

**ADMINISTRATIVE APPEAL DECISION**  
**CLEAN WATER ACT**  
**SPECK – FILE NO. NWK-2006-01952**  
**KANSAS CITY DISTRICT**  
**MAY 07 2015**  
DATE \_\_\_\_\_

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

**Appellant:** Mr. Cleo Thearl Speck

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

**Receipt of Request for Appeal:** September 23, 2014

**Informal Appeal Meeting:** December 8, 2014

**Summary:** The Appellant is challenging an approved jurisdictional determination (JD) completed by the Kansas City District (District) which concluded that the U.S. Army Corps of Engineers (Corps) has Clean Water Act (CWA) jurisdiction over a roadside drainage on property owned by the Appellant located in Section 1, Township 59 north, Range 25 west in Linn County, Livingston, Missouri. The Appellant challenges the AJD on the basis that:

1. The District [improperly] reversed its jurisdictional determination of the roadside ditch. The District's October 3, 2006 letter stated that the subject 600-ft section of the road ditch is not a water of the United States, and their July 28, 2014 letter stated that the road ditch is a jurisdictional water of the United States.
2. The July 28, 2014 jurisdictional determination is contrary to the *U.S Environmental Protection Agency and U.S. Army Corps of Engineers Clean Water Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States and Carabell v. United States* (December 2, 2008); and
3. The water [channel], and ordinary high water mark was artificially created [and thus it is not a water of the United States].

For reasons detailed in this document, the appellant's reasons for appeal are found to not have merit. The final Corps decision on jurisdiction in this case remains with the Kansas City District Engineer per his July 28, 2014 notification letter.

**Background Information:** The Appellant submitted a permit application to the District on June 30, 2006. The District responded with a letter, dated October 3, 2006, stating that a preliminary jurisdictional determination indicated that the subject water channel ["roadside ditch"] is "not a water of the United States" and the work proposed would not

require Department of the Army authorization to proceed. The appellant partially filled the channel in 2006-07, but—over time—flows in the channel and possibly county road maintenance activities removed the fill. In early 2014, the Appellant approached the county about relocating the channel to the other side of the road, which led to a request by an adjacent landowner that the District review the old preliminary JD. The District inspected the site again and found the preliminary JD had been completed incorrectly, and was not accurate. The District completed a site inspection on June 19, 2014, and a subsequent analysis concluded that the roadside ditch is actually part of a natural ephemeral stream that had been partially channelized. The District determined that this 3,497-foot ephemeral stream is an unnamed tributary to South Fork Gees Creek, which has a significant nexus to the lower two (2) miles of the Grand River, an historically (traditional) navigable water (TNW). The District provided an approved JD to the appellant on July 28, 2014 which superseded the previous 2006 preliminary JD.

The appellant was notified in a letter dated July 28, 2014, that the Corps determined the roadside ditch/channel traversing the appellant's property is a jurisdictional water of the United States, regulated under Section 404 of the Clean Water Act (33 USC 403).

The appellant submitted a complete Request for Appeal (RFA) on September 23, 2014. The appellant was informed by letter dated October 2, 2014 that the reasons presented in the RFA are accepted under this appeal.

#### **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. 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 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 provided a copy of the AR to the RO and the appellant on October 20, 2014. The AR is limited to information contained in the record prior to July 28, 2014, which is the date of the District's approved JD decision.
2. The District provided a document entitled, *Administrative Appeal of Jurisdictional Determination Summary and NWK Statement Memo*, dated October 17, 2014. Since this information was compiled following the date of the District's approved JD (July 28, 2014), and did not contain any new information, it was considered as ancillary, and clarifying, but not a part of the District's AR. The RO used the summary to interpret,

clarify, and explain information contained in the AR. A copy of the memo is retained in the appeal decision record.

3. As provided for in the Corps' Appeal Program regulations,<sup>1</sup> the RO held an informal appeal meeting on December 8, 2014. During the meeting, the appellant and the District provided an overview of the aquatic features using maps and photographs. The appellant was provided an opportunity to discuss and clarify the reasons for the appeal as presented in the RFA, and the District discussed the procedure followed in analyzing the site, and the decision reached. At this meeting, the appellant stated (through his legal counsel, the Law Office of Ellen S. Goldman) that he retained Blackstone Environmental Inc. to perform a review of documents and site reconnaissance related to the JD. The RO conveyed to the appellant that any additional information compiled and presented would be treated as ancillary information and may be used for interpretation, clarification, or explanation in determining whether the AR provides an adequate and reasonable basis to support the District Engineer's decision, but would not become part of the District's administrative record for its jurisdictional decision.

4. The appellant, through his legal counsel, provided a copy of Blackstone's report, with subject title, "Speck Jurisdictional Determination," (dated January 20, 2015) received by NWD on February 16, 2015. As stated above, this supplemental report was used by the RO to interpret, clarify and explain information contained in the AR, but was not entered into the District's AR for the JD. A copy of the report is, however, retained in the appeal decision record file.

#### **APPEAL EVALUATION, FINDINGS, AND INSTRUCTIONS TO THE KANSAS CITY DISTRICT ENGINEER**

**Appellant's Reason for Appeal:** The appellant alleges that the District [improperly] reversed its jurisdictional determination of the roadside ditch. The District's October 3, 2006 letter stated that the subject 600-ft section of the road ditch is not a water of the United States, and its July 28, 2014 letter stated that the road ditch is a jurisdictional water of the United States.

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

**Action:** No further action

**Discussion:** In June 2006, the appellant submitted an application to the District requesting authorization to place fill within a road ditch on his property. In response, the District advised the appellant, in a letter dated October 3, 2006, under a *preliminary jurisdictional determination* that the section of the road ditch the appellant proposed to fill was determined to 'not be a water of the United States for Corps of Engineers Regulatory purposes'.<sup>2</sup>

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<sup>1</sup> 33 CFR 331.7(c)

<sup>2</sup> Administrative Record pp 019.

The AR did not include a record of the basis of jurisdiction for the 2006 preliminary JD.<sup>3</sup>

A letter from the District Engineer addressed to Representative Graves, dated July 11, 2014,<sup>4</sup> states:

“... in response to discussion between Mr. Speck, Livingston County and adjacent property owners, we were requested to review the 2006 determination. We conducted another onsite inspection during which we discovered that the drainage channel was in fact a channelized stream, and that our 2006 preliminary determination was incorrect.”

On July 28, 2014, the District provided an *approved JD* to the appellant which supersedes the previous 2006 preliminary JD. The appellant was notified in a letter that the Corps determined the roadside ditch/channel traversing the appellant's property is a jurisdictional water of the United States, regulated under Section 404 of the Clean Water Act (33 USC 403).

In 2006 the Corps' regulations and policy procedures allowed a District to use a *preliminary JD* to advise landowners that there 'may be' waters of the US on their property, but they were required to complete the more comprehensive *approved JD*, with an accompanying *basis of jurisdiction*,<sup>5</sup> to conclude an absence of waters, or decline jurisdiction of a water feature on a parcel.

A definition of the term *preliminary jurisdictional determination*<sup>6</sup> was added to the Code of Federal Register, section 331.2 on the March 28, 2000, to mean “a written indication that there may be waters of the United States on a parcel or indications of the approximate location(s) of waters of the US on a parcel. Preliminary JDs are advisory in nature. . .” As stated in § 331.2, the intended use of a *preliminary JD* is to advise landowners that the Corps had determined that there may be waters of the US on the landowner's parcel. In the same 2000 FR notice the term *approved jurisdictional determination* was added to mean, “a Corps document stating the presence or absence of waters of the United States on a parcel or a written statement and map identifying the limits of waters of the United States on a parcel.”

Further, Corps 2005 guidance<sup>7</sup> reaffirmed to Districts the accepted use of preliminary and approved JDs, as well as the need for complete and accurate documentation that substantiates the Corps' decisions.

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<sup>3</sup> A verbal discussion during the appeal meeting indicates that the District is unclear how the staff member reached the decision to decline jurisdiction over the road ditch. It seemed to the District that the staff member completed only a perfunctory assessment, without looking upstream to identify water source for the road ditch, nor downstream to identify connectivity to the nearest tributary.

<sup>4</sup> AR pp 015

<sup>5</sup> Basis of Jurisdictional determination is a summary of the indicators that support the Corps approved JD, per § 331.2.

<sup>6</sup> Federal Register / Vol. 65, No. 60 / Tuesday, March 28, 2000 / Rules and Regulations

<sup>7</sup> Regulatory Guidance Letter 05-02

In June 2014, the District discovered that the 2006 preliminary jurisdictional determination was completed incorrectly,<sup>8</sup> and the District notified the appellant that the JD was not valid. The appellant allowed the District access to his property to complete an approved JD on the parcel.

The District completed an onsite evaluation on June 19, 2014, and analyzed reference materials during its assessment of the parcel in accordance with current procedures and agency guidance,<sup>9</sup> and concluded that the section of road ditch on the appellant's parcel is a straightened section of a stream, an unnamed tributary of South Fork Gees Creek. The District provided an approved JD to the appellant, in a letter dated July 28, 2014, notifying the appellant that the road ditch/drainage channel is a jurisdictional water of the US.

I find that this reason for appeal does not have merit. The District acknowledged<sup>10</sup> that an inaccurate preliminary JD had been made in this case, and took appropriate steps to amend the inaccuracy, and provide the appellant with a comprehensive, definitive, approved JD which was completed according to federal law, regulations and current agency policy.

**Appellant's Second Reason for Appeal:** The Appellant alleges that the July 28, 2014 jurisdictional determination is contrary to the *U.S Environmental Protection Agency and U.S. Army Corps of Engineers Clean Water Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States and Carabell v. United States* (December 2, 2008).

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

**Action:** No further action

**Discussion:** As part of its permit program, the Corps must determine the extent of its geographic jurisdiction. Title 33 CFR Parts 328 and 329 define *waters of the United States* and *navigable waters of the United States*, respectively, and prescribe policy, practice and procedures to be used in determining the extent of such jurisdiction.

While federal CWA jurisdiction is determined according to implementing regulations found at 33 CFR 328, additional agency guidance and standard procedures are provided in the *1987 Corps of Engineers Wetlands Delineation Manual*, 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*(Rapanos Guidance),<sup>11</sup> the U.S.

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<sup>8</sup> According the AR, during discussions between the appellant, Livingston County, and adjacent property owners. AR pp 016.

<sup>9</sup> Additional discussion provided directly below in this document under Appellant's Second Reason for Appeal.

<sup>10</sup> AR pp 015-016

<sup>11</sup> Combined cases of *Rapanos v. United States* and *Carabell v. United States*, 126 S. Ct. 2208 (2006).

*Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook*<sup>12</sup> (JD Guidebook), and Regulatory Guidance Letters.<sup>13</sup>

As per the JD Guidebook, the Corps will decide jurisdiction over non-navigable tributaries that are not relatively permanent<sup>14</sup> based on a fact-specific analysis to determine whether they have a significant nexus with a TNW.

The District completed a fact-specific analysis which included an onsite evaluation on June 19, 2014, analyzing reference materials, and documenting their findings in the AR. The AR contains the District's observations of the road ditch/channel, the presence of an Ordinary High Water Mark (OHWM) within the straightened portion of the channel and upstream (off the appellant's parcel) within the 'non-manipulated segment of the stream channel'. The District also used reference maps and aerial photographs to follow and confirm the unnamed tributary has a surface hydrological connection with South Fork Gees Creek (Relatively Permanent Water (RPW)) on the appellant's parcel, then flows approximately 2.5 miles to Gees Creek (RPW), which flows into Thompson River (RPW), then flows into the Grand River (RPW and TNW)<sup>15</sup> and the Missouri River (TNW).<sup>16</sup>

The AR states that the unnamed tributary of South Fork Gees Creek is approximately 3,497 linear feet, of which 815 linear feet appeared to be man-altered/manipulated, and mechanically channelized. This is the section that was routed into the roadside ditch that runs parallel to the county road along the appellant's parcel. The AR states that the tributary has bed and banks, and OHWM indicators were used to delineate the lateral jurisdictional extent of waters of the U.S. The District found that flow characteristics and functions of the unnamed tributary of the South Fork Gees Creek, will significantly affect the chemical, physical, and biological integrity of the TNW, as summarized in the AR:

"The unnamed tributary has the capacity to convey agricultural pollutants from the abutting farmland to the larger order Gees Creek (RPW) which connects to the Thompson River (RPW), Grand River (partial TNW), and Missouri River (TNW). The non-manipulated segments of the channel traverse through woods allowing the capture and transport of woody debris to downstream TNWs. The stream and riparian area provide a water filtration function to the downstream rivers including the TNW. The wooded riparian area provides rapid filtration of inorganic nitrogen and other contaminants present in the adjacent farm fields. Although a portion of the stream is channelized, the unmanipulated [sp] portions

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<sup>12</sup> *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 JD and documenting practices to support an approved JD.

<sup>13</sup> <http://www.usace.army.mil/Missions/CivilWorks/RegulatoryProgramandPermits/GuidanceLetters.aspx>

<sup>14</sup> As is the case regarding waters on the appellant's parcel, determined non-RPW that flows indirectly into a TNW. AR pp 0024 & 26.

<sup>15</sup> The lower 2 miles of the Grand River are traditionally navigable.

<sup>16</sup> AR pp 1-6, 9-13, 24-33

of the stream and its riparian area still provides a role in retarding the erosive power of floodwaters before they reach the downstream TNW. The tributary has the capacity to allow movement of semi-terrestrial invertebrates and small mammals to larger order stream channels. Aerial review of the site indicates there are unobstructed streams with abutting riparian areas from the channel in question to the Grand River and Missouri River (TNWs) for wildlife movement. Taking into consideration the drainage area size the average annual precipitation, and the close proximity to the downstream perennial stream, this stream has the capacity to carry pollutants downstream into the TNW. In conclusion, this stream has a significant chemical, physical and biological nexus to the downstream TNW.”

Per the Rapanos Guidance for significant nexus finding for non-RPWs that flows directly or indirectly into a TNW, Districts will assert jurisdiction over tributaries that are not relatively permanent where the tributary has a significant nexus with a TNW. The District’s explanation in Section III.C.1 includes a discussion of characteristics and the underlying basis for its conclusions regarding the presence of a significant nexus between the tributary (including the channelized, road ditch section), the nearest RPW (South Fork Gees Creek), and downstream RPWs (Thompson River and upper portion of the Grand River) and the TNWs (lower portion of the Grand River and the Missouri River).

The AR adequately reflects that the District determined that the unnamed tributary of South Fork Gees Creek, including the channelized, road ditch portion of the stream, meets the definition of *waters of the United States* as established by federal regulatory authority of the CWA in compliance with federal laws, regulations, current policies and guidance, which includes the 2008 EPA/Corps Rapanos Guidance.

As a result, I find that this reason for appeal does not have merit.

**Appellant’s Third Reason for Appeal:** The water, and ordinary high water mark, was artificially created [and thus it is not a water of the United States].

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

**Action:** No further action

**Discussion:** The appellant alleges that since the water [channel], and ordinary high water mark, were artificially created it is not a water of the US.

Through its onsite evaluation, and analysis of additional resource materials, the District determined that the subject channel/road ditch is a manipulated (man-altered) section of an unnamed tributary of the South Fork Gees Creek. The tributary<sup>17</sup> flows northward

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<sup>17</sup> A “tributary,” as defined in the *Rapanos* guidance document, means a natural, man-altered, or man-made water body that carries flow directly or indirectly into TNWs.

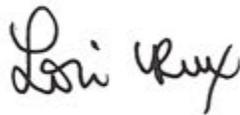
from neighboring property, through a county road culvert, into the channelized section that parallels a county road along the appellant's property prior to reaching its confluence with South Fork Gees Creek.

Manipulating the flow pathway of waters of the United States into artificial ditches, channels, culverts, or similar features does not sever federal jurisdictional status of the water. When a ditch is situated between two, or more, waters of the US, the ditch is jurisdictional under the CWA.<sup>18</sup>

As a result, I find that this reason for appeal does not have merit.

**Conclusion:** After reviewing and evaluating the RFA, the District's AR, and recommendation of the RO, I have determined that the District's conclusion regarding the jurisdictional determination was reasonable, supported by the AR, and does not conflict with laws, regulations, executive orders, or officially promulgated policies of the Corps Regulatory Program. The final Corps decision on jurisdiction in this case remains with the Kansas City District Engineer per his July 28, 2014 notification letter.

FOR THE COMMANDER:



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

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<sup>18</sup> *Jurisdictional Determination Form Instructional Guidebook*. U.S. Army Corps of Engineers and Environmental Protection Agency. 30 May 2007, (section A.9).