

**ADMINISTRATIVE APPEAL DECISION
CLEAN WATER ACT
APPROVED JURISDICTIONAL DETERMINATION
CITY OF CHADRON – FILE NO. NWO-2013-01357-KEA
OMAHA DISTRICT
DATE: 10 FEB 2014**

Review Officer (RO): Ms. Mary J. Hoffman, U.S. Army Corps of Engineers, Northwestern Division, Portland, Oregon

Appellant: City of Chadron, Mr. Wayne Anderson, City Manager

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

Receipt of Request for Appeal: October 15, 2013

Telephone Conference Call/Appeal Meeting: December 30, 2013

Summary: The Appellant is challenging an approved jurisdictional determination (JD) completed by the Omaha District (District) which concluded that the U.S. Army Corps of Engineers (Corps) has Clean Water Act (CWA) jurisdiction over a 160-foot ditch segment, identified as 'Ditch 1,' in the City of Chadron, Dawes County, Nebraska. The appeal challenges the JD on the basis that the District incorrectly applied law, regulation or officially promulgated policy, and the omission of material fact when asserting federal CWA jurisdiction. The Appellant cited four (4) reasons in their request for appeal (RFA):

1. Ditch 1 was constructed in uplands, does not convey relatively permanent flow, and is thereby non-jurisdictional under Section 404 of the Clean Water Act.
2. The resource type is not accurately classified, or designated, as a *wetland*, or a *wetland swale*.
3. The proximity designation to [the nearest] RPW is not accurate. The ditch does not abut the White River, [but rather] is 4.8 miles removed from it and separated by the dam associated with Spring Creek Reservoir, and therefore [jurisdiction should be] contingent upon a significant nexus finding.
4. Incomplete and inconsistent jurisdictional determination form. The jurisdictional determination form contains numerous omissions and inconsistencies that result in a lack of clarity toward the resulting JD.

For reasons detailed in this document, all four of the reasons for appeal were found to have merit. The AR lacks documentation of any analyses of the subject waters found within the study area, the nearest RPW, and the TNW. The JD is remanded to the District Engineer for reconsideration, additional evaluation and documentation sufficient to support the decision. The final Corps decision on jurisdiction in this case will be made by the Omaha District Engineer.

Background Information: The Appellant submitted a request to the District for an approved JD on July 18, 2013, with an accompanying stream and wetland delineation report (completed by HDR, consultant to Appellant). The District notified the Appellant of its jurisdictional finding by letter dated August 29, 2013.

The JD study area is located in the northwestern portion of the City, near the intersections of West 1st and Pine streets. The Appellant plans to conduct [municipal] drainage improvements which may affect 2 segments of a 5,900-foot long ditch, which the Appellant states was excavated in dry land in 1909 for the original purpose of laying sewage pipe prior to the construction of city roads.

The JD request was made to determine jurisdiction of two segments of ditch. The Appellant submitted a stream and wetland delineation report¹ to assist with the Corps jurisdictional evaluation. The Appellant's report identified a defined (ditch) channel with bed and banks and an identifiable ordinary high water mark (OHWM). The Appellant's report asserted that neither ditch segment exhibited wetlands or other special aquatic sites.

The District completed a field visit on August 27, 2013, and concluded that the waterway is a wetland swale that abuts the White River, and is subject to federal CWA jurisdiction. The District's Approved Jurisdictional Determination Form² identifies the relevant reach of the water body under review as a "wetland adjacent to the White River, in the Upper White Hydrologic Unit Code (HUC) 'Upper White 10140201'. The Missouri River is identified as the nearest Traditional Navigable Water (TNW). The JD Form does not document the actual flow pathway or distance from the study area to the TNW, nor does it document characteristics of the RPW.

The intended use of Section III of the JD Form is to summarize information regarding characteristics of the tributary and its adjacent wetlands, if any, and it helps the evaluator determine whether or not the standards for jurisdiction established under Rapanos have been met. The District's JD Form did not offer an analysis of the linear ditch segments or nearest RPW (White River). It is unclear how the District determined the linear ditch segments are classified as a 'wetland swale,' as opposed to a tributary of the White River (as asserted by the Appellant's consultant). The District also did not provide any data collected (e.g. wetland delineation data sheets) to refute the Appellant's assertion that "no wetlands or special aquatic resources" were identified within the study area. Finally, the District did not offer an analysis of how they determined that the subject water (wetland) abuts the RPW. Section III of the District's JD Form, where these analyses should have been documented, was left entirely blank.

The Northwestern Division Engineer received the Appellant's RFA on October 15, 2013. The RFA is specific to the 160-foot ditch segment identified in the Appellant's submitted

¹ AR pgs 018-

² AR pg 008-015. The form that the District provided to the Appellant with the JD notification letter was identified as a "Draft" document in Section I.A.

materials as 'Ditch 1.' The Appellant is not appealing the District's jurisdictional findings of the 'Ditch 2' segment.

Information Received and its Disposition During the Appeal Review:

The AR is limited to information contained in the record as of the date of the Notification of Administrative Appeal Options and Process form (NAP/NAO). Pursuant to 33 CFR § 331.2, no new information may be submitted on appeal. To assist the Division Engineer in making a decision on the appeal, the RO may allow the parties to interpret, clarify, or explain issues and information already contained in the AR. Such interpretation, clarification, or explanation does not become part of the AR, because the District Engineer did not consider it in making the decision on the 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 preamble to the appeal regulations, for appeals of Approved JDs, states that site visits will be conducted if needed to clarify the AR:

In the interests of fairness to appellants, program efficiency, and cost effectiveness, we have modified the JD appeal process to a one level appeal to the division engineer. Consequently, the division RO will conduct site visits, if necessary, for the purpose of clarifying the administrative record.³

The RO determined that the District's AR was sufficient to review and evaluate the four reasons cited in the RFA, and that a site visit was not needed.

APPEAL EVALUATION, FINDINGS, AND INSTRUCTIONS TO THE OMAHA DISTRICT ENGINEER

Appellant's First Reason for Appeal: The Appellant asserts that Ditch 1 was constructed in uplands, does not convey relatively permanent flow, and is thereby non-jurisdictional under Section 404 of the Clean Water Act.

Finding: This reason for appeal has merit.

Action: The JD is being remanded to the District for further analysis

Discussion: The Appellant provided a document that recorded an agreement between the landowner and the city to construct a man-made ditch at this location in 1909.⁴

The Final Rule for the Regulatory Program of the Corps of Engineers (1986) states the Corps generally does not view non-tidal drainage and irrigation ditches excavated on dry land to be waters of the United States.⁵ Further, that the Corps reserves the right

³ Title 33 Part 331-Administrative Appeal Program, Preamble, at *Section 331.7(c) (Proposed § 331.8(a))*

⁴ AR pgs 131-135

⁵ 51 Fed. Reg. 41217 (Nov 13, 1986)

on a case-by-case basis to determine that a particular waterbody within that category of water is a water of the United States.

The Rapanos Guidance similarly states that ditches excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water are geographic features that are generally not jurisdictional waters.⁶ The U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook contains the following reference regarding ditches:⁷

Ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water generally are not jurisdictional under the CWA, **because they are not tributaries or they do not have a significant nexus to TNWs**. If a ditch has relatively permanent flow into waters of the U.S. or between two (or more) waters of the U.S., the ditch is jurisdictional under the CWA. Even when not themselves waters of the United States, ditches may still contribute to a surface hydrologic connection between an adjacent wetland and a TNW. (Emphasis added)

Even so, the District's AR fails to document a site-specific evaluation of the man-made ditch (to include consideration of the historic document regarding its construction), sufficient to overcome the presumption that the ditch does not fall within a category of waters considered not waters of the US. As such, this reason for appeal has merit, and the JD must be remanded for further analysis.

Appellant's Second Reason for Appeal: The Appellant asserts that the resource type is not accurately classified, or designated, as a *wetland*, a *swale*, or a *wetland swale*.

Finding: This reason for appeal has merit.

Action: The JD is being remanded to the District for further consideration.

Discussion: The Appellant submitted a wetland delineation report to the District on July 18, 2013 which accompanied their request for a jurisdictional determination.⁸ The Appellant's consultant, HDR Engineering, Inc, used the *Corps of Engineers Wetlands Delineation Manual* (Environmental Laboratory, 1987) and the *Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Great Plains Region* (Environmental Laboratory, 2010) to evaluate water and wetland resources within a pre-

⁶ U.S. Environmental Protection Agency and U.S. Army Corps of Engineers, CLEAN WATER ACT JURISDICTION FOLLOWING THE U.S. SUPREME COURT'S DECISION IN RAPANOS V. UNITED STATES & CARABELL V. UNITED STATES (December 2, 2008), available at http://www.epa.gov/owow/wetlands/pdf/CWA_Jurisdiction_Following_Rapanos120208.pdf (hereafter "THE RAPANOS GUIDANCE") p8, 12.

⁷ *Jurisdictional Determination Form Instructional Guidebook*. U.S. Army Corps of Engineers and Environmental Protection Agency. 30 May 2007. This *JD 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 (JD) and documenting practices to support an approved JD.

⁸ AR pgs 0018-0078

determined study area.⁹ The Appellant's report identified two ephemeral channel segments,¹⁰ labeled as Ditch 1 and Ditch 2, with defined channel bed and banks, and an identifiable ordinary high water mark (OHWM). The Appellant's field investigation data sheets¹¹ reported that wetland characteristics were not met at any of the 6 sampling point locations within the study area. Thus, the Appellant reported that no wetlands, or other special aquatic sites, were identified within the study area.

The District conducted a site inspection on August 27, 2013. The District's Inspection Report states that the "channel is a wetland swale. . ." and assumes that there is connection to the White River, the nearest RPW.¹² The AR contains photographs, dated August 27, 2014, which are labeled with identifying locations.

According to the JD Guidebook, documentation is required to support a wetland determination. Wetlands will meet all three parameters of hydrology, hydrophytic vegetation, and hydric soils, as required by the agency regulations, and described in the Corps of Engineers Wetlands Delineation Manual (1987), or appropriate Regional Supplement. The AR did not contain any documentation to indicate that the District completed the necessary evaluation to conclude the subject waterway meets federal wetland criteria. Also lacking is an explanation of how the District determined the ditch channel is a *wetland swale*, as opposed to an ephemeral tributary of the White River (RPW). This documentation would be necessary to refute the Appellant's findings.

The AR does not provide an adequate and reasonable basis supporting the District's conclusion that the subject waters/ditches are waters of the United States, and the JD must be remanded to the District for additional documentation and reconsideration. This reason for appeal has merit.

Appellant's Third Reason for Appeal: The Appellant asserts that the proximity designation to [the nearest] RPW is not accurate, in that the ditch does not abut the White River, [but rather] is 4.8 miles removed from it and separated by the dam associated with Spring Creek Reservoir, and therefore [jurisdiction should be] contingent upon a significant nexus finding.

Finding: This reason for appeal has merit.

Action: The JD is being remanded to the District for further analysis.

Discussion: The District used the term *abutting*, as well as the term *adjacent*, in its conclusion regarding proximity of the wetland¹³ to the nearest RPW. The Corps and EPA regulations define *adjacent* as:

⁹ AR pg 0027

¹⁰ AR pgs 42-43

¹¹ AR pgs 30-41

¹² AR pg 81

¹³ It is inconclusive at this writing whether the aquatic resources found within the study area satisfy wetland criteria, per the Corps 1987 Wetland Delineation Manual. See discussion under Second Reason for Appeal, above in this document.

“[B]ordering, contiguous, or neighboring.” Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are ‘adjacent wetlands.’

The term, *abutting* is means:

Wetlands that are not separated from the tributary by an upland feature, such as a berm or dike are “abutting.”

The District’s AR fails to provide sufficient rationale supporting its conclusion that the aquatic features are “wetlands directly abutting RPWs (the White River),’ or that the waterbody is a ‘wetland adjacent to the White River.’ Data to support the conclusion (JD Form, Section II Summary of Findings) should be included in the Section III CWA Analysis, as stated on the form. The District did not complete the appropriate sections of Section III, nor is there information contained elsewhere in the AR. As a result, this reason for appeal has merit. The JD is remanded to the District Engineer for further analysis sufficient to support the District Engineer’s conclusion.

Appellant’s Fourth Reason for Appeal: The Appellant asserts that the jurisdictional determination form contains numerous omissions and inconsistencies that result in a lack of clarity toward the resulting JD.

Finding: This reason for appeal has merit.

Action: The JD is being remanded to the District for further analysis.

Discussion: The basis for an approved JD is a summary of the physical indicators and an explanation of how those indicators establish Corps jurisdiction. The JD Form was developed to ensure that the basis and rationale for the JD is presented to satisfy this condition. The AR for the approved JD shall include the completed JD Form and should include any supporting materials required to document the basis of the JD.¹⁴

As discussed above, the District failed to appropriately follow current Corps protocol in documenting CWA jurisdiction over aquatic resources found within the study area. Conclusions, or assertions stated on the JD Form were unsupported, and the District failed to document required analyses in the AR and appropriately summarize these analyses in the JD Form.

In addition, the JD form states that the District “concur[s] with the data sheets/delineation report” prepared /submitted by the Appellant¹⁵ (which found no wetlands or special aquatic sites within the study area, and determined that the two ditch segments showed evidence of an ephemeral hydrological regime). However, the JD Form later states that “this waterway is a continuous wetland swale. . . [but it is] unknown if the waterway

¹⁴ US Army Corps of Engineers, Regulatory Guidance Letter No. 07-01, *Practices for Documenting Jurisdiction under Section 9 & 10 of the Rivers & Harbors Act of 1899 and Section 404 of the Clean Water Act*, June 5, 2007

¹⁵ JD form, Section IV.A

is a stream channel or wetland swale" [downstream].¹⁶ This reason for appeal has merit, and the JD is remanded for further analysis and clarification sufficient to support the District Engineer's conclusions.

OVERALL CONCLUSION: After reviewing and evaluating the RFA, and the District's AR, I find that the AR does not provide an adequate and reasonable basis to support the District's JD, and that the appeal has merit under all four reasons cited in the RFA. I am remanding the JD to the District for further clarification and evaluation. The final jurisdictional decision in this case will be made by the Omaha District Engineer pursuant to my remand.

FOR THE COMMANDER:

A handwritten signature in blue ink, appearing to read "Lori Rux", with a stylized flourish at the end.

LORI RUX, PhD, P.E.
Chief, Program Support Division

¹⁶ JD form, Section IV.B