



ADMINISTRATIVE APPEAL DECISION

US ARMY CORPS OF ENGINEERS

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ADMINISTRATIVE APPEAL DECISION

CLEAN WATER ACT

KAS FARMS & MANAGED INVESTMENTS – MVP-2015-02665

ST. PAUL DISTRICT

**ADMINISTRATIVE APPEAL DECISION
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MVP-2015-02665
ST. PAUL DISTRICT**

Review Officer: Melinda M. Witgenstein, U.S. Army Corps of Engineers, Northwestern Division (NWD), Portland, Oregon.

Appellant: Mr. Pete Thorson, Managed Investments, Inc. and KAS Farms

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

Receipt of Request for Appeal: May 2, 2017

Summary: The Appellant is challenging an approved jurisdictional determination (AJD) issued by the St. Paul District (District), which concluded that the U.S. Army Corps of Engineers (Corps) has Clean Water Act (CWA) jurisdiction over an estimated 10.82 acres of wetlands, 425 linear feet of Relatively Permanent Waters (RPW) stream and 1238 linear feet of RPW ditch on a 39.34 acre site located at the northwest corner of Superior Avenue and Jefferson Street, Tomah, Monroe County, Wisconsin. The District did not identify precise limits of waters of the U.S., rather the AJD is limited to a presence/absence determination, and includes an estimated acreage of the presence of waters of the U.S. on the site. The Appellant disagrees with the AJD, and asserts that the District overreached in its AJD determination and that the District incorrectly disagreed with the delineation of Appellant's consultant.

For reasons detailed in this document, of the eight "points of appeal" raised by the Appellant, the first reason for appeal has merit. The District incorrectly established an upstream and downstream limit of navigability for the Lemonweir River, a determination which does not comport with applicable guidance. Therefore, the AJD is remanded to the St. Paul District Engineer for further analysis and documentation in accordance with 33 C.F.R. 331.10(b). Authority to make the final Corps decision on the jurisdictional determination resides with the St. Paul District Engineer pursuant to this remand.

Background Information:

Federal Clean Water Act (CWA) Jurisdiction. Federal CWA jurisdiction is determined according to implementing regulations found at 33 C.F.R. 328, current agency guidance and standard procedures, including the 2008 EPA/Corps *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States* (the "Rapanos Guidance"),¹ the *U.S. Army Corps of Engineers Jurisdictional Determination*

¹ Combined cases of *Rapanos v. United States and Carabell v. United States Army Corps of Eng'rs*, 547 U.S. 715, 126 S. Ct. 2208, 165 L. Ed. 2d 159 (2006). Collectively referred to as the "Rapanos" decision.

Form Instructional Guidebook² (“JD Guidebook”), the 1987 Corps of Engineers Wetlands Delineation Manual (“87 Manual”)³ and applicable Regional Supplements,⁴ and applicable Regulatory Guidance Letters (“RGLs”).⁵

In 2007, as a result of the *Rapanos* decision, the Environmental Protection Agency (EPA) and the Corps, in coordination with the Office of Management and Budget and the President’s Council on Environmental Quality, issued a guidance memorandum to ensure that jurisdictional determinations, permit actions, and other relevant actions are consistent with the *Rapanos* decision and supported by the Administrative Record (AR). The EPA and the Corps jointly revised that guidance on December 2, 2008 in response to public comments received and the agencies’ experience in implementing the *Rapanos* decision.⁶

The *Rapanos* Guidance allows for the application of two standards to support an agency jurisdictional determination for certain water bodies. 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 (TNWs), (2) all wetlands adjacent to TNWs, (3) relatively permanent non-navigable tributaries (with at least seasonal flow) of TNWs, and (4) wetlands that directly abut relatively permanent, non-navigable tributaries of TNWs. The second standard, for tributaries that are not relatively permanent, is based on the concurring opinion of Supreme Court Justice Kennedy and requires a case-specific “significant nexus” analysis to determine whether a water, and its adjacent wetlands, is jurisdictional. “A significant nexus analysis will assess the flow characteristics and functions of the tributary itself and the functions performed by all wetlands adjacent to the tributary to determine if they significantly affect the chemical, physical, and biological integrity of the downstream TNW.”⁷ The classes of water bodies that are subject to CWA jurisdiction, if such a significant nexus is demonstrated, are: (1) non-navigable tributaries that are not relatively permanent, (2) wetlands adjacent to non-navigable tributaries that are not relatively permanent, and (3) wetlands adjacent to but that do not directly abut a relatively permanent, non-navigable

² This U.S. Army Corps of Engineers and Environmental Protection Agency jointly-prepared guidebook is intended to be used as the U.S. Army Corps of Engineers Regulatory National Standard Operating Procedures for conducting an approved jurisdictional determination (AJD) and documenting practices to support an AJD.

³ Technical Report Y-87-1, U.S. Army Engineer Waterways Experiment Station, Vicksburg, Mississippi.

⁴ In 1993, at the request of Congress, the National Research Council (NRC) formed a committee to review the scientific basis for wetland delineation and the technical validity of current wetland delineation manuals. The NRC report supported the basic logic and structure of the 87 Manual. However, it also concluded that regional variation among wetlands across the United States can affect the validity and usefulness of any national delineation manual, and strongly recommended that delineation procedures be revised to increase their regional specificity (see National Research Council. 1995. Wetlands: Characteristics and Boundaries. Washington, DC: The National Academies Press. <https://doi.org/10.17226/4766>). At the recommendation of the NRC, USACE developed the regional supplements through interagency working groups, public notice and comment, and peer review. The regional supplements are technical guidance and are designed to be used with the 1987 Manual.

⁵ <http://www.usace.army.mil/Missions/CivilWorks/RegulatoryProgramandPermits/GuidanceLetters.aspx>

⁶ EPA & Corps Memorandum: Subject: *Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in Rapanos v United States and Carabell v. United States*, December 2, 2008.

⁷ *Rapanos* Guidance, page 8

tributary.⁸ Consequently, the agencies may assert jurisdiction over any water body that is not a relatively permanent water if that water body is determined (on the basis of a fact-specific analysis) to have a significant nexus with a TNW.

Brief Chronology Regarding the Subject Appeal: On July 29, 2015, the District received a wetland delineation report dated October 11, 2013, along with the Appellant's request for an AJD⁹. The District completed the AJD, concluding that Waters of the U.S. are present on the site, and notified the Appellant of its findings on March 2, 2017. The District provided two AJD forms, supporting documentation consisting of 20 attachments, and a *Notification of Administrative Appeal Options and Process and Request for Appeal* form.¹⁰ The two AJD forms represent the District's determinations of CWA jurisdiction over Deer Creek and its adjacent wetlands¹¹ and the Ditch to Deer Creek and its adjacent wetlands.¹²

The Appellant submitted a complete Request for Appeal form (RFA) and supporting information to the Mississippi Valley Division (MVD) on May 2, 2017. On May 17, 2017, the MVD Commander requested the assistance of the Northwestern Division (NWD) Review Officer (RO). NWD accepted the request for assistance on June 2, 2017.

Information Received and its Disposition during the Appeal Review: The Administrative Record (AR) is limited to information contained in the record as of the date of the Notification of Administrative Appeal Options and Process form.¹³ Pursuant to 33 C.F.R. 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 approved JD. 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) The District electronically provided copies of the AR to the RO and the Appellant (AR1 and AR2) on June 27, 2017. AR2 contained electronic mail and other correspondence between the Appellant, his consultants, the District and MVD that occurred after the AJD decision date of March 2, 2017. Because the District Engineer did not consider this information in

⁸ Rapanos Guidance, page 1.

⁹ "2-2015-02665-KDZ-KAS Farms JD Decision.pdf", pp. 000961-001001. "1-2015-02665-KDZ-KAS Farms JD Decision - 6-20-2017-signed.pdf" and "2-2015-02665-KDZ-Kas Farms JD Decision.pdf" are herein referred to as "AR". Future references to these documents comprising the AR will be identified as "AR1" and "AR2" (e.g. AR2, pp. 000961-001001).

¹⁰ AR1 000006-000947.

¹¹ AR1 000013-000024; future references to the AJD form associated with Deer Creek and its adjacent wetlands will be identified as "JD form 1".

¹² AR1 000100-000110 future references to the AJD form associated with the Ditch to Deer Creek and its adjacent wetlands will be identified as "JD form 2"

¹³ 33 C.F.R. 331.7(f) (2017).

making his AJD decision, the RO's review did not consider this information. The AR is limited to information contained in the record as of the date of the Notification of Administrative Appeal Options and Process form.

- 2) In accordance with 33 C.F.R. 331.7(d), on September 5, 2017, an informal appeal meeting and site visit was held in Tomah, Wisconsin. The meeting was attended by the RO, the Appellant, his consultants, and District staff. The informal meeting consisted of clarification of the Appellant's reasons for appeal, and the District's clarification of rationale used in the AJD decision. The site visit consisted of a tour of the site and discussion of aquatic features present on the site. The RO's notes from the September 5, 2017 appeal site visit and meeting are contained in the appeal record.
- 3) During the informal appeal meeting, the Appellant submitted two documents, and the District submitted one document to the RO:
 - a. The first Appellant-submitted document consisted of a legal opinion by the Appellant's counsel, regarding the District's use of data from previous delineations. The legal opinion is not part of the AR and was not considered in the Appeal review because it does not represent missing or clarifying information related to the contents of the AR or the reasons for appeal presented by the Appellant.
 - b. The second Appellant-submitted document consisted of information and court documents regarding the State of Wisconsin's involvement in litigation associated with the 2015 Clean Water Rule. This information is not part of the AR and was not considered in the Appeal review because it does not represent missing or clarifying information related to the contents of the AR or the reasons for appeal presented by the Appellant.
 - c. The District submitted a document titled "Northcentral/Northeast and Midwest Regional Supplement Comparison". This document summarizes the differences between two regional supplements. This document was provided in response to a question from the RO in advance of the appeal meeting. It was considered as clarifying information by the RO.
- 4) After filing his appeal, the Appellant asserted on several occasions, both verbally and via electronic mail, that the AR is missing information. The RO advised the Appellant that if he believed information was missing from the AR, he should send that information to the RO and the District, or in the alternative, identify it so that the RO can determine if it should be included in the AR.
 - a. On October 25, 2017, the Appellant submitted a large (127 pages) package of information to the RO. The Appellant indicated that this information was previously submitted and should have been part of the AR. After reviewing the information submitted, the RO determined that two documents contained in this package were

absent from the AR. These two documents consist of an electronic mail from NRCS staff, dated June 7, 2016, and an electronic mail from the Appellant to the District dated December 6, 2016.

At the request of the Appellant, the District forwarded an additional package of information (94 pages) to the RO on November 13, 2017. The Appellant asserted that this package was one of three binders he provided to the District during various meetings. The information in this package is referred to as "binder #1" and consists of information the Appellant submitted to the District during a meeting on June 8, 2016. This package contained the same NRCS electronic mail dated June 7, 2016, and contained multiple undated site photos that were not accompanied by any explanation.

- b. Via electronic mail dated December 21, 2017, the RO provided the Appellant with a detailed summary of information submitted after his appeal, both from the District and from the Appellant. The RO requested clarification on some of the information the Appellant had submitted, and provided an opportunity for the Appellant to submit any further information he thought was missing from the AR.
- c. On February 26, 2018, the Appellant visited MVD to deliver documents pertaining to his appeal, and was asked instead to provide the information directly to the RO. No additional documents were received by the RO.

APPEAL EVALUATION

As quoted below, the second page of the RFA identified eight reasons for appeal:

1. The Wisconsin River is the closest (TNW) some 67 miles from the site. Lemonier River has not been substantiated or legally approved to be a (TNW) by the St. Paul District Engineer or Mississippi Valley Division as a Traditional Navigable Water in accordance with the requirements of 33 C.F.R. Part 328 or 33 C.F.R. part 329.
2. The Farm Drainage Ditch located on KAS Farms land is not a "relatively permanent water" because it has no perceptible flow (as referred to in corps own data reports and pictures).
3. There is no surface connection between the Bopray Wetland B (Proposed Lots 1, 2 & 3) and the farm drainage ditch to Deer Creek.
4. The Corps had sufficient time and access to collect data and delineate the precise limits of the alleged waters of the United States (WOTUS) and connections to Wisconsin River a traditional navigable water (TNW).

5. The Corps cannot use obsolete data from 2001, 2002, 2003 or 2004 or data collected outside the growing season. The Corps can only refer to delineations, information, data or AJDs within a 5-year window or valid for 5 years because changing onsite conditions.
6. The Corps has not supported its significant nexus determination with reliable onsite data. To support more than a speculative or insubstantial effect on the physical, chemical and biological integrity of the TNW (Wisconsin River).
7. A so-called “shallow subsurface connection” between Lots 1, 2 & 3 and the farm drainage is not a basis for jurisdiction. (Rapanos -2006 Justice Kennedy).
8. Troubling Questions

Each of the eight reasons for appeal identified above, and respective subparts, are discussed below.

First Reason for Appeal: “The Wisconsin River is the closest (TNW) some 67 miles from the site. Lemonier River has not been substantiated or legally approved to be a (TNW) by the St. Paul District Engineer or Mississippi Valley Division as a Traditional Navigable Water in accordance with the requirements of 33 C.F.R. Part 328 or 33 C.F.R. part 329.¹⁴”

Finding: This reason for appeal has merit.

Action: This reason for appeal is remanded to the St. Paul District Engineer for further analysis and documentation in accordance with 33 C.F.R. 331.10(b). The District Engineer should analyze the TNW determination for the Lemonweir River in accordance with the Rapanos Guidance and the 2008 memoranda regarding TNW determinations.¹⁵ The District Engineer should evaluate the flow path from the project site to the downstream waters, and evaluate the confluence with the Lemonweir River to determine if a case specific determination is appropriate.

Discussion: 33 C.F.R. parts 328 and 329 provide the definitions of Waters of the United States for purposes of the CWA,¹⁶ and Navigable Waters of the United States regulated under sections 9 and 10 of the Rivers and Harbors Act (RHA),¹⁷ respectively. Due to specific characteristics, many navigable waters are regulated under both statutes. The applicable guidance regarding CWA jurisdiction over TNWs is located in the Rapanos Guidance,¹⁸ which

¹⁴ RFA, page 2.

¹⁵ 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”).

¹⁶ 33 C.F.R. 328.3(a).

¹⁷ 33 C.F.R. 329.4.

¹⁸ Rapanos Guidance, page 4.

affirms that the EPA and the Corps will continue to assert jurisdiction over TNWs. Guidance is also found in Appendix D of the JD Guidebook, which provides guidance on determining whether a water is a TNW for purposes of the Rapanos Guidance, the CWA, and the agencies' CWA implementing regulations.

Further guidance regarding TNW determinations is found in the Woodley Memo and the Stockton Memo, which direct that any stand-alone determination that a specific water body is a TNW must be made by the Division Commander, based on a recommendation and report developed by the District Commander.

Paragraph 2 of the Woodley Memo indicates that the term "Stand-Alone" does not apply to:

"TNW determinations associated with approved jurisdictional determination(s) or authorizations for the discharge of dredged or fill material into all waters of the United States, including wetlands," except as provided below."

Paragraph 5 of the Stockton Memo states:

When processing a permit application or making an approved jurisdictional determination, except as provided for in paragraph 3, a District Commander may still identify the nearest CWA TNW for determining the jurisdictional status of tributaries for making significant nexus evaluations, *as long as this process does not establish upstream or downstream limits of navigability for the TNW.* (emphasis added).

In Section III.B.1.(ii).(a). of JD form 1 and JD form 2,¹⁹ the District identified a portion of the Lemonweir River as a TNW, and included the Wisconsin River as another downstream TNW:

...Deer Creek flows through the northern portion of the JD review area in an easterly direction until reaching its confluence with South Fork Lemonweir River (RPW), approximately 2,855 linear feet east of the JD review area boundary. The South Fork Lemonweir River flows in an easterly direction approximately 10.74 river miles until its confluence with the Lemonweir River (RPW). *The Lemonweir River flows in a southeasterly direction approximately 29.95 river miles and becomes a traditional navigable water (TNW).* From this point, the Lemonweir River flows an additional 26.42 river miles until its confluence with the Wisconsin River, also a TNW and navigable-in fact waterbody. (emphasis added)

The Wisconsin River is included on the St. Paul District's list of Navigable Waters,²⁰ in accordance with 33 C.F.R. 329.16. The Lemonweir River is not on the Navigable Waters list

¹⁹ JD form 1, AR1, 000014-000015 and JD form 2, AR1, 000101-000102.

²⁰ <http://www.mvp.usace.army.mil/Portals/57/docs/regulatory/RegulatoryDocs/navigable%20waters%20wi.pdf>.

but this does not mean that it is not navigable.²¹ For purposes of this AJD, the District made a determination that a 26.42 mile reach of the Lemonweir River is a Traditional Navigable Water. This determination is explained in the AJD Attachment 20, "Memorandum for Record – Traditional Navigable Water Determination for the Lemonweir River in Juneau County, Wisconsin."²² In this Memorandum for Record, the District describes past, present and potential future use of the Lemonweir River for interstate or foreign commerce. The District also refers to an existing TNW determination made by the EPA in support of a 2011 Jurisdictional Determination.²³ Overall, Attachment 20 provides substantial data in support of a case-specific TNW determination for the segment of river in question; however, the District's conclusion that a 26.42-mile reach of the Lemonweir River is a TNW is contrary to guidance, because identifying an upstream and downstream limit of navigability (i.e. a Stand-Alone TNW determination) is a determination that must be made by the Division Commander. Accordingly, this reason for appeal is remanded to the District for further analysis and documentation.

Second Reason for Appeal: "The Farm Drainage Ditch located on KAS Farms land is not a "relatively permanent water" because it has no perceptible flow (as referred to in corps own data reports and pictures).²⁴"

The Appellant argues that the District incorrectly identified the Farm Drainage Ditch as a relatively permanent water (RPW), stating that the farm drainage ditch is not a RPW because it has no perceptible flow, as the District indicated in field observations and photos²⁵. Further, the Appellant states that there is no data verifying that the ditch meets the minimum requirement for maintaining surface water flow substantial enough to affect the closest TNW (asserted to be the Wisconsin River).²⁶

Finding: This reason for appeal does not have merit.

Action: No further action.

Discussion: The Rapanos Guidance directs the Corps and EPA to assert jurisdiction over non-navigable tributaries of traditional navigable waters that are relatively permanent where the tributaries typically flow year-round or have continuous flow at least seasonally (e.g., typically three months).²⁷ Thus, the standard for identifying a RPW is three months of flow, not whether or how that flow affects the downstream TNW. The AR reflects that during November 2015 and July 2016 visits to the site, the District documented their observations with data

²¹ 33 C.F.R. 329.16(b).

²² AR1 000836-000845.

²³ AR1 000844.

²⁴ RFA, page 2.

²⁵ RFA, page 4.

²⁶ *Ibid.*

²⁷ Rapanos Guidance, page 6.

sheets and photographs. The District did note a standing water condition in the ditch with 'no perceptible flow.'²⁸

Attachments 15 and 16 of the AJD²⁹ show that the District performed a more detailed analysis during the months of March through May 2016. The District concluded that the ditch is an RPW after documenting bi-weekly observations from the roadside at the south end of the property (along Jefferson Street) for this three month period.³⁰ Attachment 15 provides photodocumentation and a description of the observations including bankfull condition and continuous flow for the entire three month period. Attachment 16 further supports this conclusion with a series of exhibits using historic aerial photography, demonstrating visible water in the channel over several years. The District's conclusion that the ditch to deer creek is an RPW (i.e. flowing at least three months out of the year) was reasonable, supported by evidence in the AR, and is not contrary to law, regulation or officially promulgated policy guidance. This reason for appeal does not have merit.

Appeal Reason 2.a. "The Corps Misrepresents Wetland A as one parcel, when it is distinctly 2 separate wetland areas."³¹

Finding: This reason for appeal does not have merit

Action: No further action

Discussion: The Appellant argues the district incorrectly identified its 'Wetland A' as one contiguous wetland, when it should more appropriately be two separate wetland areas (i.e. Wetland A and Wetland B) as depicted on the Bopray delineation.³² The Appellant states "the standard is to define the two separate areas as Bopray did."³³ The Appellant further states that he believes the District did this intentionally to further complicate the issues.³⁴ There is no law, regulation, Executive Order, or other officially promulgated Corps policy guidance which provides specific direction to Corps districts regarding how to separate (or combine) wetland areas into polygons when there is a hydrologic surface connection.

In its analysis of the connection between Wetland A and Deer Creek,³⁵ the District describes Wetland A as follows:

... The surface flow [characteristics] of Wetland A in the review area to Deer Creek [are] best described as a combination of discrete surface flow across the surface of Wetland A to Deer Creek and also confined flow from Wetland A

²⁸ AR1 000225, 000268, 000269, and AR2 000935-000958.

²⁹ AR1 000139-000175.

³⁰ AR1 000103.

³¹ RFA, page 4.

³² *Ibid.*

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ AR1 000018.

directly to Deer Creek through two existing culverts located in a private driveway. In addition, the Ditch to Deer Creek provides confined conveyances of surface flow from the western and southern portion of Wetland A directly to Deer Creek.

Attachment 4 of the AJD³⁶ and Appendix A of the 2013 Bopray Delineation³⁷ both show that the area Bopray identified as Wetland B is connected to the area Bopray identified as Wetland A by a culvert through the private driveway. The District identified two culvert connections, and provides discussion of its analysis in Attachment 1³⁸ to the AJD:

Although the private driveway crosses Wetland A, the two existing culverts in the man-made driveway allow Wetland A to function as one continuous wetland system on the north and south sides of the private driveway. The WDNR Surface Water Data Viewer (SWDV) shows the Deer Creek 100 year floodplain (Zone AE) extending from the north portion of Wetland A into the portion of Wetland A situated south of the private driveway, further indicating hydrologic interaction between Wetland A and Deer Creek.

The Appellant's statement in Section 2.a. of the RFA reflects a general disagreement with the District's methodology with regard to establishing wetland polygons, and the level of significance associated with that methodology. Within this section, the Appellant also questions the connection between the District's Wetland A and the ditch to Deer Creek. This point will be addressed in the discussion of the RFA's third reason of appeal.

There is no evidence that the District's identification of "Wetland A" as a single polygon was an abuse of discretion, or contrary to fact or generally recognized practice. The District's conclusions and characterizations are reasonable and supported in the AR. This reason for appeal does not have merit.

Third Reason for Appeal: "There is no surface connection between the Bopray Wetland B (Proposed Lots 1, 2 & 3) and the farm drainage ditch to Deer Creek.³⁹"

3.1. "There is a 30-40' upland between Lots 1, 2, & 3 and the Farm Drainage Ditch. (24-30" higher in elevation) Thus, water cannot physically move from the land on the East side of the Ditch via a continuous surface hydrological flow into the farm drainage ditch. It is physically impossible.⁴⁰"

Finding: This reason for appeal does not have merit.

³⁶ AR1 000054.

³⁷ AR2 000976.

³⁸ AR1 000029.

³⁹ Under the third point of appeal on page 4 of the RFA, the Appellant offers several arguments via multiple bullet points over pages 5 and 6 of the RFA. The collective arguments are addressed in points 3.1 to 3.8, inclusive, of this decision.

⁴⁰ RFA, page 5.

Action: No further action.

Discussion: 33 C.F.R. 328.3(a)(6) states, in relevant part, that the term “waters of the United States” means “all waters adjacent to a water identified in paragraphs (a)(1) through (5) of this section, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters.” 33 CFR 328.3(c)(1) states, in relevant part, “The term adjacent means bordering, contiguous, or neighboring a water...including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like.”

The Rapanos Guidance further clarifies the regulatory definition of adjacency, stating that wetlands are adjacent if one of three criteria are satisfied: (1) there is an unbroken surface or shallow subsurface connection to jurisdictional waters; (2) they are physically separated from jurisdictional waters by man-made dikes or barriers, natural river berms, beach dunes, and the like; or (3) their proximity to a jurisdictional water is reasonably close, supporting the science-based inference that such wetlands have an ecological interconnection with jurisdictional waters.⁴¹

A detailed analysis of the District’s observations and data analyzed when determining the adjacency of the estimated 7.31 acres of wetlands located in the southern portion of the review area to the farm drainage ditch and to Deer Creek is located in section III.A. of Attachment 10.⁴²

On April 19, 2016, while making offsite observations of site conditions, the District identified gaps in the spoil piles adjacent to the north-south portion of the Farm Drainage Ditch.⁴³ These gaps in the spoil piles are also discussed in the District’s analysis of the 2013 Lidar map included in Attachment 16.⁴⁴ As stated by the District, “These two gaps are shown at the same elevation as Wetland A on the east side of the Ditch to Deer Creek, thereby indicating that a surface connection between Wetland A and the Ditch to Deer Creek was present in 2013.”⁴⁵ The District also observed inundation on the site which directly abuts the east-west portion of the ditch; this is demonstrated in a photo taken in March 2016 from the road just to the south of the site.⁴⁶ Further, the District determined from images 6, 12, and 13 of its aerial imagery analysis,⁴⁷ that a surface connection existed between the southern portion of Wetland A and the east-west segment of the ditch. The District’s conclusion that Wetland A directly abuts a seasonal RPW was reasonable, supported by evidence in the AR, and is not contrary to law, regulation or officially promulgated policy guidance. This point does not have merit.

⁴¹ Rapanos Guidance, page 5.

⁴² AR1 000113-000115.

⁴³ Photo, 4/19/16, AR1 000160.

⁴⁴ AR1 000175.

⁴⁵ AR1 000115.

⁴⁶ AR1 000148.

⁴⁷ AR1 000161-000175.

3.2. “The Corp position of a surface water connection (through a WISDOT storm water drain is unfounded! The drain was plugged in 2015 and 2016, so there was not a connection. (Bopray Report 2-16 (O, P) & AJD pictures). The Corps record acknowledges these abnormal conditions.⁴⁸”

Finding: This reason for appeal does not have merit.

Action: No further action.

Discussion: The Rapanos Guidance provides that an “unbroken surface or shallow subsurface connection to jurisdictional waters” can be used in establishing adjacency.⁴⁹ In order to determine if such a connection existed between the southern portion of the wetland and Deer Creek, the District evaluated available data, including the information submitted by Bopray:

At BES Sample Point S3, multiple field indicators of wetland hydrology (A1, B4, D2 and D5) were documented during the 27 April 2016 site inspection. However, a nearly completely blocked culvert under the private driveway adjacent to Highway 12 had artificially and temporarily resulted in inundation in the opinion of BES. BES contends that, under normal circumstances, wetland hydrology does not exist at this sample point. BES is correct that the temporarily blocked culvert is not the normal circumstances. The Corps inspected this culvert in April 2003. It was open and functional during the 2003 monitoring well study. In 2003, under normal circumstances, a water table at the surface was recorded at United States Sample Point 1-5 and inundation was recorded at United States Sample Points 1-3 and 1-4 (see Figure 15 and Attachments B and G). Aerial photography spanning 2005-2015 shows frequent wet signatures within the area immediately upgradient of the culvert (Figures 19, 20, 21 and 22 and Attachment D).⁵⁰

It is clear that the District disagreed with the Bopray analysis of the significance of the blocked culvert. The District’s analysis in the above paragraph demonstrates that it considered multiple sources of onsite and remote information available. This is in accordance with the guidance provided in the 87 Manual. Section B of the 87 Manual generally addresses preliminary data gathering and syntheses, and paragraphs 53-54 provides more specific guidance on data gathering and synthesis.⁵¹ These sections recommend a review of multiple sources to evaluate vegetation, soils, and hydrology, and specifically refers to sources such as recent (within 5 years) aerial photography, individuals or experts with knowledge of the area, and previous wetland determinations.

⁴⁸ RFA, page 6.

⁴⁹ Rapanos Guidance, page 5.

⁵⁰ AR1 000198-000199.

⁵¹ 87 Manual, pages 39-44.

The Bopray report, dated May 13, 2016, states “During the 2016 site visit BES observed that the North Superior Avenue (USH 12) culvert under the driveway was almost completely blocked with sediment.⁵²” The District acknowledged the possibility that the blocked culvert could have created temporarily wetter conditions in the spring of 2016, but went on to point out that two of the secondary hydrologic indicators identified in the Bopray delineation were indicative of longer-term conditions⁵³ (i.e. geomorphic position and FAC-neutral test). Therefore, the District’s conclusion that the WISDOT culvert provided a continuous hydrologic connection through the private driveway was reasonable, supported by evidence in the AR, and is not contrary to law, regulation or officially promulgated policy guidance.

3.3. “There is no on site documentation,(Volumes or Flow Data) showing that there are any surface hydrologic flows from Lots 1,2, & 3 on the East side of the ditch and South of drainage ditch into Deer Creek. The Corps instead chose to only provide off-site collection and examples. One sample, ½ mile away at the connection of Deer Creek and the South Fork of the Lemonweir and one onsite prior to the growing season. See attachment (L). The growing season of 2016 started May 15, 2016 @ 6:05 AM.⁵⁴”

Finding: This reason for appeal does not have merit.

Action: No further action.

Discussion: In determining the southern portion of Wetland A abuts the ditch to Deer Creek, the District reviewed soil maps, topographic maps, previous delineations including the Bopray delineation conducted in 2013, and direct onsite and offsite observations of the area by District staff⁵⁵, as evidenced in the AR through narrative statements and onsite photos, as well as photos of the site taken from nearby roads. There is no evidence to suggest, nor reason to believe that the District relied on a data point 0.5 mile away when determining that the southern portion of the wetland abutted the ditch to Deer Creek. The District’s determination was not an abuse of discretion, or plainly contrary to a requirement of law, regulation, Executive Order, or officially promulgated Corps policy guidance.

The Appellant also asserts that the 2016 growing season started May 15, 2016. In support of this assertion, he provided a screenshot of a mobile device, presumably taken on May 15, 2016, depicting a temperature of 25°F at 6:05 AM.⁵⁶

Alternatively, the information provided by the Appellant’s consultant in a memorandum dated May 13, 2016, suggested that the 2016 growing season began on April 26, 2016, per the WETS tables for Monroe County.⁵⁷ The 87 Manual defines the “Growing season” as “The

⁵² AR2 000699.

⁵³ AR1 000199.

⁵⁴ RFA, page 5.

⁵⁵ AR1 000113-000119.

⁵⁶ RFA, Attachment “L”.

⁵⁷ AR2 000697.

portion of the year when soil temperature at 19.7 in. below the soil surface are higher than the biologic zero (5° C)(U.S. Department of Agriculture Soil Conservation Service 1985). For ease of determination this period can be approximated by the number of frost-free days (U.S. Department of the Interior 1973).⁵⁸

The 87 Manual offers further guidance, stating “This period can be approximated by the number of frost-free days. Estimated starting and ending dates for the growing season are based on 28°F air temperature thresholds at a frequency of 5 years in 10 (HQUSACE, 6 Mar 92). This information is available in NRCS county soil survey reports or from the NRCS Water and Climate Center in Portland, Oregon, for most weather stations in the country.”⁵⁹

In addition to the 87 Manual, the Corps uses other technical guidelines and methods to identify and delineate wetlands. The Midwest and Northcentral and Northeast Regional Supplements, part of the above-referenced technical guidance, provide two additional indicators for estimating growing season, including soil temperature⁶⁰ (≥41°F measured at 12”) and evidence of active growth in non-evergreen vascular plants(the “green-up” indicator).⁶¹ The supplements indicate that the growing season has begun when at least one of a list of indicators of biological activity is present, including bud burst on woody plants.⁶²

The District documented this ‘green-up’ indicator during a site visit on April 7, 2016, through photographs of multiple woody species exhibiting bud-break.⁶³ The District determined that because the “green-up” indicator was met on April 7, that date was in fact the start of the growing season. The District explained that because April is considered the beginning of the wet season for the area, misidentifying the beginning of the growing season could lead to incorrect determinations regarding hydrology.⁶⁴ There is no evidence to suggest, nor reason to believe, the District’s determination of the beginning of the growing season was contrary to fact or generally recognized practice. Rather, the District’s conclusions and characterizations are reasonable and supported in the record, and fall within the discretion delegated to the District.

3.4. “There is No data provided in the ADM, records regarding the flow, volume or effect of the farm drainage ditch to Deer Creek or WISDOT storm water drain which didn’t provide a connections 14 days of the growing season . (tributary) Except numerous notations from 2003 to 2016 of No perceptible flow in the (2015-AJD).⁶⁵”

Finding: This reason for appeal does not have merit.

⁵⁸ 87 Manual, page A5.

⁵⁹ 87 Manual, page 29 (“User Notes”).

⁶⁰ Midwest Regional Supplement, page 71. Northcentral and Northeast Regional Supplement, page 80.

⁶¹ Midwest Regional Supplement, page 70. Northcentral and Northeast Regional Supplement, page 80.

⁶² Midwest Regional Supplement, page 70. Northcentral and Northeast Regional Supplement, page 78.

⁶³ AR1 000300-000304.

⁶⁴ AR1 000191.

⁶⁵ RFA, page 5.

Action: No further action.

Discussion: The District documented its observations regarding the duration and volume of flow within the Ditch to Deer Creek in section III. B.1.(ii).(c). of the JD form 2⁶⁶, as well as in attachments 15⁶⁷ and 16⁶⁸ to the AJD, as discussed in section 2.1, above. The District's conclusions regarding the physical, chemical, and biological influence of the tributary (Ditch to Deer Creek) and its adjacent wetlands on downstream waters are located in section III.B. of the JD form 2⁶⁹ and summarized in section III. C⁷⁰. The District concluded that the Ditch to Deer Creek, in combination with its adjacent wetlands, has a significant nexus with downstream navigable waters. The District's conclusions with regard to the Ditch and its adjacent wetlands are supported by substantial evidence in the AR, and are not contrary to a requirement of law, regulation, Executive Order, or officially promulgated Corps policy guidance.

The "WISDOT Stormwater Drain" referenced by the Appellant is one of two culverts in the private driveway, closest to Superior Avenue, and is depicted in Attachment 9, photo 12.⁷¹ The District did not identify this feature as a tributary, but rather as a continuous feature providing for a portion of the connectivity of Wetland A, despite the presence of the driveway that crosses the wetland.⁷² Because it is not identified as a tributary, there would be no need or requirement to provide any discussion on flow, volume or duration of this feature. There is no law, regulation, Executive Order, or officially promulgated Corps policy guidance requiring proof of a 14-day connection between two areas of a wetland when assessing CWA jurisdiction.

3.5. "The Corp's position of a connection through or underneath a 30'-40' upland East of the farm ditch is not accurately shown in the AJD. Where LiDAR maps. See attachment (J). and the 2004 record clearly acknowledge substantially different conditions, correctly shown on the South side (Jefferson St.) Subsurface connections are not federally regulated and as described in the Rapanos (2006).(see EPA/Corps current factsheet).⁷³"

Finding: This reason for appeal does not have merit.

Action: No further action.

⁶⁶ AR1 000102.

⁶⁷ AR1 000139.

⁶⁸ AR1 000161.

⁶⁹ AR1 000101-000106.

⁷⁰ AR1 000106-000107.

⁷¹ AR1 000072.

⁷² AR 000028-000029.

⁷³ RFA, page 5.

Discussion: The Appellant is correct in that the Rapanos Guidance does not direct the agencies to regulate subsurface connections as Waters of the U.S. Rather, the Rapanos Guidance identifies that subsurface connections are one of the ways to establish adjacency, stating that wetlands are adjacent if one of three criteria are satisfied.⁷⁴ One of those criteria is an unbroken surface or shallow subsurface connection to jurisdictional waters.

The District analyzed the potential for a subsurface connection between Wetland A and Deer Creek using data from previous onsite studies (2002/2003) and knowledge of the area's cold water streams.⁷⁵ By reviewing available data on hydrology, including previous onsite investigations spanning 2001 to 2016 as well as multiple years of aerial photography, the District concluded that onsite hydrology has not been substantially altered, leading to an assertion that the hydrology data from the 2003 delineation remains valid.⁷⁶

The District also determined that a shallow subsurface connection exists between Wetland A and the Ditch to Deer Creek, because the Ditch was constructed through a mapped wetland, and because the Ditch remains full for most of the year indicating a water source that is not limited to surface water.⁷⁷

The District's determination that Wetland A has a subsurface connection with Deer Creek and the Ditch to Deer Creek was reasonable, supported in the record, and is not contrary to a requirement of law, regulation, Executive Order, or officially promulgated Corps policy guidance.

The factsheet the Appellant references is included in the RFA as attachment "U." Although the undated factsheet appears to be printed from an EPA website, it is unclear where and when it was obtained. Regardless, it does not represent current information. The "Clean Water Rule" ("the rule") referenced in the factsheet was published on June 29, 2015,⁷⁸ with the stated purpose of defining the scope of waters protected under the CWA. Upon becoming effective in August 2015, the Corps and EPA began implementing the rule. However, the rule was subject to multiple legal challenges that ultimately led to a nationwide stay in October 2015. As a result of the stay, the Corps and EPA returned to regulating under the definition of "Waters of the U.S." that was in place prior to August 28, 2015. The factsheet referred to by the Appellant is not relevant to the appeal because it does not reflect law, regulation, policy, or guidance in place at the time of the District's March 2017 decision.

⁷⁴ Rapanos Guidance, page 5.

⁷⁵ AR1 000016 and 000290-000297.

⁷⁶ AR1 000213.

⁷⁷ AR1 000103.

⁷⁸ 80 Fed. Reg. 37053, 37053-37127 (June 29, 2015).

3.6. *“Wetlands, adjacent to other wetlands are not jurisdictional”* (US Army Corps v. Great Northwest (2012)).⁷⁹

Finding: This reason for appeal does not have merit.

Action: No further action.

Discussion: There is no evidence in the AR that suggests the District made any assertion or determination that included claiming federal CWA jurisdiction based on a wetland's adjacency to another wetland. The District's determination regarding wetland adjacency is further discussed in Reasons for Appeal 3.1, 3.2, 3.5, 6, 7, and 8.7.1.

3.7. “Please note the attached picture (4-25-17) where at the start of the “growing season” in a timeframe of 150% the normal precipitation (1.35” above normal precipitation to date) The Corps has no surface water connection! (14 days of the growing season with the culvert now unplugged).⁸⁰”

Finding: This is not an acceptable reason for appeal.

Action: No further action

Discussion: This is not an acceptable reason for appeal because it does not assert that there was any procedural error, incorrect application of law, regulation or officially promulgated policy, omission of material fact, or incorrect application of the current regulatory criteria and associated guidance for identifying and delineating wetlands. In addition, it references information that is dated after the AJD decision of March 3, 2017, is not part of the AR, and is therefore not within the scope of a decision on the merits of this appeal.

3.8. “The State of Wisconsin clearly disagrees with the Corps “WOTUS” position. They joined 30 other states in the current “nationwide” stay of the new “WOTUS” rule. It is the State of Wisconsin’s position: “The act applies only to Navigable Waters” and Corps, you can’t base federal jurisdiction on adjacency to tributaries” (Rapanos-2006 Justice Kennedy) comments of Misha Tseytlin Wisconsin Solicitor General (State of Wisconsin) at last weeks (4-26-17) Senate Environment and Public Works committee hearing in Washington D.C.⁸¹”

Finding: This is not an acceptable reason for appeal.

Action: No further action.

Discussion: Restating the purported position of the State of Wisconsin as it relates to federal jurisdiction and current litigation does not indicate that there was any procedural error,

⁷⁹ RFA, page 5.

⁸⁰ RFA, page 5.

⁸¹ RFA, page 6.

incorrect application of law, regulation or officially promulgated policy, omission of material fact, or incorrect application of the current regulatory criteria and associated guidance for identifying and delineating wetlands.

Fourth Reason for Appeal: “The Corps had sufficient time and access to collect data and delineate the precise limits of the alleged waters of the United States (WOTUS) and connections to Wisconsin River a traditional navigable water (TNW).⁸² | “The Corps did not delineate the precise limits of the alleged waters of the United States even though it had all the information needed to do, or could have collected the information.⁸³ | “The Corps had ample opportunity for access to conduct or collect samples (2 missed opportunities in May 2016 and 2 missed opportunities in October 2016). But it was Col. Calkin’s decision that they had “all the information” to complete the AJD. See attachments (J,K).⁸⁴ | “The Corps has made several requests for KAS to apply for a permit, because a permit would require that Pete submit a wetland delineation study so the Corps could provide a legally binding AJD! All individual Corps 404 permits, as well as many general nationwide permits (max. ½ acre wetland impact) identify the precise area in square feet or acreage that is covered by the 404 permit. This delineation of impacted wetlands is necessary for the Corps to determine the size/area needed for compensatory mitigation.⁸⁵”

Finding: This reason for appeal does not have merit.

Action: No further action.

Discussion: The request for an AJD was originally received July 29, 2015.⁸⁶ The first contact from the District to the Appellant’s consultant, Kagel Environmental, LLC, was on October 27, 2015,⁸⁷ when it requested site access on November 5, 2015. During the site visit, the District identified discrepancies in the Bopray delineation, and notified the appellant’s consultant of the discrepancies in an email dated December 2, 2015.⁸⁸ The District stated that it would need to revisit the site during the growing season (spring 2016), in order to gather additional data for completion of the AJD.⁸⁹ Extensive email correspondence in the AR indicates that there were multiple complications arranging site access to complete the data collection.⁹⁰ Multiple dates were proposed/scheduled between April and July 2016. At one point, the District requested a site visit and was denied by the appellant’s consultant, because the Appellant and/or his consultants were unavailable to be present.⁹¹ Additionally, there were multiple scheduling conflicts on the part of both the District and the Appellant, and an attempt by the Appellant’s

⁸² RFA, page 3.

⁸³ RFA, page 6.

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

⁸⁶ AR2 000961-000995.

⁸⁷ AR2 000959.

⁸⁸ AR2 000759.

⁸⁹ *Ibid.*

⁹⁰ AR2 000668, 000670, 000677, 000696, 000735-000737.

⁹¹ AR2 000736.

consultant (Kagel) to require the District to agree to a list of conditions prior to granting site access.⁹² The District was finally able to visit the site on July 21 and 22, 2016. However, on July 22, the AR reflects that the District did not complete their data collection, as the Appellant terminated the site visit and asked the staff to leave.⁹³ A few more attempts were made to schedule a site visit and complete the data collection, but there is no further record in the AR of additional onsite investigations. Further adding to the timeline, the Appellant provided new information to be considered in the District's AJD on November 22, 2016, and requested a revision to the review area on December 15, 2016.⁹⁴

Guidance regarding timeliness of jurisdictional determinations that was in place when the AJD request was received can be found in RGL 07-01, Subject: Practices for Documenting Jurisdiction under Sections 9 & 10 of the Rivers & Harbors Act (RHA) of 1899 and Section 404 of the Clean Water Act (CWA), 5 June 2007, and RGL 08-02, Subject: Jurisdictional Determinations, 26 June 2008.⁹⁵

In relevant part, Section IV. C. ("JD Requests") of RGL 07-01 states:

"When a landowner or other "affected party" (in the sense that term is used at 33 CFR 331.2) requests that the Corps provide a JD, then, to the maximum extent practicable consistent with district completion of other regulatory program responsibilities, the Corps should complete that JD in a timely manner. The Corps should strive to provide such a timely JD whether the JD request accompanies a permit application or is made independent of any permit application.

Every District Engineer (DE) has authority to set reasonable priorities for a district's total regulatory workload to balance the various facets of that workload against the district's available regulatory resources.

Nevertheless, the following policies should guide every Corps DE as he or she sets priorities for addressing requests for JDs.

- No class of JD requests should be considered of such low priority that the district will not provide an approved JD in response to that request at the earliest practicable time.

- Some requests for JDs that are not accompanying (or supporting) a permit application are deserving of relatively high priority

⁹² AR2 000611-000613.

⁹³ AR2 000435-000437.

⁹⁴ AR2 000227.

⁹⁵ RGLs 07-01 and 08-02 were effective at the time of the Appellant's AJD request, but both were superseded by RGL 16-01 in October 2016. Although RGL 16-01 does not address specific timeframes for JDs, Q&A #3 to RGL 16-01 states that "Every AJD and PJD should be completed and provided to the requestor as promptly as practicable in light of the district's workload, efficient processing of any related permit actions, and site and weather conditions if a site visit is determined necessary."

treatment. For example, a landowner may need a JD to allow or facilitate the sale of his or her land. Consequently, as a general rule, no DE should relegate every request for a JD that is not supporting a permit application to a priority level below that of every JD request that is supporting a permit application."

In relevant part, Section 5. ("Processing approved and preliminary JDs.") of RGL 08-02 provides the following guidance:

"Every approved JD and preliminary JD should be completed and provided to the person, organization, or agency requesting it as promptly as is practicable in light of the district's workload, and site and weather conditions if a site visit is determined necessary."

and

"It is the Corps' goal that every JD requested by an affected party should be completed within 60 calendar days of receiving the request. Regulatory Project Managers will notify their supervisors and develop a schedule for completion of the JD if it is not practicable to meet this 60 day goal."

The guidance in the above-referenced RGLs clearly suggests that districts work with applicants to complete requests for jurisdictional determinations as quickly as practicable, but recognizes that the 60-day goal is not always achievable due to workload priorities and other factors. The AR does not address what caused the delay from July 2015 to October 2015, but from that point forward, delays resulting from site access issues, growing season, and other scheduling conflicts are well documented in the AR. It is evident from the correspondence within the AR that supervisors and senior leaders were informed as to the status and progress of the subject AJD. There is no evidence to suggest, nor reason to believe the District's treatment of the AJD request was an abuse of discretion, or plainly contrary to a requirement of law, regulation, Executive Order, or officially promulgated Corps policy guidance.

On October 19, 2016, the District Engineer stated "it looks like the best next step is to complete the AJD based on the information we have."⁹⁶ The District continued its site analysis with the data available to them, and forwarded the draft AJD to the Environmental Protection Agency on November 18, 2016.⁹⁷ On December 15, 2016, the Appellant provided new information to the District that modified the review area to include areas that had previously been removed from consideration.⁹⁸ The District had previously advised the Appellant, in a November 22, 2016 meeting, that these changes would require additional field review.⁹⁹

⁹⁶ RFA, Attachment "J." This was an email between Col. Calkins and the Appellant and his consultant, Ray Kagel, dated 19 October 2016, at 5:03 p.m.

⁹⁷ AR2 000276.

⁹⁸ AR2 000227-000228.

⁹⁹ AR2 000273.

In an email to the District Regulatory Chief, a district attendee recapped the discussions that occurred at a November 22, 2016 meeting between the Appellant, his consultant, and the District Engineer, in which it was explained that due to workload, jurisdictional determination (JD) requests received without a permit application are given a lower priority than those received with a permit application.¹⁰⁰ The determination of JD review priority, as described above, is consistent with Section IV.C. of RGL 07-01.

There is no evidence to suggest, nor reason to believe the District's action with regard to the timeliness of the AJD, or in its request that the appellant submit a permit application, was an abuse of discretion, or plainly contrary to a requirement of law, regulation, Executive Order, or officially promulgated Corps policy guidance.

Fifth Reason for Appeal: "The Corps cannot use obsolete data from 2001, 2002, 2003 or 2004 or data collected outside the growing season. The Corps can only refer to delineations, information, data or AJDs within a 5-year window or valid for 5 years because changing onsite conditions."¹⁰¹

5.1. "The March 3, 2017 AJD substantially but erroneously used 2001, 2002, and 2003 soils determinations based upon the 1987 Wetland Delineation Manual in spite of the Corps' requirements to use the soil definitions, methods, and determinations required by the Regional Supplement for the Northcentral and Northeast –January 2012. (But the data sheets used were Midwest Regional vs. Northeast Northcentral)."¹⁰²

Finding: This reason for appeal does not have merit.

Action: No further action.

Discussion: The District's analysis includes multiple references to data collected in 2001 through 2003,¹⁰³ in support of a previous jurisdictional determination, enforcement case, and subsequent litigation. However, there is no evidence to suggest that the District assigned that information undue weight when making a decision on CWA jurisdiction on the site, or relied on it to the exclusion of an up-to-date field investigation.

The AR reflects that the District reviewed the previous delineation data as part of its preliminary data gathering,¹⁰⁴ and in accordance with Part IV., Section B of the 87 Manual.¹⁰⁵ The District reviewed the delineation in addition to other data, including but not limited to soil surveys, wetland mapping, gage data, and data collected during the onsite investigations in

¹⁰⁰ AR2 000273.

¹⁰¹ RFA, page 3.

¹⁰² RFA, page 7.

¹⁰³ AR1 000320-000610; AR2 001165-001185.

¹⁰⁴ AR1 000023; AR1 000109.

¹⁰⁵ 87 Manual, pages 36-44.

2015 and 2016.¹⁰⁶ The 2016 onsite investigation included observations of the characteristics of vegetation, soils, and the presence or absence of hydrology at seven (7) data points in July of 2016.¹⁰⁷ The data sheets¹⁰⁸ associated with the July 2016 site visit reflect direct observations of site conditions, and include information in the remarks section referencing the 2003 data. However, there is no evidence that the 2003 data was given undue consideration by the District in conducting the subject AJD.

The approximate boundary between the Midwest Region and Northcentral and Northeast Region Regional Supplements is located near the subject site. There is a map of these approximate boundaries in each regional supplement,¹⁰⁹ and a map on the District's website that identifies this approximate boundary in relationship to Wisconsin Townships.¹¹⁰

Both of the Regional Supplements discuss the transitional areas between regions:

Region boundaries are depicted in Figure 1 as sharp lines. However, climatic conditions and the physical and biological characteristics of landscapes do not change abruptly at the boundaries. In reality, regions and subregions often grade into one another in broad transition zones that may be tens or hundreds of miles wide. The lists of wetland indicators presented in these Regional Supplements may differ between adjoining regions or subregions. In transitional areas, the investigator must use experience and good judgment to select the supplement and indicators that are appropriate to the site based on its physical and biological characteristics. Wetland boundaries are not likely to differ between two supplements in transitional areas, but one supplement may provide more detailed treatment of certain problem situations encountered on the site. If in doubt about which supplement to use in a transitional area, apply both supplements and compare the results.¹¹¹

The District acknowledged that the site was very close to the approximate boundary between the two Regional Supplements in Attachment 17 to the AJD:

"The boundary between the Midwest and Northcentral/Northeast Regions happens to run through Tomah, Wisconsin and specifically very near the subject site. Field indicators in either regional supplement can be applied because boundaries for the regional supplements are considered as being miles in width, e.g., a field indicator in one supplement region does not immediately become invalid one mile into an adjacent supplement region.

¹⁰⁶ AR1 00023.

¹⁰⁷ AR 00223-00285; 2AR 00427-00505.

¹⁰⁸ AR 00223-00257.

¹⁰⁹ Midwest Regional Supplement, page 5; Northcentral and Northeast Regional Supplement, page 4.

¹¹⁰ <http://www.mvp.usace.army.mil/Portals/57/docs/regulatory/2WI%20Supplement%20Township%20Map.pdf>

¹¹¹ Midwest Regional Supplement, page 4; Northcentral and Northeast Regional Supplement, page 5.

A delineator can note in the “Remarks” section of the data sheet their rationale as to why a field indicator from an adjacent regional supplement is valid at a particular sample point. For purposes of this memorandum, “Regional Supplements” refers to both the *Midwest Supplement* and *Northcentral/Northeast Supplement (NC/NE)*. If there is an important difference between the two, it will be noted in the text.¹¹²

The RO inquired with the District as to the known differences between the NC/NE manual and the Midwest manual. In response, the District provided a summary sheet to the RO and the Appellant at the Appeal meeting/site visit. This document provided a short summary of the differences discussed in the AR, and concluded that use of either manual would have yielded the same delineation result. The District’s decision to use the Midwest Regional Supplement is reasonable, supported in the AR, and falls within the discretion delegated to the District, as identified by the Regional Supplements.

5.2. “The Corps cannot use obsolete data from 2001, 2002, 2003 or 2004 or data collected outside the growing season because any prior delineation was only valid for a maximum of 5 years (2008).¹¹³”

Finding: This reason for appeal does not have merit.

Action: No further action.

Discussion: The data analyzed in the AJD is based on a myriad of data points observed over 16 years on the site.¹¹⁴ It is not uncommon for site visits to occur outside the growing season, and there is no evidence in the AR that demonstrates the District relied on information collected outside the growing season to the exclusion of within-growing season data, or gave “out of growing season” data any undue weight in its analysis. Rather, the data sheets from July 2016¹¹⁵ show data collected and observations that are well within the growing season.

5.3. “The March 3, 2017 AJD should have used soil data descriptions, analyses, and determinations solely based upon the USDA National Technical Committee for Hydric Soils publication entitled “Field Indicators of Hydric Soils in the United States” – A Guide for Identifying and Delineating Hydric Soils, Version 7.0 (2010), but the Corps failed to use it. The erroneous, yet intentional, use of soil descriptions and determinations made by the Corps in 2001, 2002, and 2003, as the basis to assert jurisdiction over the KAS Farms property through the AJD issued March 3, 2017 is arbitrary, capricious, and deliberately disingenuous, as well as not in accordance with the law.¹¹⁶” | “For example,

¹¹² AR1 000186.

¹¹³ RFA, page 7.

¹¹⁴ See generally AR1 000223-000285, 000424-000610; AR2 000438-000505, 001166-001185.

¹¹⁵ AR1 000223-000285.

¹¹⁶ RFA, page 7.

in the prior classification criteria used in 2001, 2002, and 2003 a soil in the upper 10-12 inches of the profile taken from a suspected wetland with a color of 10YR 2/1 was determined to be a hydric soil. Also, if a similar soil sample had a color of 10YR 2/2 with 2% or 3% redox features, it was also classified as a hydric soil. On the other hand, these exact same soil descriptions in 2017 would **not** be hydraulic soils and therefore the area from which they were sampled could not be a wetland.¹¹⁷

Finding: This reason for appeal does not have merit.

Action: No further action.

Discussion: The District acknowledged the change in certain technical guidance since the 2003 delineation in Attachment 17 to the AJD.¹¹⁸ Specifically noted was that field indicators located in the 87 Manual have been replaced by newer guidance or rescinded.¹¹⁹

There is no evidence in the AR to suggest, nor reason to believe, the District's soils analysis for the 2017 AJD was incorrect, or relied on data from 2001-2003 to the exclusion of current observations. The District clearly documented soil observations on its 2016 data sheets, and determined which hydric soil indicator was met or not met based on those observations.¹²⁰ The hydric soil indicators listed on the data sheets are listed in "Field Indicators of Hydric Soils in the U.S." and both of the Midwest and North Central/Northeast Regional Supplements. The District's conclusions regarding the characteristics of hydric soils observed on the site are reasonable and supported in the AR.

Sixth Reason for Appeal: "The Corps has not supported its significant nexus determination with reliable onsite data. To support more than a speculative or insubstantial effect on the physical, chemical and biological integrity of the TNW (Wisconsin River).¹²¹"

6.1. "The Data Does Not Show a Chemical Nexus Between the Lots 1, 2 and 3 and the Wisconsin River.¹²²" | "The Data Does Not Show a Physical Nexus Between Lots 1, 2 and 3 and the Wisconsin River.¹²³" | "The Data Does Not Show a Biological Nexus Between Lots 1, 2 and 3 and the Wisconsin River.¹²⁴"

Finding: This reason for appeal does not have merit.

Action: No further action.

¹¹⁷ *Ibid.*

¹¹⁸ AR1 000185-000186.

¹¹⁹ AR1 000185.

¹²⁰ AR1 000223-000257.

¹²¹ RFA, page 3.

¹²² RFA, page 8.

¹²³ RFA, page 9.

¹²⁴ *Ibid.*

Discussion: The Rapanos Guidance directs the agencies to assert jurisdiction over RPWs and their adjacent wetlands.¹²⁵ The Approved Jurisdictional Determination Form (AJD form)¹²⁶ is used to document the information analyzed when making determinations as to RPW status and adjacency. As previously addressed in the discussion of Reasons for Appeal 2 and 3, the District made a reasonable determination that Wetland A was a contiguous feature that directly abuts both Deer Creek, a perennial RPW, and the ditch to Deer Creek, a seasonal RPW. As stated in Section III. B. of the AJD form:

The agencies will assert jurisdiction over non-navigable tributaries of TNWs where the tributaries are “relatively permanent waters” (RPWs), i.e. tributaries that typically flow year-round or have continuous flow at least seasonally (e.g., typically 3 months). A wetland that directly abuts an RPW is also jurisdictional. If the aquatic resource is not a TNW, but has year-round (perennial) flow, skip to Section III.D.2. If the aquatic resource is a wetland directly abutting a tributary with perennial flow, skip to Section III.D.4.

A wetland that is adjacent to *but that does not directly abut* an RPW requires a significant nexus evaluation. Corps districts and EPA regions will include in the record any available information that documents the existence of a significant nexus between a relatively permanent tributary that is not perennial (and its adjacent wetlands if any) and a traditional navigable water, even though a significant nexus finding is not required as a matter of law.¹²⁷ (emphasis added)

Because the District determined that Wetland A directly abuts Deer Creek, a perennial RPW,¹²⁸ a significant nexus analysis was not required. Accordingly, the data the district used in describing a physical, chemical, and biological nexus to downstream waters was for informational purposes and not the basis for establishing jurisdiction over Wetland A.

6.2. “The Corps in its analysis has not provided any substantiated data in a 14-day connection to Deer Creek via the Ditch. However, there are numerous notations from 2003 to 2016 of no perceptible flow in the Ditch in the 2017 AJD.¹²⁹”

Finding: This reason for appeal does not have merit.

Action: No further action.

Discussion: This reason for appeal is addressed in the discussion of Reason for Appeal 3.4, above.

¹²⁵ Rapanos Guidance, page 6.

¹²⁶ JD Guidebook, Appendix B.

¹²⁷ AR1 000014.

¹²⁸ AR1 000015-000016.

¹²⁹ RFA, page 8.

6.3. “Please note the Administrative Appeal of Hawkes Co. (dated 1-11-13) where the appeal officer for M.G. Peabody found identical situations.¹³⁰”

Finding: This reason for appeal does not have merit.

Action: No further action.

Discussion: Because a decision to determine geographic jurisdiction, deny a permit or condition a permit depends on the facts, circumstances, and physical conditions particular to the specific project and/or site being evaluated, appeal decisions would be of little or no precedential utility.¹³¹ Therefore, an appeal decision of the division engineer is applicable only to the instant appeal and has no other precedential effect.¹³² Such a decision may not be cited in any other administrative appeal, and may not be used as precedent for the evaluation of any other jurisdictional determination or permit application.¹³³

For the reasons discussed above, the final decision on the merits of the subject appeal is limited to the specific facts associated with this AJD. Therefore, in accordance with the regulations cited above, the results of previous appeal decisions are not applicable to the subject appeal, and are not discussed in this decision.

Seventh Reason for Appeal: “A so-called “shallow subsurface connection” between Lots 1, 2 & 3 and the farm drainage is not a basis for jurisdiction. (Rapanos -2006 Justice Kennedy).¹³⁴”

Finding: This reason for appeal does not have merit.

Action: No further action.

Discussion: As previously addressed in the discussion regarding Reason for Appeal 3.5, a shallow subsurface connection is one of three ways to establish adjacency in accordance with the Rapanos Guidance.¹³⁵ The Rapanos Guidance does not rely solely upon the Scalia opinion. When there is no majority opinion in a Supreme Court case, controlling legal principles may be derived from those principles espoused by five or more justices.¹³⁶ Thus, the regulatory jurisdiction under the CWA exists over a water body if either the plurality’s or Justice Kennedy’s standard is satisfied.¹³⁷

¹³⁰ RFA, page 8.

¹³¹ 33 C.F.R. 331.7(g).

¹³² *Id.*

¹³³ *Id.*

¹³⁴ RFA, page 3.

¹³⁵ Rapanos Guidance, page 5.

¹³⁶ *Id.* at 3.

¹³⁷ *Id.*

In the two March 2, 2017 AJD forms (JD form 1 and JD form 2), the District documented subsurface flow when describing the characteristics of the RPWs Deer Creek and the Ditch to Deer Creek, and the interaction of Wetland A with both RPWs.¹³⁸ In both cases, the District also identified a surface connection between Wetland A and the RPW tributaries. Thus, the District determined that Wetland A met both facets of the first adjacency criteria, in identifying both a surface and shallow subsurface connection. It is appropriate for districts to document and consider all data that was reviewed in the decision-making process. However, there is no evidence that the groundwater data was given undue consideration by the District in conducting the 2017 AJD. In this case, because the District established there is a surface connection, the absence of the groundwater data does not preclude a determination of CWA jurisdiction.

Eighth Reason for Appeal: “Troubling Questions.¹³⁹” | “Other Questions that are still unfounded.....¹⁴⁰”

8.1. “Why are the final data sheets from Jeff Olson of January 2017 different from the data sheets provided in the AJD of 3/3/17? See attachments (Q,R,S,T).¹⁴¹”

Finding: This reason for appeal does not have merit.

Action: No further action.

Discussion: There are no data sheets in the AR that are dated in January 2017. The RO inquired with the District about January data sheets; the project manager (PM) did not have a copy of them, but stated the January data sheets were revised drafts that were updated prior to finalization based on a request from the Appellant.¹⁴² The PM also stated that these draft data sheets were left out of the AR to avoid confusion. A portion of an email chain dated February 2, 2017, includes an email from the Appellant acknowledging receipt of revised data sheets.¹⁴³ The mapped soil unit was previously listed as “Ettrick silt loam (classified on-site by NRCS Soil Scientist).” In his December 2016 review of earlier draft data sheets, the Appellant’s consultant (Newling) asked about this,¹⁴⁴ and the February email correspondence demonstrates that the Appellant requested and acknowledged the change.

8.2. “Why was the wetland determination data form Midwest Region when the Town of LaGrange is appropriately the Northeast Northcentral Region? See attachment (I).¹⁴⁵”

¹³⁸ AR1 000016, 000018, 000029, 000103-000105, and 000115.

¹³⁹ RFA, page 8.

¹⁴⁰ *Ibid* at 10.

¹⁴¹ *Ibid*.

¹⁴² AR2 000273.

¹⁴³ AR2 000154-000157.

¹⁴⁴ AR2 000233.

¹⁴⁵ RFA, page 10.

Finding: This reason for appeal does not have merit.

Action: No further action.

Discussion: The application of regional supplements to the subject AJD is discussed in sections 5.1 and 5.3., above.

8.3. “Why wasn’t the plugged culvert in the fall of 2016 and spring of 2016 acknowledged as an abnormal condition? Contrary to the April of 2016 depiction of a saturated site. (prior to the start of the 2016 growing season) See attachment (L).¹⁴⁶”

Finding: This reason for appeal does not have merit.

Action: No further action

Discussion: This reason for appeal is addressed in section 3.2., above.

8.4. “How can a Jr. Biologist (Kyle Zibung) substantiate or trump soils and hydrology data which is contrary to experienced licensed professional soil scientist like Kelly Bopray or Charlie Newling.¹⁴⁷”

Finding: This reason for appeal does not have merit.

Action: No further action.

Discussion: The District is within its authority to not approve a wetland delineation prepared by a project proponent. The Corps AJD Form provides for such an outcome¹⁴⁸ and the ability to disapprove privately prepared delineations is a standard, necessary practice in the Corps regulatory program whenever privately prepared delineations do not conform to the applicable guidelines and/or have other substantial issues. In this case, the District identified discrepancies in the Bopray delineation during the first site visit, and provided feedback to the Appellant and the consultant regarding specific issues.¹⁴⁹ The District attempted to arrange a site visit to verify some elements of the submitted delineation. Before the site visit could be arranged, the consultant provided revised information on May 13, 2016. In a subsequent email dated June 15, 2016, the District reiterated that a site visit was necessary to clear up remaining deficiencies in the submitted delineation information.¹⁵⁰ There is no evidence to suggest, nor reason to believe, the District’s evaluation and assessment of the Appellant’s submitted wetland delineation and additional submitted information was an abuse of discretion or contrary to fact or generally recognized practice. Rather, the District’s conclusions and

¹⁴⁶ *Ibid.*

¹⁴⁷ *Ibid.*

¹⁴⁸ Section IV.A. (“Supporting Data”) of Approved JD Form.

¹⁴⁹ AR2 000759.

¹⁵⁰ AR2 000615.

characterizations are reasonable and supported in the record, and fall within the discretion delegated to the District.

8.5. “Why hasn’t the Corps acknowledged the farm drainage ditch was dug in uplands on or about 1988 as depicted in 1957 aerial photo, attachment (M) showing it was cropped and farmed.”¹⁵¹”

Finding: This reason for appeal does not have merit.

Action: No further action.

Discussion: This reason for appeal is contradicted by the aerial photo the Appellant provided, labeled by the Appellant as “Attachment M,” and by additional evidence in the AR. This photo, allegedly taken in 1957, clearly demonstrates a wet signature in the approximate location of the present-day Ditch to Deer Creek. The fact that a feature was in existence in this location well before 1988 is further corroborated by a June 6, 2016 email from Jeff Deniger, NRCS,¹⁵² which states, in part: “I did find a crop history in the area on the 4/30/1939 air photo along with the ditch that was present back then.” Historic presence of the ditch is further corroborated by the 1939 photo itself, included in the District’s Attachment 16,¹⁵³ which shows a hydrologic signature in that location.

8.6. “Please note current ASCS Farm Map, attachment (N).¹⁵⁴ | ”5 Professional wetland consultants (Kelly Bopray, Charlie Newling, Ray Kagel, Dana Sanders and Dr. Straw) have all been to the site and have concluded similar results and opinions as the latest Bopray delineation submitted for this AJD. As you may recall, Dr. Dana Sanders was the original author of the “87 Delineation Manual”.¹⁵⁵”

Finding: This reason for appeal does not have merit.

Action: No further action.

Discussion: The reference to the ASCS farm map that shows cropped/non-cropped lands is not relevant to the decision whether CWA jurisdiction exists on the site. Furthermore, the caption accompanying the map states “USDA FSA maps are for FSA Program administration only...” and “...FSA Programs Wetland identifies do not represent the size, shape, or specific determination of the area.”¹⁵⁶ The AR reflects comprehensive data collection and consideration of factors by the District, and the District’s evaluation and assessment of the Appellant’s submitted wetland delineation and additional analysis is discussed in section 8.4. above.

¹⁵¹ RFA, page 10.

¹⁵² Discussed in Newling analysis, 2AR 00233, and included as p. 31 in “Binder 1” submitted by the Appellant.

¹⁵³ AR1 000161-000175.

¹⁵⁴ RFA, page 10.

¹⁵⁵ *Ibid.*

¹⁵⁶ RFA, Attachment “M.”

8.7.1. “Under the Scalia test, the Corps is limited to asserting jurisdiction only over waters of the United States.¹⁵⁷” | “Additionally, in establishing the hydrologic connection to waters of the United States, the Corps is limited to only those wetlands that actually have a surface hydrologic connection.¹⁵⁸” | “In this case, the Corps’ reliance on a “shallow subsurface connection” obviously does not meet the Scalia test for jurisdiction. Justice Scalia was very clear that there must be a continuous surface connection that makes it difficult to determine where Deer Creek ends and the wetland begins. In fact, the banks of Deer Creek are quite distinct and it is easy to determine where Deer Creek ends. Any reference to or reliance on a “shallow subsurface connection” to establish jurisdiction over the land contained in Lots 1, 2 and 3 of the KAS Farms site is unlawful.¹⁵⁹”

Finding: This reason for appeal does not have merit.

Action: No further action.

Discussion: As discussed above in Reason for Appeal 7, the Rapanos Guidance does not rely solely on the Scalia opinion, but is the result of the Agencies’ evaluation of all the opinions in the Rapanos litigation.¹⁶⁰ Accordingly, the Rapanos Guidance, which is the mandated guidance for districts to evaluate the jurisdictional status of waters, incorporates both the Scalia opinion, which includes “relatively permanent, standing or continuously flowing bodies of water” connected to traditional navigable waters, and “wetlands with a continuous surface connection to such relatively permanent waters,” and the Kennedy opinion, which concluded that wetlands are “waters of the United States” “if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as `navigable.”¹⁶¹”

In this case, the District appropriately applied the Rapanos Guidance in its conclusion that Wetland A directly abuts the perennial RPW Deer Creek (direct surface connection), and that Wetland A has a subsurface connection to Deer Creek and the Ditch to Deer Creek, both RPW tributaries. The District provided further analysis, which concluded that Wetland A also has a significant nexus to downstream navigable waters, even though such analysis was not required as a matter of law. There is no evidence to suggest, nor reason to believe, that the District used the shallow subsurface connection as its only basis for asserting CWA jurisdiction on the site. The District’s identification of a subsurface connection in addition to the surface connection was not an abuse of discretion, or contrary to fact or generally recognized practice. The District’s conclusions and characterizations are in accordance with applicable guidance, reasonable, and supported in the AR.

¹⁵⁷ RFA, page 10.

¹⁵⁸ *Ibid* at 11.

¹⁵⁹ *Ibid*.

¹⁶⁰ Rapanos Guidance, page 3.

¹⁶¹ *Ibid*.

8.7.2. “Under the Justice Kennedy substantial nexus test, the outcome is not much different. In order to establish jurisdiction here, the Corps must show a substantial nexus to the Wisconsin River. However, the Corps must first connect the Wisconsin River to the JD area by showing that Lots 1, 2 and 3 are "adjacent" to a jurisdictional water. The law allows the Corps to establish jurisdiction over wetlands based on "adjacency" to non-navigable tributaries. Once the Corps identifies wetlands adjacent to a jurisdictional non-navigable tributary, the Corps must then establish a significant nexus basis between those wetlands and traditional navigable waters. *United States v. Rapanos*, 547 U.S. 775-7 (Kennedy, J. concurring). Here, however, there is no wetland adjacent to a "tributary" or other jurisdictional water that would allow for the assertion of jurisdiction.”¹⁶²

Finding: This reason for appeal does not have merit.

Action: No further action.

Discussion: As previously discussed in section 6.1., because the District determined that Wetland A directly abuts the perennial RPW, Deer Creek, no significant nexus analysis was required in this case.

8.7.3. “Contrary to the Corps’ December 2, 2008 *Guidance* document issued in light of *Rapanos*, the actual Court ruling only expressly stated that jurisdiction could be established by a "*continuous surface hydrologic connection*" to a TNW as held by Justice Scalia or by a showing the requisite nexus that the wetland in question along with wetlands in the relevant reach “significantly affect the chemical, physical and biological integrity of . . . navigable waters.”¹⁶³

Finding: This reason for appeal does not have merit.

Action: No further action.

Discussion: This reason for appeal is not specific to the subject appeal, but rather appears to question the general validity of the *Rapanos* Guidance. However, with regard to this appeal, as noted throughout this decision, the AR evidences comprehensive data collection and consideration of applicable factors by the District, and the District’s evaluation concluded there are surface connections, as well as subsurface connections, between Wetland A, Deer Creek, and the Ditch to Deer Creek, both RPW tributaries.

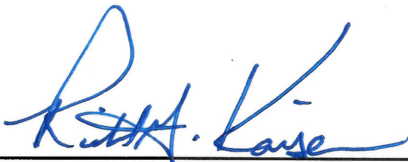
OVERALL CONCLUSION: As stated above, I find that only the first reason for appeal has merit. It is only for this reason for appeal that the AJD is being remanded to the St. Paul District Engineer for further analysis and documentation in accordance with 33 C.F.R. 331.10(b). Authority to make the final Corps decision on the jurisdictional determination resides with the

¹⁶² RFA, page 11.

¹⁶³ *Ibid* at 12.

St. Paul District Engineer pursuant to this remand. This concludes the Administrative Appeals Process.

02 April 2018
Date


Richard G. Kaiser
Major General, U.S. Army
Division Commander