



DEPARTMENT OF THE ARMY  
CORPS OF ENGINEERS, NORTHWESTERN DIVISION  
PO BOX 2870  
PORTLAND OR 97208-2870

Program Support Division

OCT 15 2009

Ms. Deanna Pulse  
Olsson Associates  
I-80 West Lincoln Business Center  
1111 Lincoln Mall, Suite 111  
Lincoln, NE 68501-44608

Dear Ms. Pulse:

Reference Request for Appeal: Omaha District File No 2007-2209-WEH, regarding an Approved Jurisdictional Determination by the Omaha District for Ringneck Development in Lancaster County, Nebraska.

After evaluating Ringneck Development's Request for Appeal and the District's Administrative Record, I have determined that the Record does not contain sufficient documentation/analysis to support a finding of CWA jurisdiction. The decision is being remanded to the District for further consideration. A copy of the decision is enclosed.

The Division has the authority to determine the merits of appeals under 33 CFR §331.3(a)(2). However, the Division does not have authority under the appeal process to make a final decision regarding JDs, as that authority remains with the District Engineer. Please contact Mr. John Moeschen of the Omaha District, at (402) 896-0896, with any questions regarding the re-evaluation of their Jurisdictional Determination.

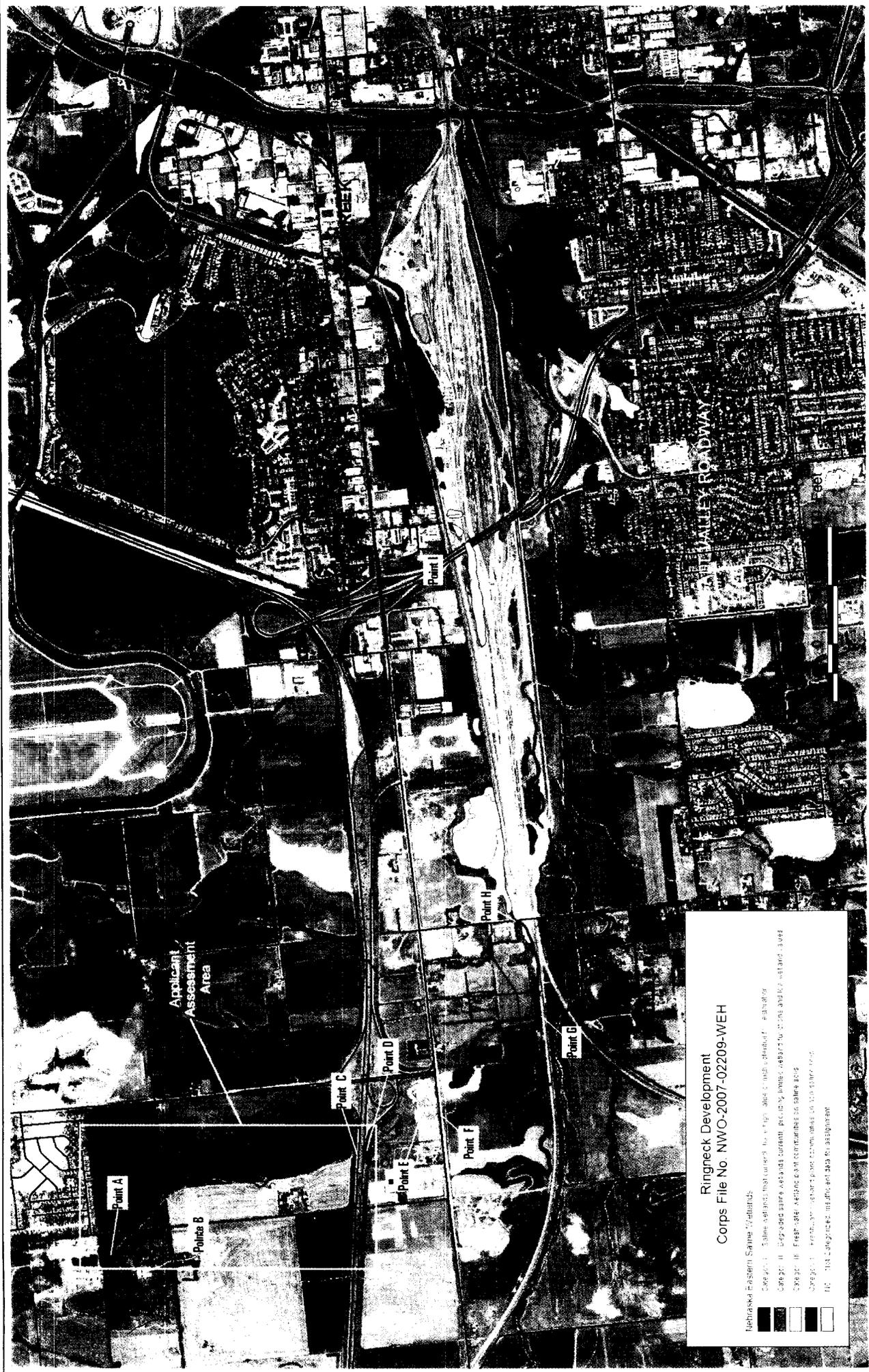
Copies of this document are being furnished to the Omaha District, U.S. Army Corps of Engineers. If you have any questions about the Appeal Decision, you may contact our Regulatory Appeals Review Officer, Mr. David Gesl, at (503) 808-3825.

Sincerely,

A handwritten signature in black ink that reads "Lorelynn M. Rux".

Lorelynn M. Rux  
Chief, Program Support Division

Enclosure



Applicant Assessment Area

Point A

Point B

Point C

Point D

Point E

Point F

Point H

Point G

Ringneck Development  
Corps File No. NWO-2007-02209-WEH

- Hebridean Eastern Shrike (Yellow)
- Category I - Same as birds that currently have a high level of protection - 100%
- Category II - Dependent on the current protection level of the birds - 100%
- Category III - Freshwater birds that currently have a low level of protection - 100%
- Category IV - Freshwater birds that currently have a low level of protection - 100%
- Category V - Freshwater birds that currently have a low level of protection - 100%



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CENWD-PDS

**OCT 15 2009**

MEMORANDUM FOR Commander, Omaha District (CENWO-DE)

SUBJECT: Decision on Appeal of an Approved Jurisdiction Determination for Ringneck Development (NWO-2007-2209-WEH)

1. Enclosed is a copy of the Administrative Appeal Decision for an Approved Jurisdiction Determination (JD) by your District for Ringneck Development, in Lancaster County, Nebraska. I have determined there is insufficient documentation/analysis in the record to support the District's finding that the subject property contains waters subject to regulation under the Clean Water Act. The JD is hereby remanded for reconsideration.
2. I encourage you to complete your review in an expeditious manner that satisfies the interests of the applicant and upholds our Regulatory responsibility to protect the public interest. Please provide me a copy of your final decision within 30 days.
4. Questions regarding this matter may be directed to Dave Gesl, NWD Appeals Review Officer at (503) 808-3825. NWD regulatory and legal staffs are available for any assistance or further clarification that you may require.

  
LORELYNN M. RUX  
Chief, Program Support Division

Encl

**ADMINISTRATIVE APPEAL DECISION**  
**FILE NWO-2007-2209 WEH (Ringneck Development)**  
**OMAHA DISTRICT (NWO)**  
**SECTION 404 AUTHORITY**  
**DATE: 10/14/09**

**Review Officer (RO):** David W. Gesl, U.S. Army Corps of Engineers, Northwestern Division (NWD), Portland, Oregon.

**Appellant:** Ringneck Development, LLC. (Appellant), represented by Olsson Associates (Olsson).

**Receipt of Request For Appeal (RFA):** The RFA was initially received on March 24, 2009. The Appellant requested an appeal of an Approved Jurisdictional Determination (JD) by the Omaha District (District).

**Site Visit:** A site visit was held on August 26, 2009. The site visit was attended by Deanna Pulse of Olsson Associates, John Moesch and Laura Banker of the District's Nebraska State Regulatory Program Office, and the NWD RO. The observations/results of that Site Visit are incorporated in this document.

**Summary of Appeal Decision:** The Appellant is challenging the District's January 26, 2009 JD which concluded that the U.S. Army Corps of Engineers has Clean Water Act (CWA) jurisdiction over an unnamed tributary located on a property in Lancaster County, Nebraska. The RFA challenged the JD on the basis that, 1) the District relied upon incorrect/insufficient information, 2) the waterway has a discontinuous Ordinary High Water Mark (OHWM), 3) the tributary was an agricultural land treatment and not a non-Relatively Permanent Water (non-RPW), 4) the tributary did not provide more than a speculative or insubstantial effect on the chemical, physical, or biological integrity of a Traditional Navigable Water (TNW), and 5) the tributary does not have a connection to a TNW. After review of the Administrative Record (AR) provided by the District, specifically the JD Form, and the site visit, it has been determined that the AR does not contain sufficient documentation/analysis to support a finding of CWA jurisdiction. Specifically, the District has not adequately documented that the tributary provides more than a speculative or insubstantial effect on the chemical, physical, or biological integrity of a TNW, and that the tributary has a connection to a TNW. The decision is being remanded to the District for further consideration and final action.

**Reason(s) for Appeal:** The Appellant challenged the JD on the following (as stated verbatim from the RFA):

1. Incorrect and insufficient data;
2. The grassed waterway has discontinuous OHWM throughout its length, does not have seasonal flow, and has no ground water contribution;

3. The grassed waterway was constructed as agricultural land treatment and is not a "non-RPW tributary";
4. The grassed waterway does not provide more than a speculative or insubstantial effect on the chemical, physical, or biological integrity of a TNW; and
5. There is no significant nexus to Middle Creek, thus no significant nexus to TNWs.

**Background Information:**

The AR was provided to NWD on June 11, 2009. A copy of the AR was provided to the Appellant on June 22, 2009.

The property is located in Lancaster County, Nebraska. The Appellant requested an approved JD for the property on January 7, 2009. The Appellant is proposing to utilize the property for mixed commercial/residential development.

The District determined that the property contained a non-RPW that flows indirectly into a TNW and wetlands adjacent to that non-RPW that are subject to CWA authority on January 26, 2009. The appellant was notified of the District's jurisdiction determination on January 26, 2009.

The flow route to a TNW identified on the District's Approved Jurisdictional Determination Form (JD Form) is from the unnamed tributary the District determined to be subject to CWA jurisdiction, to Middle Creek, to Salt Creek and to Platte River, the TNW.

***Site Visit***

According to a follow-up communication by Olsson, rainfall information from Lincoln's Climatology website indicated the area had received a total of 1.06 inches of precipitation during and immediately prior to the site visit.

The site visit was initiated with a general tour of the site to inspect the overall flow path and general condition of the tributaries. The District provided an aerial photo having local wetlands and tributaries overlain for reference; that map was used for orientation during the visit. The map is attached to this decision for reference.

The unnamed tributary begins just upstream of the subject property (Point A) where it flows through a channel that is relatively well defined and bordered by a natural riparian corridor.

It was agreed by the District and Olsson that the channel varies in character as it crosses the subject property (Point B to Point C), sometimes having a distinct channel and well

defined bed and bank, while at other points having a poorly defined channel not exhibiting the typical physical features that define an OHWM. There was a distinct flow of water in the channel during the visit. It was agreed by both the District and Olsson that the unnamed tributary has a discontinuous OHWM as it traverses the subject property.

The unnamed tributary flowed off the subject property (Point C), under the Interstate, and emerged as a well defined channel dominated by emergent aquatic vegetation approximately 300 hundred yards long (Point D to Point E). The channel then enters a culvert which conveys flow approximately 150 yards under a truck stop parking lot and Hwy-6 (Point E to Point F). From there, the flow/channel crosses private property and was only viewed from Hwy-6.

The channel/flow was next inspected as it crossed SW 40<sup>th</sup> St adjacent to a railroad yard (Point H), where the flow direction under 40<sup>th</sup> was easterly. Both Olsson and the District indicated their belief that the tributary flowed from the Hwy-6 culvert (Point F), through a channel(s) to a ditch bordering the north side of the railroad yard (Point G). From there, they indicated agreement in the belief that flow was easterly at least some distance past 40<sup>th</sup> (Point H).

A portion of the channel adjacent to the north side of the rail yard up to approximately the Homestead Expressway (Point H to Point I) was briefly inspected. There was some disagreement between District and Olsson regarding the overall direction of flow in this reach of channel. In many areas of the channel the direction of flow was difficult to determine (where dense, in-channel vegetation was present and/or where the depth of the water was greater), however at several observation points (where the channel was shallower) flow was distinctly to the east.

The brief, limited site visit did not identify an actual physical connection between the channel/ditch bordering the north side of the railroad yard and Middle Creek (or any other water body). The District indicated their belief flow continued easterly, and at some undetermined point or series of points, was connected under the rail yard to Middle Creek, in part because there would be flooding if this did not occur. Olsson indicated they believed there was no connection to Middle Creek; they indicated their belief that flow is retained by local wetlands and does not enter Middle Creek.

The ditch/channel between Point G and Point H was heavily silted and contained either shallow standing water or no water. Based on the volume of flow observed in the channel upstream of Hwy-6 (Point E), the volume of flow through the culvert under 40<sup>th</sup> St (Point H), and the lack of flow in the ditch/channel on the north side of the rail yard to the west of 40<sup>th</sup> St (Point G to Point H), it is possible that the primary route of flow may actually be via other, possibly man-made channel(s) between the Hwy-6 culvert (Point F) and the 40<sup>th</sup> St culvert (Point H), bypassing the historic flow path between Point F and Point H via Point G.

Based on the relative volume of flow observed in the channel as it traverses the subject property as well as at the 40<sup>th</sup> St crossing (Point H), it is reasonable to conclude that the flow is either part of a surface water tributary system that conveys water out of the immediate watershed, or possibly that there is a relatively large area capable of retaining water somewhere to the east. Otherwise, the flow would be expected to result in distinguishable flooding. There was disagreement between the District and Olsson regarding whether this was part of a surface tributary system or whether flow is retained prior to reaching Middle and/or Salt Creek.

The unnamed tributary was inspected at a centrally located point on the subject property. Both the District and Olsson were in agreement that the channel at that point had a distinct OHWM, and also that the OWWM was not evident at some other locations on the property. There was distinct flow of water at this location. The channel was bordered by a natural vegetation corridor. Frogs were observed within the vegetation and adult damselflies, a predatory insect with an aquatic nymph stage were observed patrolling the channel. The same damselfly species was also relatively abundant in the vegetated channel immediately downstream, below the Interstate 80 culvert (Point D to Point E). The presence of predatory frogs and insects is an indication of some aquatic food chain production and aquatic habitat within the tributary.

### ***Rapanos Background***

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).<sup>1</sup> 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 traditional navigable waters (TNW) and all wetlands adjacent to TNWs. CWA regulatory jurisdiction also includes relatively permanent waterbodies (RPW) that are not TNWs, if that waterbody flows year-round, or at least "seasonally", and wetland adjacent to such waterbodies, if the wetland directly abuts the waterbody.

In addition, the agencies may assert jurisdiction over a waterbody that is not an RPW if that waterbody is determined (on the basis of a fact-specific analysis) to have a significant nexus with a TNW. Waterbodies such as, (1) non-navigable tributaries that do not typically flow year-round or have continuous flow at least seasonally; (2) wetlands

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<sup>1</sup> 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](http://www.epa.gov/owow/wetlands/pdf/CWA_Jurisdiction_Following_Rapanos120208.pdf)

adjacent to such tributaries; and, (3) wetlands that are adjacent to but that do not directly abut an RPW require a significant nexus determination.

### **APPEAL EVALUATION, FINDINGS, AND INSTRUCTIONS TO THE OMAHA DISTRICT ENGINEER (DE):**

**Reason for Appeal 1:** Incorrect and insufficient data (stated verbatim from materials submitted in support of the RFA).

**Finding:** This reason for appeal does not have merit.

**Action:** A remand is not required, but the District should revise/supplement the JD with definition where appropriate.

**Discussion:** The Appellant's submittal was specific with respect to this reason. The Appellant pointed out that the District's JD Form indicates the watershed size was noted as 13,064 acres; the Appellant asserted the watershed size is 350 acres.

Watershed size is recorded in the Characteristics of non-TNW's that flow directly or indirectly into TNW- General Area Conditions part of the JD Form (Section III.B.1.). Watershed size is not defined in the EPA-Corps instructions for completing the JD Form (JD Instructions).<sup>2</sup> However, it is reasonable to define the watershed size in a manner consistent with the concept of relative reach in the JD Instructions. A reasonable definition of the watershed is the area that is upstream from the point of confluence, where that tributary enters a higher order stream below the area in question. Absent a definition in the JD Instructions, it is also reasonable for the District to define the watershed in an alternative manner; that definition should be indicated on the form.

It is unclear what the reported watershed actually described. At the same time, it is clear that the District was aware that the reach of the waterway they were considering as having a significant nexus to a TNW was the relatively small headwater reach in question. While there is uncertainty in the intent and definition of this entry on the JD Form, the watershed size indicated on the JD Form does not appear to have been a major nor direct factor in the JD. As such, the watershed size entry appears to have had a relatively inconsequential impact on the JD. Therefore, this specific reason for appeal is not a basis for remand in and of itself. However, the JD Form should be revised to explain what "watershed" was being reported.

**Reason for Appeal 2:** The grassed waterway has discontinuous OHWM throughout its length, does not have seasonal flow, and has no ground water contribution (stated verbatim from materials submitted in support of the RFA).

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<sup>2</sup> U.S. Environmental Protection Agency and U.S. Army Corps of Engineers, U.S. ARMY CORPS OF ENGINEERS JURISDICTIONAL DETERMINATION FORM INSTRUCTIONAL GUIDEBOOK (June 1, 2007).

**Finding:** This reason for appeal does not have merit.

**Action:** No further action by the District is required.

**Discussion:** The appellant asserted that “many areas (on the subject property) appear to be temporary upland erosional features, especially adjacent to the grassed waterway”.

A footnote in the national template JD Form states “A natural or man-made discontinuity in the OHWM does not necessarily sever jurisdiction (e.g. where the stream temporarily flows underground, or where the OHWM has been removed by development or agricultural practices).” During the appeal site visit, there was a very distinct and well developed channel with a well developed OHWM evident at at least one location on the subject property. The District noted the tributary had a discontinuous OHWM on the JD Form, as well as during the site visit, therefore this was a consideration in the JD. It is within the discretion of the District to determine there is CWA jurisdiction, in spite of the presence of a discontinuous OHWM.

The observation during the appeal site visit of aquatic vegetation and even more so, of aquatic fauna in proximity to the channel supports a conclusion the tributary is an aquatic feature, rather than an erosional feature.

There may be a transitional point where the jurisdictional tributary becomes a non-jurisdictional erosional feature(s), such as in lateral channels. The District should remain willing to determine the exact point of that transition.

The Appellant also challenges that the tributary does not have seasonal flow and has no groundwater contribution as part of this stated reason for appeal. The District acknowledged the tributary is a non-RPW and has intermittent but not seasonal flow on the JD form. Groundwater influence and flow regime alone are not determining factors for CWA jurisdiction; they are considerations in determining whether a significant nexus determination is required. The District acted correctly by completing the significant nexus determination step (Section III.C. of the JD Form).

This reason for appeal does not have merit.

**Reason for Appeal 3:** The grassed waterway was constructed as agricultural land treatment and is not a "non-RPW tributary" (stated verbatim from materials submitted in support of the RFA).

**Finding:** This reason for appeal does not have merit.

**Action:** No further action by the District is required.

**Discussion:** The Appellant further clarified this reason for appeal with the following: “The grassed waterway was constructed in uplands, drains upland agricultural lands, and does not carry relative permanent waters. Discontinuous erosional features within the

grassed waterways carry runoff from overland flow from agricultural fields characterized by low volumes following rain events. Flows are infrequent and of short duration.”

During the site visit, the RO confirmed that portions of the unnamed tributary on the subject property could be described as shallow, grassed features in the landscape that convey water across upland areas. Such areas could be considered swales, as described in the Rapanos Guidance<sup>3</sup> and the JD Instructions,<sup>4</sup> if they are viewed narrowly and not considered part of a larger unit of water. At the same time, other areas of the unnamed tributary, also on the subject property, clearly differ by being much more distinct on the landscape (deeper), by having an associated wetland fringe, and by supporting at least some aquatic flora and fauna. The unnamed tributary, as with most similar size waters in this general region, has been heavily impacted by the activity of man, possibly including some degree of channel alteration and/or relocation. However, the unnamed tributary has a generally dendritic landscape pattern, similar to other tributaries in the area; the channel is not linear or located at a property or field margin, as would be expected if the tributary were man-made. It is reasonable to conclude the channel is at least a remnant of a natural feature, as opposed to existing only as a result of agricultural activity. According to the JD Instructions, field staff will need to make a case-by-case determination on the jurisdictional status regarding ditches or similar features.<sup>5</sup> The District acted within its discretion in considering the unnamed tributary a non-RPW for purposes of conducting a significant nexus determination.

**Reason for Appeal 4:** The grassed waterway does not provide more than a speculative or insubstantial effect on the chemical, physical, or biological integrity of a TNW (stated verbatim from materials submitted in support of the RFA).

**Finding:** This reason for appeal has merit.

**Action:** The RFA is being remanded to the District for additional documentation and reconsideration. Further evaluation, analysis, and documentation in the AR are required by the District regarding the CWA jurisdictional determination.

**Discussion:** Materials submitted by the Appellant in support of the RFA contend the District’s JD Form does not contain sufficient data to determine with certainty whether the waterway and wetlands provide more than insubstantial or speculative effect on TNW’s. The supporting materials also assert that the land treatments on the site reduce the amount of pollutants, sediments, or floodwaters to the point where wetlands on site do not have potential to provide a significant contribution to sediment or nutrient removal. They also assert that flood waters are not an issue on the site.

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<sup>3</sup> 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](http://www.epa.gov/owow/wetlands/pdf/CWA_Jurisdiction_Following_Rapanos120208.pdf)

<sup>4</sup> U.S. Environmental Protection Agency and U.S. Army Corps of Engineers, U.S. ARMY CORPS OF ENGINEERS JURISDICTIONAL DETERMINATION FORM INSTRUCTIONAL GUIDEBOOK (June 1, 2007), at p38.

<sup>5</sup> Id., see sub caption associated with photos 53 and 54.

The Rapanos Guidance requires the evaluation of a tributary's nexus with a TNW in terms of the CWA's goals and purposes, that being "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters". The Guidance states that the Corps will apply the significant nexus standard in a manner that restores and maintains *any* of these three attributes of TNW's."<sup>6</sup> The JD Form prepared by the District recognizes that the water in question is a non-RPW that flows directly or indirectly into a TNW. As such, it is incumbent on the District to make a significant nexus determination (Part III.C. of the JD Form).

There are three basic elements required to make a significant nexus determination: 1) observations/data, 2) analysis, and 3) conclusions. In this case, the District determined the basis of their positive significant nexus determination was "The unnamed tributary has the capacity to capture pollutants to reduce the amount of pollutants, sediments, or flood waters from reaching the TNW".

The District recorded observations regarding both the physical and chemical characteristics of the tributary in Section III.B.1. of the JD Form. The District recorded observations regarding only the physical characteristics of adjacent wetlands in III.B.2; the only entry regarding the chemical characteristics of adjacent wetlands was "Unknown". Thus, the JD Form meets the minimal requirement to provide observations to support a potential finding that the tributary has a significant chemical and physical nexus to a TNW. Although the standard is that a single attribute must be demonstrated to have a significant nexus, the JD could be strengthened with additional, more detailed observations for all three attributes and should address both the tributary and its adjacent wetlands.

The only analysis on the JD Form concerning the significant nexus finding is the statement, "the unnamed tributary has the capacity to capture pollutants to reduce the amount of pollutants, sediments, or flood waters from reaching the TNW". It is essential that the JD Form contain an analysis or explanation supporting a significant nexus finding. This analysis 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. Any attribute (chemical, physical, biological) that is used to support the nexus finding must be supported in the AR with observations, analysis, and conclusion(s).

The observations and analysis need to be sufficient to support that the effect between the tributary and the TNW is not speculative or insubstantial. The record must, to the maximum extent practicable, explain the rationale for the determination, disclose the data and information relied upon, and if applicable, explain what data or information received

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<sup>6</sup> Id., at n. 35

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 JD and the decision must be remanded to the District for additional documentation and reconsideration. This reason for appeal has merit.

**Reason for Appeal 5:** There is no significant nexus to Middle Creek, thus no significant nexus to TNWs (stated verbatim from materials submitted in support of the RFA).

**Finding:** This reason for appeal has merit.

**Action:** The RFA is being remanded to the District for further evaluation, analysis, and documentation regarding the CWA jurisdictional determination.

**Discussion:** Materials submitted by the Appellant in support of this reason for appeal assert the unnamed tributary is not part of a tributary system to a TNW; specifically, that the tributary system terminates at a pond and the tributary is hydrologically separated from Middle Creek by a rail yard.

The JD Form indicates the unnamed tributary has a flow route to the TNW as follows: “the unnamed tributary to Middle Creek to Salt Creek to Platte River (the TNW)”.

The identification of tributary connection(s) is required to determine CWA jurisdiction under the Rapanos Guidance. The Appellant has disputed the tributary connection and the appeal site inspection confirmed there is some uncertainty with respect to the tributary connections. There have been substantial drainage impacts and physical channel alterations on this tributary system; it is unclear whether the flow path indicated on the JD Form accurately reflects the present circumstances. The volume of flow within the unnamed tributary strongly suggested that there either is a connection to the Platte River, or that there is a location downstream of the property having the capacity to retain a substantive volume of runoff. Neither the District nor Olsson could offer more than a speculative conclusion as to which is the case during the site visit.

The RFA has merit with respect to this reason for appeal. The District must further investigate whether there is, in fact, a tributary flow path between the unnamed tributary and the TNW.

#### **INFORMATION RECEIVED AND ITS DISPOSITION DURING THE APPEAL REVIEW:**

The Division Engineer has the authority to consider appeal of this JD.<sup>7</sup> However, the Division Engineer does not have authority under the appeal process to make a final decision regarding JDs, as that authority remains with the District Engineer. Upon appeal

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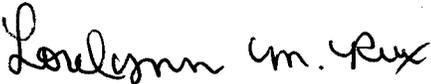
<sup>7</sup> 33 C.F.R. § 331.3(a) (2).

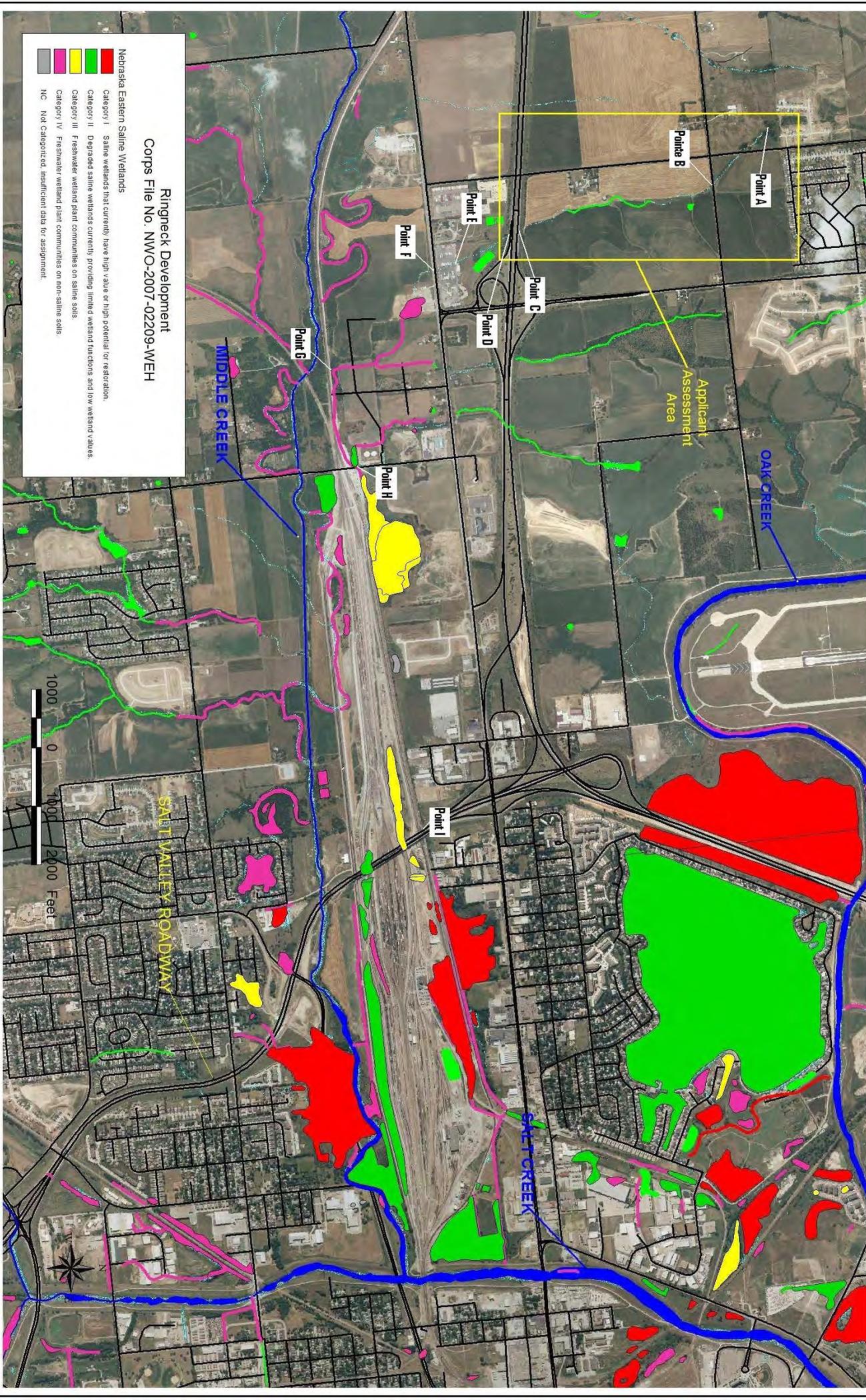
of the District Engineer's decision, the Division Engineer or his delegate conducts an independent review of the AR to address the reasons for appeal cited by the Appellant. The AR is limited to information contained in the record by the date of the Notification of Administrative Appeal Options and Process (NAP) form. Pursuant to 33 C.F.R. § 331.2, no new information may be submitted on appeal. Neither the Appellant nor the District may present new information. 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 District's AR, because the District Engineer did not consider it in making the decision on the JD. However, in accordance with 33 C.F.R. § 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 District provided a copy of the AR to the RO and the Appellant. This information was used in the Appeal Decision Process. The District also provided a map during the site visit that was used for reference during the visit; that document is considered clarifying information.

**OVERALL CONCLUSION:** After reviewing and evaluating the RFA, the District's AR, and the site visit, I find that the AR does not sufficiently support the District's JD's and the appeal has merit. I am remanding the appeal to the District.

**FOR THE COMMANDER:**

  
**LORELYNN M. RUX**  
**Chief, Program Support Division**



**Ringneck Development**  
 Corps File No. NWO-2007-02209-WEH

- Nebraska Eastern Saline Wetlands**
- Category I Saline wetlands that currently have high value or high potential for restoration.
  - Category II Degraded saline wetlands currently providing limited wetland functions and low wetland values.
  - Category III Freshwater wetland plant communities on saline soils.
  - Category IV Freshwater wetlands plant communities on non-saline soils.
  - NC Not Categorized, insufficient data for assignment.

