

**ADMINISTRATIVE APPEAL DECISION
CLEAN WATER ACT
NEBRASKA DEPARTMENT OF ROADS – FILE NO. NWO-2012-01895-WEH
OMAHA DISTRICT
DATE: 20 DEC 2013**

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

Appellant: State of Nebraska, Department of Roads, Randall D. Peters, Director (Mike Owens, point of contact)

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

Receipt of Request for Appeal: September 24, 2013

Site Visit/Appeal Meeting: Not applicable

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 7.71 acres of ditches and abutting wetlands along the U.S. Highway 30, Schuyler to Rogers Expressway, in Colfax and Dodge counties, Nebraska. The appeal challenged the JD on the basis that the District incorrectly applied law, regulation or officially promulgated policy when identifying federal CWA jurisdiction over the ditches at this locale. The Appellant submitted two (2) reasons for appeal: The Appellant believes the Corps assertion of jurisdiction over 7.71 acres of ditches is a misinterpretation of the Rapanos Guidance, contending that these ditches were constructed in uplands and are not regulated under Section 404 of the Clean Water Act; and the Appellant asserts that the District did not sufficiently support the designation of receiving waters as Relatively Permanent Waters (RPWs), contending that this designation is speculative and has not met the standard for supporting information requirements set forth in the JD Form Instructional Guidebook.

For reasons detailed in this document, one of the two reasons for appeal is found to have merit. 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 initiated pre-application discussions with the Corps regarding the (larger) Highway 30 Schuyler to Fremont road project on August 1, 2012. On January 23, 2013 the Appellant requested an approved JD for the Schuyler to Rogers section. The District notified the Appellant of its jurisdictional finding by letter dated August 8, 2013.

The Northwestern Division Engineer received the Appellant's request for appeal (RFA) on September 24, 2013. The District provided copies of the JD administrative record (AR) to the RO and the Appellant on October 10, 2013.

The JD study area is located along U.S. Highway 30, beginning 2.25 miles east of the Schuyler interchange at mile marker 398.85, and extends to a location 0.7 miles east of Rogers, at mile marker 405.0, in Colfax and Dodge counties, Nebraska. The Appellant plans to expand US-30 from a two-lane to a four-lane expressway initially between the Schuyler and Rogers communities, and ultimately extending to the City of Fremont.

The Appellant submitted a wetland delineation report, an agricultural wetland delineation technical memorandum, and an assessment of jurisdiction (completed by HDR Engineering, Inc., consultant to the Appellant) to the District with their request for a JD. There is a network of linear waterways and Palustrine emergent floodplain depressional wetlands within the subject study area. A bend in the Platte River, the nearest traditionally navigable water (TNW), is located to the south of US-30 at this locale in close proximity to the JD study area.

The District completed the JD analyses in the office, and in the field, visiting the site on 3 occasions (April 23, 2013, May 30, 2013, and July 23, 2013) prior to determining jurisdiction. A total of 34 distinct geographic water features were evaluated, including 4 linear ditches/water features and a total of 18.25 acres of Palustrine emergent wetland. Of these, the District concluded that the 4 linear ditches/waters and abutting wetlands totaling 9.34 acres were determined relatively permanent waters (RPWs) that flow directly or indirectly into the Platte River, the nearest TNW, and are subject to federal CWA jurisdictional, as follows:

- 800-feet of the Hughes Payzant Ditch, and 3.16 acres of abutting wetlands,¹
- 250-feet of a tributary to Hughes Payzant Ditch and 2.27 acres of abutting wetlands,²
- 350-feet of a second tributary to Hughes Payzant Ditch and 1.27 acres of abutting wetlands,³ and
- 350-feet of the Byrne Ditch and 2.64 acres of abutting wetlands.⁴

The flow route to the TNW identified by the District is that each of the two tributaries flow [independently] into Hughes Payzant Ditch, and that Hughes Payzant Ditch and Byrne Ditch each flow directly into the Platte River. The JD Forms identify the source of flow is from snowmelt, with a groundwater correlation between water elevations of the Platte River and the ditches. The JD Forms state that water flow in the 4 subject waters/ditches is seasonal, typically beginning with snowmelt in March, and continuing through July.

Finally, the District concluded that the remaining 8.91 acres of water features⁵ evaluated under the JD fall within a category of geographic features described in the preamble to the Final Rule for the Regulatory Program of the Corps of Engineers (1986),⁶ and are not waters of the United States.

Information Received and its Disposition During the Appeal Review:

¹ AR pg 0063

² AR pg 0073

³ AR pg 0083

⁴ AR pg 0093

⁵ AR pg 0053

⁶ 51 Fed., Reg. 41206,41217 (Nov 13, 1986)

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.⁷

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

The AR contains a Conversation Record dated September 12, 2013,⁸ which was received after the NAP/NAO date (August 8, 2013), and as such this information was not considered in the administrative appeal review and evaluation. No additional information was received during this appeal review.

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

Appellant's First Reason for Appeal: The Appellant believes the Corps' assertion of jurisdiction over 7.71 acres of ditches is a misinterpretation of the Rapanos Guidance, contending that ditches constructed in uplands are not regulated under Section 404 of the Clean Water Act (CWA).

Finding: This reason for appeal does not have merit.

Action: No further action required.

Discussion: The preamble to 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.⁹ The preamble also states that the Corps reserves the right 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 cites the 1986 preamble and indicates ditches excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water are geographic

⁷ Title 33 Part 331-Administrative Appeal Program, Preamble, at *Section 331.7(c) (Proposed § 331.8(a))*

⁸ AR pg 0049

⁹ 51 Fed., Reg. 41206,41217 (Nov 13, 1986)

features that are generally not jurisdictional waters.¹⁰ Additionally, the U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook contains the following reference regarding ditches:¹¹

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.

The District evaluated specific characteristics of the 4 artificial, man-made drainage ditches, in combination with wetlands abutting the 4 ditches, and concluded that these 4 ditches function as tributaries of the Platte River, the closest TNW.¹² Further that the 4 ditches carry a relatively permanent,¹³ seasonal flow to the TNW. According to the Rapanos Guidance, the Corps:

[W]ill assert jurisdiction over non-navigable tributaries of TNW's 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.

Under its case-specific evaluation the District concluded that the ditches and abutting wetlands carry a relatively permanent flow, and have a clear surface connection to, and are tributaries of, the Platte River which is the nearest TNW. The District's case-specific evaluation and AR is sufficient to overcome the preamble general presumption,¹⁴ reaching a conclusion that the 4 subject waters/ditches are waters of the United States subject to CWA authority. This reason for appeal does not have merit.

Appellant's Second Reason for Appeal: The Appellant asserts that the District did not support the designation of receiving waters as Relatively Permanent Waters (RPWs), contending that this designation is speculative and has not met the standard for supporting information requirements set forth in the JD Form Instructional Guidebook.

Finding: This reason for appeal has merit.

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

¹⁰ 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.

¹¹ *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.

¹² AR pgs 0009-0048

¹³ The merit of the District's determination of RPW, as it applies to the 4 subject ditches, is evaluated in the Second Reason for Appeal, below in this document.

¹⁴ That these geographic features (ditches) are generally not jurisdictional waters.

Discussion: As a result of the *Rapanos* Supreme Court decision, the U.S. Environmental Protection Agency and the Corps, in coordination with the Office of Management and Budget and the President's Council on Environmental Quality, developed the memorandum *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States*, dated 5 June 2007, and amended 2 December 2008 (Rapanos Guidance).¹⁵ The Rapanos Guidance requires the application of new standards, as well as a greater level of documentation to support an agency JD for a particular waterbody. The Rapanos Guidance provides a methodology to ensure CWA jurisdictional determinations are consistent with the Supreme Court decision in *Rapanos*.

The Corps and EPA assert jurisdiction over TNWs and all wetlands adjacent to TNWs. CWA regulatory jurisdiction also includes RPWs that are not TNWs, if that waterbody flows year-round, or at least seasonally,¹⁶ and wetlands adjacent to such waterbodies, if the wetland directly abuts the waterbody.

The *JD Guidebook* states that documentation is needed to support flow determinations and a significant nexus.¹⁷ A determination that a water body is classified as a RPW should include the following:

- If flow is typically year round, flow determination should be supported by characteristics in Section III.B.1 of the form such as flow/gage data, rainfall data, anecdotal information, or
- If flow is continuous at least seasonally provide data supporting this conclusion in Section III.B.¹⁸

The District concluded that each of the 4 subject waters/ditches is a RPW with seasonal flow. Supporting documentation¹⁹ described flow regime as, "flow was observed during the July 23, 2013 site visit. July typically is a drier month of precipitation and with flow observed then provides proof positive that flow is present during March, April, May, and June, which typically are wetter months." Surface flow was described as 'confined,' and each of the 4 waters/tributaries was found to exhibit bed and banks with an ordinary high water mark (OHWM) described as a 'clear, natural line impressed on the bank.' The District stated that subsurface flow "has a direct correlation with the level of ground water in the Platte River floodplain" (rationale was not provided for this conclusory statement). Data regarding flow duration or volume was not recorded on the form, nor were characteristics of the surface flow described on the form.

The AR shows that the District conducted 3 separate site visits.²⁰ The Inspection Report from the District's 1st visit (April 23rd) does not mention the presence or absence of water in the subject waters/ditches. Inspection Reports from the 2nd and 3rd site visits (May 30 and July 23, respectively) record that water flow was observed on both dates, although the JD Forms only mention the presence of water flow on the 3rd visit (July 23rd). As mentioned above, the 4 JD Forms lack an adequate discussion of flow duration, volume, and descriptions of surface flow characteristics. It would have benefited the analysis to also record area rainfall data such as,

¹⁵ THE RAPANOS GUIDANCE.

¹⁶ *JD Guidebook* (May 30, 2007), pg 50, (e.g., typically at least 3 months)

¹⁷ *JD Guidebook* (May 30, 2007), pg 8

¹⁸ *JD Guidebook* (May 30, 2007), pg 56

¹⁹ AJD Form, Section III.B.1(ii)(c)

²⁰ AR 'Inspection Report', pgs 0095, 0100, and 0102

whether there was a rain event on, or just prior to the dates of the site visits, and/or whether 2013 experienced precipitation that was typical, wetter, or drier than usual.

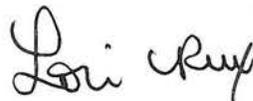
The District's observations and analyses need to be sufficient to support the conclusion that the RPW is not speculative. The analyses should be documented in any or all of the following locations on the JD Form, 1) the end of the Clean Water Act Analysis-Characteristics of Tributary and Its Adjacent Wetlands portion of the JD Form (Section III.B), which allows for entry under the instruction "Summarize overall biological, chemical, and physical functions being performed", 2) in the Clean Water Act Analysis- Significant Nexus Determination portion (Section III.C.), and/or 3) in the Additional Comments to Support JD (Section IV.B.). The JD Form provides opportunity to document the required discussion/analysis to support the jurisdiction conclusion in these areas including a determination that a water feature is classified as a RPW.

The record must, to the maximum extent practicable, explain the rationale for the District's determination, disclose the data and information relied upon, and if applicable, explain what data or information received greater or lesser weight, and what professional judgment or assumptions were used in reaching the determination.

The AR does not provide an adequate and reasonable basis supporting the District's conclusion that the 4 subject waters/ditches are relatively permanent, and the JD must be remanded to the District for additional documentation and reconsideration. This reason for appeal has merit.

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 one of the two 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:



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