included in the AR. While applicable guidance, RGL 05-05, allows for flexibility in identifying and delineating the OHWM of non-wetland waters, the AR does not contain any specific documentation regarding how the District identified, delineated, or mapped the OHWM of the Red River, Holm Lake, or Stream 2.³⁴ OHWM indicators were present and observed by the RO during the site visit; however, it is unclear from the evidence observed or presented whether the OHWM of the Red River encompasses Holm Lake and Stream 2. Without evidence that Holm Lake and Stream 2 are inundated below the ordinary flows of the Red River, claiming RHA jurisdiction requires a determination according to the procedures outlined in 33 CFR 329.14.³⁵

The AR does not contain conclusive information regarding the jurisdictional status of Holm Lake or Stream 2. Although the District indicates that it holds evidence supporting its determination, the District did not include this information in the AR. Therefore, while it cannot be conclusively determined whether the District identified, delineated, and mapped the OHWM in accordance with relevant law and regulation, the effort does not follow officially promulgated Corps policy or guidance, and so, this reason for appeal has merit as the documentation provided by the District does not comply with RGL 05-05 and is not supported by substantial evidence in the AR as to whether Holm Lake and Stream 2 are covered by a determination of navigability for the Red River or whether an independent determination of navigability is necessary to assert RHA authority over these waters.

Comparison of the respective dates that Holm Lake was part of the Red River, when the Red River was determined navigable, and additional documentation of the processes involved in the formation of Holm Lake and Stream 2 are important to evaluate the jurisdictional status of these features whether they are connected below the OHWM of the Red River or not.³⁶

ACTION: The District should reconsider the jurisdictional status of Holm Lake and Stream 2. As part of this reconsideration, the District should document the OHWM for Holm Lake, Stream 2, and the Red River, if necessary to determine jurisdiction. The District should document the presence of physical indicators of any OHWM such as those described by regulation at 33 CFR 329.11 and policy at RGL 05-05 as part of its reconsideration.

³⁴ Regulatory Guidance Letter 05-05, Ordinary High Water Mark; Standard Operating Procedures for the U.S. Army Corps of Engineers Regulatory Program, p. 9.

³⁵ Memoranda issued by the Assistant Secretary of the Army (Civil Works) dated 24 September 2008 (Traditional Navigable Water Determinations under the Clean Water Act) and issued by the Director for Civil Works dated 16 October 2008 (Stand-Alone Traditional Navigable Water Determinations Under the Clean Water Act - Clarifying Guidance) are specific to the CWA and specifically exclude determinations made as a part of an AJD.

³⁶ See 33 CFR 329.11.

If needed to make this determination, the District should consider the Appellant's contention that Stream 2 was constructed, and if constructed, whether the area in which the channel was constructed is navigable in law, i.e., that the area was subject to RHA jurisdiction prior to the construction of the channel, after construction of the channel, and following the installation of the culvert.³⁷

REASON FOR APPEAL 2: Holm Lake and Stream 2 are not jurisdictional under the CWA.

FINDING: This reason for appeal has merit.

DISCUSSION: In large part, this reason for appeal is predicated on the Appellant's challenge against RHA jurisdiction discussed beneath the previous reason for appeal. In short, the claim is that Holm Lake does not qualify as a traditional navigable water (TNW) under the CWA because it is not a navigable water of the U.S. under the RHA pursuant to 33 CFR 329.14, it does not qualify as a navigable water of the U.S. under any of the tests set forth in 33 CFR Part 329, and it cannot be considered a TNW because of an on-channel culvert that prevents traffic from occurring on Stream 2. The Appellant said that neither the Lake or Stream is used or susceptible to use in its existing condition for any commercial purpose involving navigation (i.e., navigable-in-fact).

Additionally, the Appellant interprets the ruling in *Sackett v. EPA* to require a relatively permanent water (RPW) connection to a TNW as basis for CWA jurisdiction. According to the Appellant, Stream 2 lacks the required perennial or intermittent flow to satisfy the RPW definition and therefore is not jurisdictional. However, submittals to the District on behalf of the Appellant say that Stream 2 is a first-order stream that flows from a "mixture of sources" and is an intermittent RPW that exhibits scour marks, deposition of coarse particulate organic matter, a debris dam, a riffle-pool sequence, and moderate sinuosity.³⁸ The report includes a photograph of flows >50% of the channel following three consecutive clear days with no precipitation.³⁹ The report concludes that Stream 2 would be considered jurisdictional under the CWA.⁴⁰

Still, the Appellant holds that Stream 2 is a non-RPW and explained its use of the term "intermittent" to characterize the flow regime of Stream 2 in its reports as an error. Although the term "ephemeral" was not used to describe Stream 2, the Appellant said that it previously discussed its ephemeral character with the District and held that flows are non-permanent.⁴¹ The Appellant believes that the District should have relied on the characteristics of flow rather than the naming convention used by its consultant. In response to questions from the Review Officer, the Appellant and its Agent said that

³⁷ 33 CFR 329.13.

³⁸ AR 211.

³⁹ AR 208, 211.

⁴⁰ See AR 91-92. Note the 12 December 2022 Jurisdictional Determination (AR 88-95) identifies Stream 2 as "Stream 3."

⁴¹ AR 40.

Stream 2 is, by the Corps' definition, an ephemeral, non-RPW because it only flows in response to precipitation and that groundwater is not a source of water for streamflow.⁴²

As mentioned beneath the previous reason for appeal, the question of streamflow duration entails disagreement over direct observations of flow in Stream 2 – the District holds that it witnessed flows in Stream 2 on two separate occasions, but the Appellant said this is not true and identified photographs in the AR as evidence contrary to the District's assertion.⁴³ The cited photographs, purported to reflect the conditions observed by the District, depict herbaceous vegetation growing across the width of Stream 2.⁴⁴ According to the Appellant, the photographs document Stream 2 absent flowing or standing water at the time of the District's site evaluations, and that the vegetation growing in the channel is an indication of the Stream remaining dry for significant periods. The Appellant believes that these photographs, along with its firsthand observations, effectively disprove that Stream 2 is an RPW.

The District said that based on the size of Stream 2, it can be inferred that water forms a tributary between Holm Lake and the Red River. The District said that notwithstanding the relative position of the Red River OHWM, in rendering the AJD, it relied on the consultant-determined flow regime, the consultant's report, and data points that identify Stream 2 as a jurisdictional relatively permanent tributary connection between Holm Lake and the Red River.⁴⁵

Per the previous reason for appeal, the District asserted RHA jurisdiction over Stream 2, but the AR does not reflect that Stream 2 was evaluated as a category 33 CFR 328.3(a)(1) tributary. Instead, the District's basis for asserting CWA jurisdiction over Stream 2 is that it is a category 33 CFR 328.3(a)(5) tributary connected to a TNW.⁴⁶ The AJD MFR states the basis for jurisdiction is that Stream 2 flows from Holm Lake to the Red River.⁴⁷

The District maintained that Holm Lake is a 328.3(a)(1) TNW because it is part of, and located below the OHWM of, the Red River.⁴⁸ However, the AJD MFR reveals that the District did not name Holm Lake jurisdictional under the CWA or provide rationale that it meets any CWA category of waters of the U.S.⁴⁹ Additionally, the AR does not describe how the OHWM was determined and mapped or reference applicable guidance or policy.⁵⁰

⁴² AR 92, 94.

⁴³ See AR 87. The Appellant claims this photograph as proof that there were no flows in Stream 2.

⁴⁴ AR 84-87. These photos are duplicated in the RFA.

⁴⁵ AR 18, 31, 91-92, 94, 208, 211.

⁴⁶ AR 16.

⁴⁷ AR 14.

⁴⁸ AR 15.

⁴⁹ AR 14, 16.

⁵⁰ For example, references used such as the National OHWM Manual (not required but an appropriate resource) or Regulatory Guidance Letter 05-05 (must follow).

The AJD MFR references that the District conducted a “review of historical aerial imagery and drainage area size” and that it had completed a site evaluation.⁵¹ During the appeal meeting, the District said that it had completed two separate site evaluations including a survey to determine the relative elevation of the OHWM of the Red River to portions of Stream 2. The AR does not specify the indicators relied on to support the OHWM determination, only that the OHW elevation was determined by the District Hydraulics Branch.⁵² The District also referenced Antecedent Precipitation Tool (APT)⁵³ data and observation data points (i.e., "LS1" and "LS2") as supporting evidence but the AR does not include APT data or the District’s data points. Despite the District’s claims, the AR does not reflect an evaluation of site conditions, of climatic conditions, or an analysis of drainage size or aerial photographs. Neither does the AR include a description of the relevant reach or how specific characteristics led to the determination that there is relatively permanent flow in Stream 2.⁵⁴

Under the CWA, the limit of Corps jurisdiction in non-tidal waters of the United States is defined at 33 CFR 328.4(c)(1) as: “In the absence of adjacent wetlands, the jurisdiction extends to the [OHWM].” Corps regulations at 33 CFR 328.3 define the term OHWM under the CWA as “... that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.” Pursuant to these regulations, the Corps determines, on a case-by-case basis, the extent of geographic jurisdiction of non-tidal streams for the purposes of administering its regulatory program by identifying physical evidence. Similar to implementation of the 1987 Corps of Engineers Wetland Delineation Manual, best professional judgment should be used in conjunction with data when characterizing the physical features associated with the OHWM that best represent the entire stream reach.⁵⁵

The regulation ties the lateral extent of CWA jurisdiction in non-wetland waters to diagnostic physical features indicative of an OHWM, like a line on the bank, soil changes, or vegetation destruction.⁵⁶ Corps’ policy is clarified by Regulatory Guidance Letter 05-05 with direction to document the physical characteristics forming the OHWM “unless inconclusive, unreliable, or not evident.”⁵⁷ If physical characteristics are not relied upon,

⁵¹ AR 14, 16, 31.

⁵² AR 18, 35, 38-42.

⁵³ The APT is a desktop tool used to support decisions as to whether field data collection and other site-specific observations occurred under normal climatic conditions and can also be used to assess the presence of drought conditions for a given location (<https://www.epa.gov/wotus/antecedent-precipitation-tool-apt>)

⁵⁴ See, e.g., streamflow duration assessment methods, available online at: <https://www.epa.gov/streamflow-duration-assessment>

⁵⁵ Environmental Laboratory. 1987. Corps of Engineers Wetlands Delineation Manual. Technical Report Y-87-1. U.S. Army Engineer Waterways Experiment Station. Vicksburg, MS.

⁵⁶ The definition of OHWM for navigable waters of the U.S. at 33 CFR 329.11(a)(1) is the same as the definition of OHWM for waters of the United States at 33 CFR 328.3(e).

⁵⁷ Regulatory Guidance Letter 05-05, Ordinary High Water Mark.

districts must document other means used to determine the OHWM.⁵⁸ Documentation of the physical characteristics or other means used to establish the OHWM must be sufficient to allow for accurate replication in the future (e.g., data sheets, site visit memos, maps, sketches, surveys, photos).⁵⁹ Therefore, in addition to having an appropriate basis of jurisdiction, the AR must include sufficient evidence to establish an OHWM.

The 1986 regulations include relatively permanent tributaries as a jurisdictional category of waters and the *Rapanos* guidance indicates that the Corps will assert jurisdiction over non-navigable tributaries of TNWs that are relatively permanent, where the tributaries typically flow year-round or have continuous flow at least seasonally.⁶⁰ The training materials provided 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 not jurisdictional.⁶¹ Non-relatively permanent tributaries are those that have flowing or standing water only in response to precipitation or that do not have continuously flowing or standing water at least seasonally.⁶² The duration of seasonal flowing or standing water may vary regionally, but an RPW must have predictable flowing or standing water seasonally.⁶³

The concept of how to identify tributary reaches for purposes of assessing tributaries was not affected by the decision in *Sackett*. Because the Supreme Court in *Sackett* adopted the *Rapanos* plurality standard and the January 18, 2023 rule preamble discussed the *Rapanos* plurality standard, the implementation guidance and tools in the January 2023 rule preamble that address the regulatory text that was not amended by the conforming rule, including the preamble relevant to the *Rapanos* plurality standard incorporated in paragraphs (a)(3), (4), and (5) of the amended 2023 rule, generally remain relevant to implementing the amended 2023 rule. The January 2023 rule preamble states that: “[t]o determine the flow characteristics of a tributary for purposes of implementing this rule, the agencies will evaluate the entire reach of the tributary that is of the same Strahler stream order (i.e., from the point of confluence, where two lower order streams meet to form the tributary, downstream to the point such tributary enters a higher order stream; see Technical Support Document section IV.A.ii.1). The flow characteristics of lakes, ponds, and impoundments that are part of the tributary network will be assessed in conjunction with the stream they connect to. Consistent with the pre-2015 regulatory regime, the agencies will assess the flow characteristics of a particular tributary at the farthest downstream limit of such tributary (i.e., the point the

⁵⁸ *Id.*; See, e.g., U.S. Army Corps of Engineers, Engineer Research and Development Center. 2022. National Ordinary High Water Mark Field Delineation Manual for Rivers and Streams, Interim Version.

⁵⁹ Regulatory Guidance Letter 05-05, Ordinary High Water Mark.

⁶⁰ *Rapanos* guidance, p. 4.

⁶¹ Updates for Tribes and States on “Waters of the United States” Slide 45 (15 November 2023). Available online at: https://www.epa.gov/system/files/documents/2023-11/wotus-overview_tribes-and-states_11-15-23_508.pdf

⁶² *Rapanos* guidance, p. 6.

⁶³ 88 FR 3038. The 2023 preamble defines the “relatively permanent standard” test of the plurality opinion in *Rapanos* to mean “waters that are relatively permanent, standing or continuously flowing waters” connected to paragraph (a)(1) TNWs, interstate waters, and the territorial seas.”

tributary enters a higher order stream). *Rapanos* guidance at 6 n.24. Where data indicate the flow characteristics at the downstream limit are not representative of the entire reach of the tributary, the flow characteristics that best characterize the entire tributary reach will be used.”⁶⁴ Therefore, a tributary is the entire reach of a stream of the same order and assessments of flow duration in 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).⁶⁵

Consistent with the pre-2015 regulatory regime, CWA jurisdictional tributaries include natural, man-altered, or man-made waterbodies that carry flow directly or indirectly into a TNW.⁶⁶ A constructed ditch or canal can be a tributary. Therefore, a water feature is a tributary, regardless of its flow regime, if the feature has a defined channel and an indicator of an OHWM.⁶⁷ A tributary connection establishing CWA jurisdiction can exist without a continuous OHWM and discontinuity in the OHWM does not typically sever CWA jurisdiction upstream where the OHWM has been removed by rerouting the tributary through a culvert.⁶⁸

TNWs are described at 33 CFR 328.3(a)(1) to include not only navigable waters of the U.S. under the RHA, as defined in 33 CFR 329, but also encompass all other waters that are navigable-in-fact.⁶⁹ To identify and determine a TNW, the Corps uses the legal memorandum “Waters That Qualify as “Traditional Navigable Waters” Under Section (a)(1) of the Agencies’ Regulations.”⁷⁰ Per this memo, one of the following is necessary to support a TNW determination:

- A determination of the Corps that the water is a navigable water of the U.S. pursuant to 33 CFR 329.14; or
- One or more decisions of the Federal courts determining that the water is navigable-in-law; or
- One or more decisions of the Federal courts determining that the water is a navigable water of a particular state, although not a navigable water of the U.S. (e.g., Great Salt Lake, UT); or

⁶⁴ 88 FR 3086.

⁶⁵ 88 FR 3004, 3086.

⁶⁶ *Rapanos* guidance at footnote 24. Final Rule for Regulatory Programs of the Corps of Engineers, 51 FR 41206, 41216–17 (13 November 1986). These re-codified regulations, including the 1993 exclusion, are called the “1986 Regulations.”

⁶⁷ Regulatory Guidance Letter 05-05, Ordinary High Water Mark.

⁶⁸ 2023 Rule, 88 FR 3083. See 27 September 2023 Joint Coordination Memorandum. “Because the Supreme Court in *Sackett v. EPA*, 566 U.S. 120 (2023) adopted the *Rapanos* plurality standard and the 2023 rule preamble discussed the *Rapanos* plurality standard, the implementation guidance and tools in the 2023 rule preamble that address the regulatory text that was not amended by the conforming rule, including the preamble relevant to the *Rapanos* plurality standard incorporated in paragraphs (a)(3), (4), and (5) of the 2023 rule, as amended, generally remain relevant to implementing the 2023 rule, as amended.”

⁶⁹ 51 FR 41250, 13 November 1986; 33 CFR 328.3(a)(1). See also *Rapanos* guidance pp. 4-5.

⁷⁰ Formerly known as Appendix D of the *Rapanos* guidance. See U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook, 30 May 2007; Appendix D of the same and subsequent versions, dated 5 June 2007 and 2 December 2008.

- The water body qualifies as a navigable water of the U.S. under any of the tests set forth in 33 CFR Part 329 (e.g., the water body is (a) subject to the ebb and flow of the tide, and/or (b) the water body is presently used, or has been used in the past, or may be susceptible for use (with or without reasonable improvements) to transport interstate or foreign commerce); or
- The water body is navigable-in-fact (i.e., it is either currently used or susceptible to use in its existing condition for any commercial purpose involving navigation).

There are also memoranda relevant to TNWs that specifically exclude determinations made as a part of an AJD.⁷¹ However, documentation necessary to determine the presence of a TNW generally utilize the factors provided in the stand-alone process as well as relevant case law.

The AR reflects that, prior to the appeal meeting, the term “ephemeral” was not used to describe Stream 2 and there is no prior claim that Stream 2 is an ephemeral non-RPW. The Appellant previously explained that the resource would be jurisdictional under the CWA.⁷² The District is not required to evaluate the flow regime or other data independently and can adopt the conclusions submitted for review. If the District is reaching a conclusion contrary to that which was presented, then it would be appropriate for the AJD to include a discussion to substantiate how and why the District reached such contrary conclusion. Because the Appellant identified Stream 2 as an intermittent RPW, it is reasonable for the District to adopt the conclusion and not independently verify that the assessment is accurate.

Still, the AR does not contain sufficient information to support a determination that Stream 2 is a relatively permanent tributary. Specifically, the upstream and downstream limits of the tributary reach Stream 2 are not defined, and the flow characteristics of the downstream limit of the tributary reach are not provided. The AR also does not make clear if the information referenced by the AJD MFR are relevant to the downstream limit of the tributary reach. The AR also does not make clear if the flow characteristics were determined at the downstream limit of the tributary reach, another portion of Stream 2, or based on some other approach. Based on an evaluation of the approach described in the January 2023 rule preamble, the District did not appropriately identify or characterize the entire tributary reach and its jurisdictional status.

The AJD MFR concludes that Holm Lake is a “Section 10 TNW.”⁷³ However, the AR does not provide adequate rationale, consistent with regulation and guidance, for a

⁷¹ Memorandums: Subject: Traditional Navigable Water Determinations Under the Clean Water Act, September 24, 2008, John Paul Woodley, Jr. (the “Woodley Memo”), and Subject: Stand-Alone Traditional Navigable Water Determinations Under the Clean Water Act- Clarifying Guidance, October 16, 2008, Steven L. Stockton (the “Stockton Memo”).

⁷² AR 92, 94. The naming convention for the culverted stream channel connecting Holm Lake to the Red River, identified as Stream 2 in this decision, is inconsistent in the AR. However, the Agent had previously reported that Stream 2 “is an intermittent stream with riffle-pool morphology and that it is a relatively permanent water that would be considered a jurisdictional WOTUS by the USACE.”

⁷³ AR 15.

determination that Holm Lake is a jurisdictional TNW. Because the District's AR does not fully document the jurisdictional status of Stream 2, the District's AR does not fully support the jurisdictional determination for Holm Lake. Moreover, in the basis for jurisdiction, the District did not indicate that Holm Lake was jurisdictional under the CWA.⁷⁴ Identifying Holm Lake as a Section 10 TNW but not a CWA TNW is inconsistent with regulation because Section 10 RHA navigable waters of the U.S. are generally a subset of CWA TNWs; with rare exception, RHA waters are not CWA waters, and in such variance, rationale would be necessary to explain the difference.

The District's AR, and subsequent clarifying discussions of its conclusions at the appeal meeting and site visit, provided insufficient documentation that a tributary connection meeting the requirements of 33 CFR Part 328.3(a)(5) extends from the Red River to Holm Lake. It remains unclear from the evidence presented by the AR whether the OHWM of the Red River reaches Holm Lake. The AR does not include how either party calculated the OHWM or contain documentation of technical criteria sufficient to identify Stream 2 as a tributary (i.e., a flow path but no documentation of an OHWM or evidence of relatively permanent surface water contributions to the Red River).⁷⁵

The discrepancy of accounts together with insufficient documentation complicates matters concerning the actual flow regime of Stream 2. Without related documentation, notes, photographs, or data points, it remains unclear where the OHWM is located and whose account of Stream 2's flow regime is more accurate. The District's reliance on visual evidence is hampered by documentation issues and emphasizes the requirement for evidence to refute the claims of the Appellant.

ACTION: The District should reconsider and further document the decision regarding the TNW determination for Holm Lake in accordance with applicable regulation, guidance, and policy. If upon reconsideration the District concludes that Holm Lake is not a 33 CFR 328.3(a)(1) TNW, then the District should consider the jurisdictional status under any of the other categories of jurisdictional waters.

The District should reconsider and further document the decision that Stream 2 is a relatively permanent tributary per 33 CFR 328.3(a)(5). As applicable, the District shall identify, delineate, and map the OHWM of Holm Lake, Stream 2, and the Red River at its junction with Stream 2, in accordance with RGL 05-05. Additionally, the District shall, as necessary, provide documentation that allows "for a reasonably accurate replication of the determination at a future date" including elements such as the methodology employed, the rationale for the methodology employed, identification of any data relied on, the source(s) of any data relied on, any assumptions or caveats associated with any data relied on, and any conclusions reached in identifying, delineating, and mapping the OHWM.⁷⁶

⁷⁴ AR 16.

⁷⁵ AR 18, 33-45. See also Regulatory Guidance Letter 05-05, Ordinary High Water Mark.

⁷⁶ Regulatory Guidance Letter 05-05, Ordinary High Water Mark.

REASON FOR APPEAL 3: Holm Lake is not jurisdictional under the CWA because it lacks a continuous surface connection to the Red River.

FINDING: This reason for appeal does not have merit.

DISCUSSION: The Appellant contends that the AJD is inconsistent with the ruling in *Sackett v. EPA*⁷⁷ because jurisdiction must be based on a continuous surface connection (CSC) between Holm Lake and the Red River. The Appellant proposed an interpretation of the Corps regulations and jurisdiction that would extinguish a jurisdictional connection if Stream 2 does not have a CSC to the Red River. The Appellant reasoned that since Stream 2 appears dry most of the year and that it is constricted by a culvert, its channel cannot constitute a CSC.

The District said that the presence or absence of a CSC to a TNW influence whether a wetland falls under the CWA but that the presence or absence of a CSC has no bearing on the jurisdictional status of a non-wetland feature, such as a lake, stream, or canal. There is no evidence in the AR that suggests the District made any assertion or determination that included claiming CWA jurisdiction based on a CSC between non-wetland waters.

In this instance, the District is correct that a CSC is not relevant to the jurisdictional status of Holm Lake. Under the pre-2015 regulatory regime, consistent with *Sackett*, the Corps will assert jurisdiction over (in part) “relatively permanent non-navigable tributaries of traditional navigable waters and wetlands with a [CSC] with such tributaries.”⁷⁸ The Supreme Court's decision in *Sackett* rejected the 1986 interpretation of adjacent *as it pertains to wetlands* (emphasis added) and said that the plurality standard established in *Rapanos* is controlling; a CSC exists between a wetland and an RPW where the wetland directly touches the tributary.⁷⁹ There is no similar requirement applicable to non-wetland waters.

ACTION: There is no evidence or reason to suggest that the District's handling of the AJD request constituted an abuse of discretion or was plainly contrary to any law, regulation, Executive Order, or officially promulgated Corps policy guidance. Therefore, this reason for appeal does not have merit.

REASON FOR APPEAL 4: The delay of process violated standards of decision making.

FINDING: This reason for appeal does not have merit.

⁷⁷ *Sackett v. EPA*, 566 U.S. 120 (2023).

⁷⁸ *Rapanos* guidance, p. 6. See also 88 FR 3004; 3095-96. The preamble to the 2023 Rule explains that wetlands meet the CSC requirement if they physically abut an RPW, or if they are connected to RPWs by a discrete feature like a ditch, pipe, or culvert, because such features serve as the physical connection that maintains the CSC.

⁷⁹ *Rapanos* guidance, p. 7. The *Rapanos* plurality uses phrases like continuous physical connection to describe the CSC requirement, e.g., *Rapanos*, 547 U.S. at 747, 751 n.13, 755.

DISCUSSION: At the appeal meeting, the Appellant clarified their contention that the District's delay in processing its request violated decision-making standards. The Appellant stated that it understood the process to have begun upon submitting their preconstruction notification on October 13, 2022, and expected the process would be finished 60 days later. The reason for appeal is that the District's misdirection and delay indicated a failure to fulfill its regulatory obligations and resulted in an unfair process.

The (RFA) includes a timeline documenting the Appellant's account of events and interactions with the District, referencing emails, phone calls, and meetings not documented in the AR. The Appellant does not possess documentation of these interactions, and while the District did not dispute the timeline, in response to questions from the Review Officer, it said that some interactions may not be part of the AR because the communications were not relevant to the AJD. The absence of records makes it unclear whether issues raised by the Appellant were discussed during these interactions, and conflicting accounts further complicate the matter.

However, a review of the record does not indicate any inappropriate actions by the District regarding the timeliness of its response. While a timely decision is a goal of the Regulatory Program, this goal competes with workload priorities, associated permit actions, and weather conditions requiring site visits. Although delays were not explained in the AR, there are no timeframes required in Corps regulations for the issuance of an AJD. There is no regulatory or statutory entitlement to an AJD from the District. Districts are responsible for performing context specific AJDs and documenting findings in a decision, exercising appropriate judgment and using appropriate information.⁸⁰ As per 33 CFR 320.1(a)(6), the Corps has authorized its district engineers to issue formal determinations concerning the applicability of the CWA to tracts of land, but this does not establish an applicant's right to an AJD nor a requirement for districts to issue AJDs. Additionally, there is no target timeline in regulations or current guidance specific to AJD decisions.

ACTION: There is no evidence or reason to suggest that the District's handling of the AJD request constituted an abuse of discretion or was plainly contrary to any law, regulation, Executive Order, or officially promulgated Corps policy guidance. Therefore, this reason for appeal does not have merit.

Conclusion: This AJD is remanded to the Vicksburg District Engineer for further analysis and documentation in accordance with 33 CFR 331.10(b) for reconsideration due to inadequate documentation and procedural compliance, as outlined beneath Reasons 1 and 2 above. The District must reassess the jurisdictional status of Holm Lake and Stream 2, thoroughly documenting the OHWM and flow regime, as necessary. This includes coordinating with the EPA if needed.⁸¹

⁸⁰ Standard Operating Procedures for the U.S. Army Corps of Engineers Regulatory Program, pp. 1-2; RGL-16-01, Questions and Answers for RGL 16-01, #4.

⁸¹ https://epa.gov/system/files/documents/2023-10/2023-joint-coordination-memo-pre-2015-regulatory-regime_508c.pdf.

The District must thoroughly review its decision to ensure accurate and sufficient information and analysis are included in the AR to provide adequate basis for its determination. The District should follow applicable regulations, guidance, and policy, including 33 CFR parts 328 and 329, RGL 05-05, and the National OHWM Manual. The revised AR must contain detailed methodology, rationale, data sources, assumptions, and conclusions to support the District's final determination, which should be governed by the regulations effective at the time of the AJD completion. The reconsideration will account for all relevant subsequent revised rules or guidance.

6 JAN 2025

DATE



Kimberly A. Peebles
Major General, U.S. Army
Commanding