

ADMINISTRATIVE APPEAL DECISION
FILE NO. NWK-2007-01833 (Armistead)
KANSAS CITY DISTRICT (NWK)
SECTION 404 AUTHORITY
September 17, 2008

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

Appellants: Sidney J. and Diane M. Armistead

Receipt of Request For Appeal (RFA): February 25, 2008 (Encl 1)

Site Visit Date: May 6, 2008

Summary of Appeal Decision: The Appellants are challenging the assertion by Kansas City District (NWK) that the U.S. Army Corps of Engineers has jurisdiction over a segment of unnamed tributary on their property. In particular they assert that a significant nexus does not exist between this stream segment and the Missouri River, a navigable water of the United States. I find that two of the Appellant's four reasons for appeal have merit. There is insufficient documentation in the record to support the NWK finding that the stream on the Appellant's property has a significant (more than insubstantial or speculative) effect on the physical, chemical and biological integrity of the Missouri River. NWK's approved JD is being remanded.

Background Information:

The administrative record (AR), provided by NWK is attached as Enclosure 2a. A Memorandum for Record dated 16 April 2008 (Subject: NWK-2007-01833, Summary/Rebuttal for Administrative Appeal of Jurisdictional Determination (JD) by Sidney J. and Diane M. Armistead) accompanied the AR (Encl 2b).

The appellants requested an appeal of an Approved Jurisdiction Determination (JD) involving a small stream flowing in Jefferson City, Cole County, Missouri (hereafter referred to as the unnamed tributary of Dickerson Creek or unnamed tributary). The appellants are proposing to impound the unnamed tributary to construct a small recreational lake, completely contained on their property. The property is located within a residential subdivision and properties located downstream are developed.

History:

11 July 2005 --Unauthorized work activities were documented on the subject property during a site inspection. Approximately 400 linear feet of the unnamed tributary of Dickerson Creek had been filled with earthen material, trees and root wads from mechanical clearing activities.



2007-01833

5/06/2008

Looking west (downstream) at unnamed tributary of Dickerson Creek, located upstream of unauthorized work within the stream.



2007-01833

5/06/2008

Looking east (upstream) at unnamed tributary of Dickerson Creek, located upstream of unauthorized work within the stream.



2007-01833

5/06/2008

Looking west (downstream) at unnamed tributary of Dickerson Creek, taken immediately upstream of area of unauthorized work.



2007-01833

5/06/2008

Looking north (downstream) at unnamed tributary of Dickerson Creek, located within area of unauthorized work.



2007-01833

5/06/2008

Looking east (upstream) at unnamed tributary of Dickerson Creek, located within area of unauthorized work. East end of mechanical clearing is located at tree line in photo.



2007-01833

5/06/2008

Looking south/southwest (downstream) at unnamed tributary of Dickerson Creek, located within area of unauthorized work. Taken near midpoint of project.



2007-01833

5/06/2008

Looking west (downstream) at unnamed tributary of Dickerson Creek, located within area of unauthorized work. West end of mechanical clearing is located at tree line in photo.



2007-01833

5/06/2008

Looking east (upstream) at unnamed tributary of Dickerson Creek, located within area of unauthorized work.



2007-01833

5/06/2008

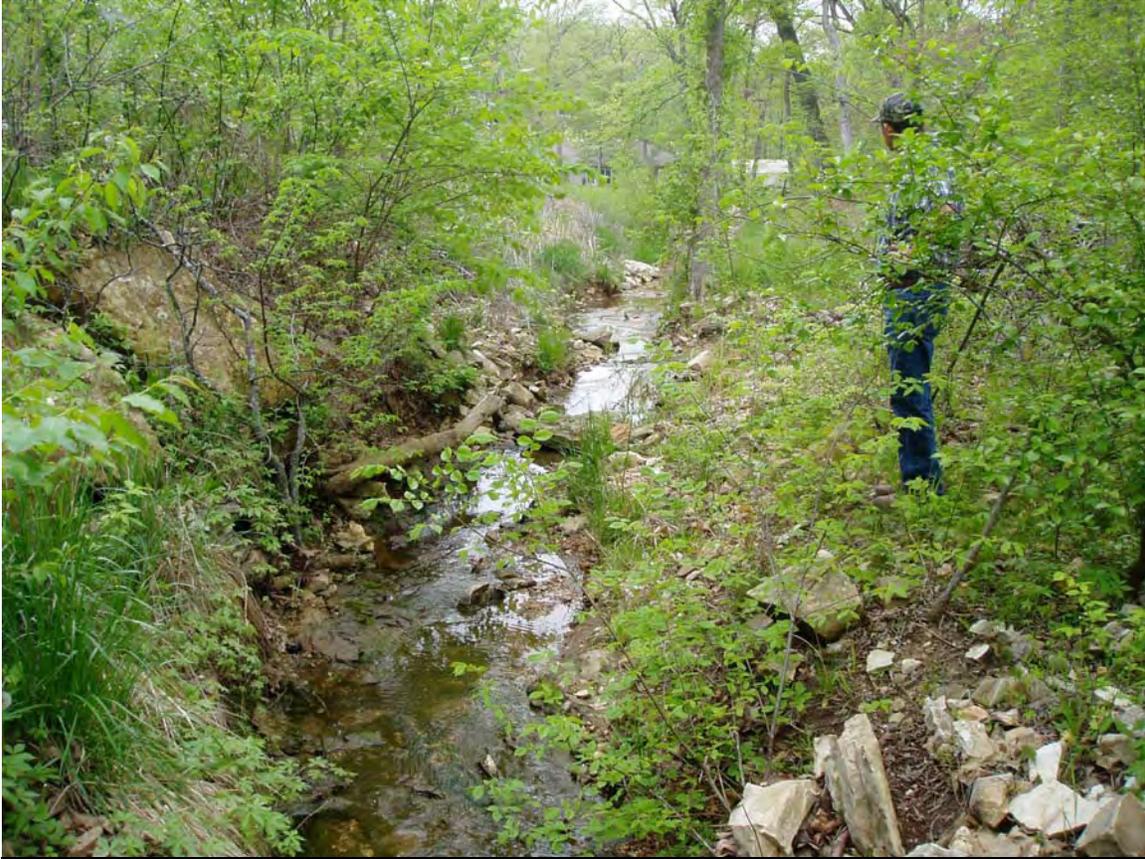
Looking west (downstream) at unnamed tributary of Dickerson Creek, located within area of unauthorized work. Taken near west end of mechanical clearing.



2007-01833

5/06/2008

Looking west (downstream) at unnamed tributary of Dickerson Creek, taken near west end of mechanical clearing.



2007-01833

5/06/2008

Looking west (downstream) at unnamed tributary Dickerson Creek, located immediately downstream of unauthorized work.



2007-01833

5/06/2008

Looking east/northeast (upstream) at unnamed tributary of Dickerson Creek, located within area of unauthorized work. Taken near west end of mechanical clearing.



2007-01833

5/06/2008

Looking downstream at unnamed tributary of Dickerson Creek, looking at its confluence with Dickerson Creek.



2007-01833

5/06/2008

Looking upstream at Dickerson Creek, looking at the confluence of the unnamed tributary of Dickerson Creek with Dickerson Creek. The pedestrian bridge in the photo is located on Dickerson Creek.



2007-01833

5/06/2008

Looking upstream at Dickerson Creek, located immediately upstream from the confluence of the unnamed tributary of Dickerson Creek with Dickerson Creek.



2007-01833

5/06/2008

Looking downstream at Dickerson Creek, located downstream of the confluence of the unnamed tributary of Dickerson Creek with Dickerson Creek.

Applicant: Sidney J. and Diane M. Armistead		File Number: 2007-01833	Date: 2/04/2008
Attached is:			See Section below
	A. INITIAL PROFFERED PERMIT (Standard Permit or Letter of Permission)		A
	B. PROFFERED PERMIT (Standard Permit or Letter of Permission)		B
	C. PERMIT DENIAL		C
X	D. APPROVED JURISDICTIONAL DETERMINATION		D
	E. PRELIMINARY JURISDICTIONAL DETERMINATION		E

A: INITIAL PROFFERED PERMIT: You may accept or request modification of the permit.

- **ACCEPT:** If you received a Standard Permit, you may sign the permit document and return it to the District Engineer for final authorization. If you received a Letter of Permission (LOP), you may accept the LOP and your work is authorized. Your signature on the Standard Permit or acceptance of the LOP means that you accept the permit in its entirety, and waive all rights to appeal the permit, including its terms and conditions, and approved jurisdictional determinations associated with the permit.
- **REQUEST MODIFICATION:** If you object to the permit (Standard or LOP) because of certain terms and conditions therein, you may request that the permit be modified accordingly. You must complete Section II of this form and return the form to the District Engineer. Your objections must be received by the District Engineer within 60 days of the date of this notice, or you will forfeit your right to appeal the permit in the future. Upon receipt of your letter, the District Engineer will evaluate your objections and may: (a) modify the permit to address all of your concerns, (b) modify the permit to address some of your objections, or (c) not modify the permit having determined that the permit should be issued as previously written. After evaluating your objections, the District Engineer will send you a proffered permit for your reconsideration, as indicated in Section B below.

B: PROFFERED PERMIT: You may accept or appeal the permit.

- **ACCEPT:** If you received a Standard Permit, you may sign the permit document and return it to the District Engineer for final authorization. If you received a Letter of Permission (LOP), you may accept the LOP and your work is authorized. Your signature on the Standard Permit or acceptance of the LOP means that you accept the permit in its entirety, and waive all rights to appeal the permit, including its terms and conditions, and approved jurisdictional determinations associated with the permit.
- **APEAL:** If you choose to decline the proffered permit (Standard or LOP) because of certain terms and conditions therein, you may appeal the declined permit under the Corps of Engineers Administrative Appeal Process by completing Section II of this form and sending the form to the Division Engineer (address on page 2). This form must be received by the Division Engineer within 60 days of the date of this notice.

C: PERMIT DENIAL: You may appeal the denial of a permit under the Corps of Engineers Administrative Appeal Process by completing Section II of this form and sending the form to the Division Engineer (address on page 2). This form must be received by the Division Engineer within 60 days of the date of this notice.

D: APPROVED JURISDICTIONAL DETERMINATION: You may accept the approved JD, appeal the approved JD, or submit new information and request reconsideration of the approved JD.

- **ACCEPT:** You do not need to notify the Corps to accept an approved JD. Failure to notify the Corps within 60 days of the date of this notice, means that you accept the approved JD in its entirety, and waive all rights to appeal the approved JD.
- **APEAL:** If you disagree with the approved JD, you may appeal the approved JD under the Corps of Engineers Administrative Appeal Process by completing Section II of this form and sending the form to the Division Engineer (address on page 2). This form must be received by the Division Engineer within 60 days of the date of this notice.
- **RECONSIDERATION BASED ON NEW INFORMATION:** You may submit new information to the District Engineer for reconsideration of an approved JD. You must submit the information within 60 days of the date of this notice.

E: PRELIMINARY JURISDICTIONAL DETERMINATION: You do not need to respond to the Corps regarding the preliminary JD. The preliminary JD is not appealable. If you wish, you may request an approved JD (which may be appealed), by contacting the Corps district for further instruction. Also you may provide new information for further consideration by the Corps to reevaluate the JD.

SECTION II—Fill out this section and return this form to the appropriate office only if submitting a request for modification or reconsideration to the District Engineer, or if submitting a request for Administrative Appeal to the Division Engineer. All such submittals must be made within 60 days of the date of this notice.

Submit the following requests to the District Engineer

- A. Modification of an INITIAL PROFFERED PERMIT (Item A).
- D. Reconsideration of an APPROVED JURISDICTIONAL DETERMINATION based on NEW INFORMATION (Item D RECONSIDERATION).

Submit the following requests to the Division Engineer

- B. Administrative Appeal of a PROFFERED PERMIT (Item B).
- C. Administrative Appeal of a PERMIT DENIAL (Item C).
- D. Administrative Appeal of an APPROVED JURISDICTIONAL DETERMINATION (Item D APPEAL) (for reasons other than reconsideration of an approved JD based on new information).

(Note: Preliminary Jurisdictional Determinations (Item E) are not appealable. If you have concerns regarding a preliminary Jurisdictional Determination, you can request an approved Jurisdictional Determination).

REASONS FOR APPEAL OR OBJECTIONS: (Describe your reasons for appealing the decision or your objections to an initial proffered permit in clear concise statements. You may attach additional information to this form to clarify where your reasons or objections are addressed in the administrative record.) It is our opinion that the Rapanos guidance has not been properly applied in the approved jurisdictional determination of the unnamed tributary of Dickerson Creek. The unnamed tributary is an ephemeral stream, experiencing water flow only during significant precipitation events, and is fed primarily by upland drainage systems and the like. It is our opinion that the significant nexus determination, formed with basis of a field visit on 7/11/05, is invalid and the unnamed tributary does not truly have a significant nexus with a TNW. Our application is asking for a permit to impound a small section of the unnamed tributary for construction of a recreational lake of only 0.6 acre in size. We believe it should be of significance to note that the unnamed tributary of Dickerson Creek intersects with at least two additional unnamed tributaries approximately 400' downstream from our proposed site, and they all effectively terminate as they flow into Woodward Lake, a more substantial recreational lake of 6 +/- acres approximately 800' downstream of our proposed site. Woodward Lake, in turn, overflows into other tributaries, continuing on to Dickerson Creek, Grays Creek, and ultimate termination at the Missouri River.

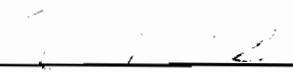
SUBMITTAL OF NEW OR ADDITIONAL INFORMATION: The District Engineer may accept and consider new information if you request a modification to an initial proffered permit (Part A), or a reconsideration of an approved JD (Part D). An administrative appeal to the Division Engineer is limited to a review of the administrative record, the Corps memorandum for the record of the appeal conference or meeting, and any supplemental information that the review officer has determined is needed to clarify the administrative record. Neither the appellant nor the Corps may add new information or analyses to the administrative record. However, you may provide additional information to clarify the location of information that is already in the administrative record.

POINT OF CONTACT FOR QUESTIONS OR INFORMATION:

If you have questions regarding this decision and/or the appeal process you may contact:
DISTRICT ENGINEER
Attn: Mark D. Frazier
Chief, Regulatory Branch
U.S. Army Engineer District, Kansas City
601 East 12th Street, Room 706
Kansas City, MO 64106-2896
Telephone: 816-389-3990
(Use this address for submittals to the District Engineer)

If you wish to submit an appeal or have questions regarding the appeal process you may contact:
DIVISION ENGINEER
Attn: David W. Gesl
Administrative Appeals Review Officer
U.S. Army Corps of Engineers
P.O. Box 2870
Portland, OR 97208-2870
Telephone: 503-808-3825

RIGHT OF ENTRY: Your signature below grants the right of entry to Corps of Engineers personnel, and any government consultants, to conduct investigations of the project site during the course of the appeal process. You will be provided a 15 day notice of any site investigation, and will have the opportunity to participate in all site investigations.



Signature of appellant or agent.

Date:
2-21-2008

Telephone number:
518 291-2609



22 July 2005 – NWK accepted an After-the-Fact (ATF) Department of the Army permit application from a previous property owner (Chris Bratten, NWK-2005-02052) who signed a tolling agreement. The appellants acquired the property and accepted responsibility for the unauthorized work by joining a new tolling agreement and by submitting a new ATF permit application. The appellant's ATF application for the construction of a recreational lake, involves the same portion of stream where the unauthorized activities of the previous landowner were documented.

18 September 2007 – Corps Public Notice issued. Comments were received from the U.S. EPA (recommended denial), the Missouri Department of Natural Resources (recommended avoidance, minimization and compensation), and from an adjacent property owner (objection).

11 January 2008 – Appellant requested a new JD in accordance with the 5 June 2007 National Guidance on Clean Water Act Jurisdiction.

4 February 2008 --- Approved JD provided to the appellant.

25 February 2008 – Request for Appeal (RFA) received by NWD

16 April 2008 - NWK provided AR to the appellant and the NWD Appeals Review Officer (RO).

6 May 2008 – RO conducts site visit with Ward Lenz and Kenny Pointer of NWK's Jefferson City Office and the appellants, Sidney and Diane Armistead. The RO's observations during that site visit are included in this Background Information Section.

Portions of quad maps showing a) the project site and immediate vicinity, including the downstream impoundment; b) the relevant reach for the JD, the unnamed tributary from its origin, as indicated on the quad map, to the confluence with Dickerson Creek; c) the unnamed tributary, Dickerson Creek, and Grays Creek tributary connections are attached (Encl 3a-c). Enclosure 3d is a portion of a county map which shows the location of the proposed worksite relative to the Missouri River. The Missouri River is the nearest Traditionally Navigable Water (TNW). The series of tributaries connecting the waterbody in question to the TNW is highlighted.

According to NWK, the following distances were considered in the JD:

Site to confluence with Dickerson Creek-- Approximately 1.1 river miles.

Site to confluence Grays Creek (Relatively Permanent Water, RPW) --
Approximately 2 river miles (1.3 straight miles)

Site to confluence with Missouri River (TNW) -- Approximately 10 river miles (4 straight miles)

An aerial photo provided by the appellant is attached (Encl 4). The photo shows the proposed worksite and the downstream impoundment.

A set of ground photographs taken during the 6 May 2008 site visit, showing the unnamed tributary as well as the confluence of that waterbody with Dickerson Creek is attached for reference (Encl 5).

Site Conditions:

The unnamed tributary is a headwater stream that arises either on or a short distance above the subject property. There is a very well defined channel and distinct streambed that is comprised primarily of gravel, stone, and bedrock. There generally is a distinct transition (clear natural line) from the gravel, stone, and bedrock channel to soils and riparian vegetation (the Ordinary High Water Mark).

The stream was flowing on the date of the visit, and the well developed nature of the channel suggests that although the flow was characterized in the JD as “intermittent but not seasonal flow”, the flow is in fact sufficient to support an easily recognizable channel that would generally be considered, even by most lay persons, as a stream or aquatic feature.

Based on the AR and supported by the RO’s on-site observations, materials were graded into the former channel from adjacent uplands previously (2005). Since that time the channel has naturally reformed a new channel following the low contour of the area, sometimes flowing under/through piles of brush and/or large woody debris.

The RO observed aquatic invertebrate life within the channel. A small invertebrate (possibly chironomid larvae) was somewhat abundant in the channel on the undersurface of rocks. Therefore, the stream was observed to provide aquatic habitat, is likely to provide aquatic production that could be transported downstream, and serves a nutrient processing function tied to downstream reaches.

Water stained leaf litter was observed in collections adjacent to the channel where the immediate topography is relatively flat. This results from the formation of small backwater pools during higher flows and/or wet periods. Channel constrictions are created by larger woody debris adjacent to/over/within the channel. This is an indication that some degree of leaf litter processing and retention occurs within the channel and adjacent flooded areas. This processing influences carbon retention, cycling, and export to downstream areas. It could also be reasonably concluded that the configuration of the channel and the relatedness with the adjacent riparian areas would influence the physical delivery of water downstream by detaining/retaining flows. This would contribute to the moderation of downstream flood peaks.

The impoundment downstream of the site is believed to be constructed such that the dam would preclude upstream fish movement. It was confirmed, via review of topographic and county maps, that the unnamed tributary of Dickerson Creek flows, via surface connection, into Dickerson Creek, Dickerson Creek flows into Grays Creek (Relatively Permanent Water, RPW), and Grays Creek flows into the Missouri River (Traditional Navigable Water, TNW).

At the confluence of the unnamed tributary with Dickerson Creek near the entrance to Binder State Park, a dead Channel catfish was observed in the channel. The configuration (depth/width) of the channel and well defined channel bed at this point, combined with what appeared to be well sorted bottom sediments and a lack of indication that upland or riparian vegetation may grow within the confines of the distinct channel strongly suggest the waterway at this point is relatively permanent (RPW).

Rapanos Background:

As a result of Supreme Court decisions in *Rapanos v. United States* and *Carabell v. United States (Rapanos)*, EPA 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 (Memorandum). The Memorandum requires the application of two new standards, as well as a greater level of documentation to support an agency JD for a particular waterbody.

The first standard, based on the plurality opinion in *Rapanos* recognizes regulatory jurisdiction over a waterbody that is not a traditional navigable water (TNW) if that waterbody is "relatively permanent" (i.e., it flows year-round, or at least "seasonally") and over wetlands adjacent to such waterbodies if the wetlands directly abut the waterbody. The second standard, for tributaries that are not relatively permanent, is based on the concurring opinion of Justice Kennedy and requires a case-by-case "significant nexus" analysis to determine whether waters and their adjacent wetlands are jurisdictional. A significant nexus may be found where a tributary, including its adjacent wetlands, has more than a speculative or insubstantial effect on the chemical, physical and biological integrity of a TNW.

The Memorandum, executed jointly by EPA and the Corps since 5 June 2007, provides a methodology to ensure jurisdictional determinations under the Clean Water Act (CWA) are consistent with the Supreme Court decision in *Rapanos* and implement the standards required in the Memorandum. Consequently, the Corps and EPA may only assert jurisdiction over the following categories of waterbodies (plurality test): (1) TNWs, (2) all wetlands adjacent to TNWs, (3) non-navigable tributaries of TNWs that are relatively permanent waters (RPW), and (4) wetlands that directly abut non-navigable tributaries of TNWs.

In addition, the agencies may assert jurisdiction over every 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. The classes of waterbody that are subject to CWA jurisdiction only if such a significant nexus is demonstrated (Kennedy test) are: (1) non-navigable tributaries that do not typically flow year-round or have continuous flow at least seasonally, (2) wetlands adjacent to such tributaries, and (3) wetlands that are adjacent to but that do not directly abut a relatively permanent, non-navigable tributary.

Factors considered in the significant nexus evaluation include flow characteristics and functions of the tributary itself in combination with the functions performed by any wetlands adjacent to the tributary to determine their effect on the chemical, physical and biological integrity of TNWs. Hydrologic factors considered include volume, duration, and frequency of flow, including consideration of certain physical characteristics of the tributary (proximity to the TNW, size of the watershed, average annual rainfall). Ecologic factors considered include the ability for tributaries to carry pollutants and flood waters to TNWs. Ecologic factors also include the ability of a tributary to provide aquatic habitat that supports a TNW, the ability of wetlands to trap and filter pollutants or store flood waters, and maintenance of water quality.

Implementation of the *Rapanos* decision requires EPA and the Corps to be more thorough and consistent in documenting jurisdictional determinations (JD). To meet this requirement the Corps now uses a standardized JD form. Instructions for completing the form are found in *U.S. Army Corps of Engineers Jurisdictional Form Instructional Guidebook* (Guidebook). The Guidebook clarifies terms commonly used in the form, presents an overview on jurisdictional practices, and supplements the form instructions. Information on *Rapanos* related memoranda, guidance, forms, guidebooks, etc., can be found at <http://www.usace.army.mil/cw/cecwo/reg/>.

APPEAL EVALUATION, FINDINGS AND INSTRUCTIONS TO THE KANSAS CITY DISTRICT ENGINEER (DE):

Reason 1: The Rapanos guidance was not properly applied in making the JD.

FINDING: This reason for appeal has merit. The District has not provided sufficient documentation to establish that the tributary in question has a significant nexus to a TNW.

ACTION: The JD is remanded to the District for reevaluation, reconsideration, and additional documentation.

DISCUSSION:

Based upon the Approved Jurisdictional Determination Form (JD Form), the District identified the water in question as a non-RPW (intermittent but not seasonal) flowing indirectly into a TNW. The District identified that a continuous surface water

connection, consisting of the unnamed tributary, Dickerson Creek, and Grays Creek and eventually the Missouri River (TNW), exists. This finding of fact was supported by the administrative record and the site visit. In accordance with the *Guidebook*, jurisdiction is to be asserted over every body of water 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. The standard in determining a significant nexus is that the “tributary, in combination with all its adjacent wetlands, has more than a speculative or insubstantial effect on the chemical, physical, and/or biological integrity of a TNW.

While the JD form was completed in accordance with the Guidebook, it fails to adequately document the chemical characteristics (Part III.B.1(iii)) and the biological characteristics (Part III.B.1(iv)) of the waterbody in question. Specifics on the aquatic/wildlife diversity characteristics are critical to the support the conclusions in the JD form, particularly to support any finding regarding the biological relationship of the stream to a TNW.

Part III.C. Significant Nexus Determination of the JD Form is critical to the finding of jurisdiction for a waterbody. The conclusions stated in that section of the JD Form appear reasonable based upon the specific observations the RO made during the site visit, but the JD form does not contain sufficient data, documentation or discussion to support the District’s finding of CWA jurisdiction. A finding of jurisdiction must be based on a fact-specific analysis that a waterbody has a significant nexus with a TNW. Considerations when evaluating significant nexus include, but are not limited to, the volume, duration, and frequency of the flow of water in the tributary and its proximity to a TNW, and the functions performed by the tributary and all its adjacent wetlands. It is recognized that a detailed study of the structure and function of a particular waterbody is not practicable in the vast majority of cases. However, at a minimum, it is incumbent upon the District to support its determination with analysis of documented site-specific information (record either observations of aquatic life, physical and chemical conditions or explain what biological, chemical, or physical characteristics could be reasonably expected in the case of a desk determination).

This reason for appeal has merit.

Reason 2: The unnamed tributary is an ephemeral stream, flowing only during significant precipitation events.

FINDING: This reason for appeal does not have merit for the reasons contained in the Discussion section below.

ACTION: No action is required by the District regarding this reason for appeal.

DISCUSSION:

The distinction between an ephemeral stream flowing only during significant precipitation events and an intermittent but not seasonal flowing stream are subtle and

difficult to determine. The distinction between intermittent (flows only during wet periods of the year and flows in a continuous well-defined channel) and ephemeral (flows only during and for short periods following precipitation and flows in low areas that may or may not have a well-defined channel) lies along a continuum and can be difficult to confirm. In any event, the precise definition is not critical in most cases. Both intermittent and ephemeral streams fall under the category of “not-relatively permanent” for purposes of jurisdiction determination.

The joint Rapanos Memorandum indicates the agencies will decide jurisdiction over non-navigable tributaries that are not relatively permanent based on a fact-specific analysis to determine whether they have a significant nexus with a traditional navigable water.

The JD Guidebook contains example photos identified as Non-RPW’s that flow directly or indirectly into TNWs, where the flow through the tributary is not continuous at least seasonally. Examples of both intermittent and ephemeral waterbodies are shown. Some of the photos are described as showing waters flowing typically during and after storm events. The pertinent factor in determining jurisdiction is whether or not there is a “significant nexus”.

Characterization of a waterbody as intermittent or ephemeral is not the determining factor for jurisdiction. Therefore, this reason for appeal does not have merit.

Reason 3: The tributary does not have a significant nexus with a TNW.

FINDING: This reason for appeal has merit. The District has not demonstrated that a significant nexus exists between the tributary in question and the Missouri River, a navigable water of the United States.

ACTION: The JD is remanded to the District for reevaluation, reconsideration and additional documentation.

DISCUSSION:

As cited under reason for appeal #1, Part III.B.1(iii) and Part III.B.1(iv)) of the JD form were not adequately completed by the District. The JD form should contain site specific information to support an analysis of the role of the unnamed tributary in maintaining the integrity of the nearest downstream TNW (Missouri River).

Section III (C) of the JD Form is used to document the significant nexus determination. The conclusions in Part C are not adequately supported by site specific information in Part III.B. The AR does not support the District’s determination that a significant nexus exists between the unnamed tributary and the nearest downstream TNW.

This reason for appeal has merit for the reasons stated above.

Reason 4: It is significant that the unnamed tributary of Dickerson Creek, where the worksite is located, intersects with at least two additional unnamed tributaries approximately 400' downstream from the site and "they all effectively terminate as they flow into Woodward Lake, a more substantial recreational lake of 6+/- acres approximately 800' downstream of the proposed site."

FINDING: This reason for Appeal does not have merit for the reasons contained in the Discussion section below.

ACTION: No action is required by the District regarding this reason for appeal.

DISCUSSION:

The Rapanos Guidance is clear that waters that flow indirectly into a TNW may be subject to CWA authority. The JD form and AR clearly identify that the waterbody in question connects to a series of waterbodies that eventually flow into a TNW (the Missouri River). Direct connection is not a determinate factor for determining jurisdiction.

Impoundments constructed on jurisdictional streams (waters of the U.S.) do not constitute a breach in jurisdiction and the pool areas of the lakes constructed on jurisdictional streams can also be jurisdictional waters of the U.S. Therefore, the appellant's statement that the unnamed tributary of Dickerson Creek terminates as it flows into Woodward Lake does not, in itself, eliminate jurisdiction.

This reason for appeal does not have merit.

INFORMATION RECEIVED AND ITS DISPOSITION DURING THE APPEAL REVIEW:

33 C.F.R. 331.3(a) (2) sets the authority of the Division Engineer to hear the appeal of this JD. 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 of the District Engineer's decision, the Division Engineer or his RO conducts an independent review of the administrative record to address the reasons for appeal cited by the Appellant. The administrative record 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. Section 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 administrative record. Such interpretation, clarification, or explanation does not become part of the District's administrative record, 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 administrative record provides an adequate and reasonable basis to support the District Engineer's decision.

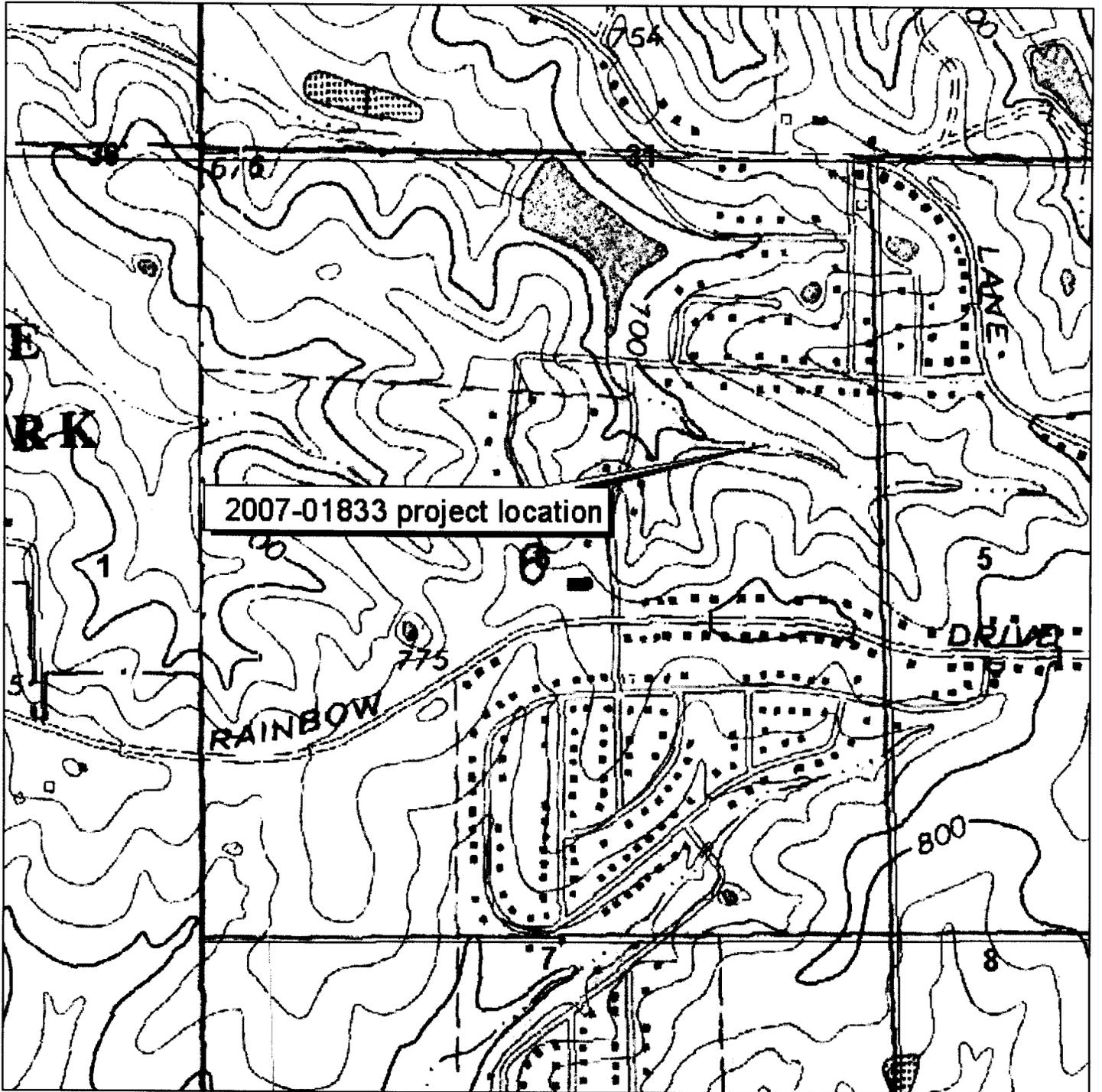
1. NWK provided a copy of the administrative record to the RO and the Appellant. The administrative record is limited to information contained in the record by the date of the NAP form, which in this case was 5 Feb 2008.
2. A site visit was held on May 6, 2008. During the site visit, 16 digital photographs were taken. The site visit and photographs are deemed clarifying information.
3. The District provided a Summary/Rebuttal dated April 16, 2008, along with the Administrative Record. This rebuttal is deemed clarifying information.

OVERALL CONCLUSION: After reviewing and evaluating information provided by the appellant, the District's Administrative Record, and the information obtained during the appeal site visit, I find that two of the four reasons for appeal put forth by the Appellant have merit. I am remanding the Appellant's jurisdictional determination to the Kansas City District for reevaluation, reconsideration, and additional documentation to assure that the administrative record provides a reasonable basis for asserting jurisdiction. The final Corps jurisdiction decision will be the Kansas City District Engineer's decision made pursuant to my remand.

FOR THE COMMANDER:



PAUL R. WEMHOENER
Chief, Program Support Division



2007-01833 project location

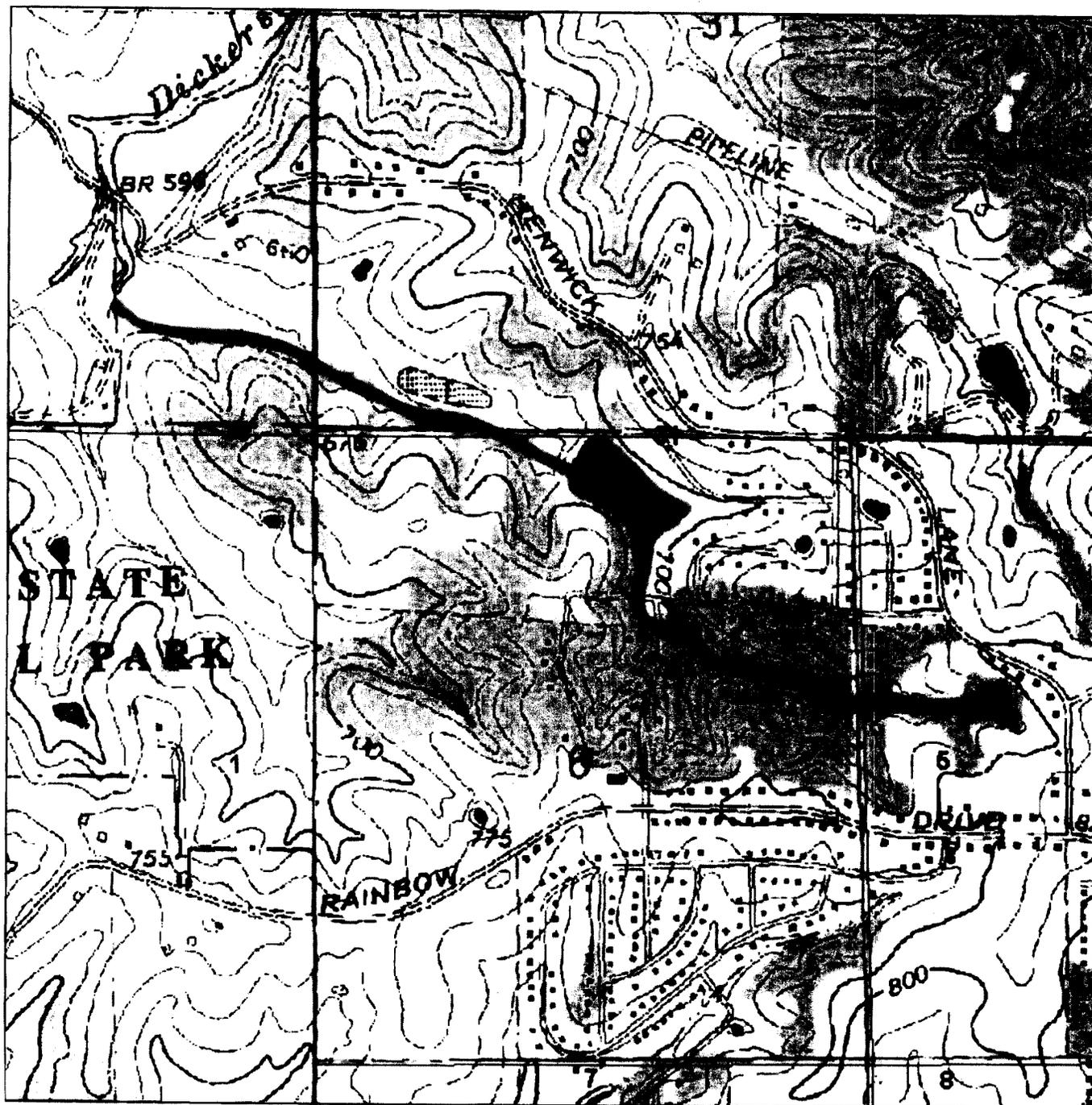
0 0.5 Miles



Encl 3a. The project location and immediate vicinity, including the downstream impoundment.



Panel 4



 = relevant reach for jurisdictional determination on unnamed tributary of Dickerson Creek for file number 2007-01833.

Encl 3b. Relevant reach

16 April 2008

Subject: NWK-2007-01833, Summary/Rebuttal for Administrative Appeal of Jurisdictional Determination (JD) by Sidney J. and Diane M. Armistead

1. Background information: Unauthorized work activities were previously documented on the subject property during a site inspection on 11 July 2005. Approximately 400 linear feet of the unnamed tributary of Dickerson Creek had been filled with an undetermined amount of earthen material, trees and root wads from mechanical clearing activities that had been performed for the construction of a lake.
2. A Do No Further Work Order was issued to the previous owner (Chris Bratten) on 22 July 2005, and we accepted an After-the-Fact (ATF) Department of the Army (DA) permit application (No. NWK-2005-02052) and tolling agreement signed by Mr. Bratten and his contractor.
3. Subsequently, Mr. Bratten requested Corps consent to transfer the property under the terms of the tolling agreement to Mr. Armistead. We consented to the transfer with the condition that Mr. Armistead accept the responsibility for the unauthorized work by joining a tolling agreement with Mr. Bratten and his contractor, and by submitting a new ATF DA permit application.
4. The original application was withdrawn on 18 September 2007, concurrently with the acceptance of an ATF application by Mr. Armistead and a new tolling agreement signed by Mr. Armistead, Mr. Bratten and his contractor.
5. Mr. Armistead's ATF application, for the construction of a recreational lake, involves the same portion of stream on the subject property where the unauthorized work activities were previously documented. In response to Mr. Armistead's 11 January 2008, request, an approved JD (in accordance with the 5 June 2007 National Guidance on Clean Water Act jurisdiction) was sent to Mr. Armistead on 4 February 2008. Mr. Armistead filed a Request for Appeal of the JD in a form dated 21 February 2008, and received in NWD on 25 February 2008.
6. The Kansas City District provides the following response to the issues raised in the referenced Request for Appeal.
 - A previous determination was performed on same review area of the proposed project site on 11 July 2005, (file number NWK-2005-01052) when unauthorized work activities were documented.
 - In response to the 11 January 2008, request by the Mr. Armistead, an approved JD was issued on 4 February 2008, in accordance with the 5 June 2007 National Guidance on Clean Water Act jurisdiction. The unnamed tributary of Dickerson Creek has a significant nexus with the Missouri River (Traditional Navigable Water, TNW).
 - The unnamed tributary of Dickerson Creek is approximately 10-foot-wide at the ordinary high water mark (OHWM). A pool was present in the unnamed tributary of Dickerson Creek at the downstream end of the property on 11 July 2005, (downstream from portion

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of stream where fill activities had occurred). The unnamed tributary of Dickerson Creek is identified as a blue line stream with intermittent hydrology on U.S.G.S. topographic mapping (7.5 minute U.S.G.S. topographic map, Lohman, MO Quadrangle).

- Significant nexus (see 4 February 2008 approved JD) - The unnamed tributary of Dickerson Creek has the capacity to transfer nutrients and organic carbon that support downstream food webs. The unnamed tributary of Dickerson Creek has a direct surface water connection to the Missouri River, and has the capacity to carry pollutants and floodwaters to a TNW. The unnamed tributary of Dickerson Creek flows into Dickerson Creek, Dickerson Creek flows into Grays Creek (Relatively Permanent Water, RPW), and Grays Creek flows into the Missouri River.
- Distances – Approximately 1.1 river miles from site to confluence with Dickerson Creek. Approximately 2 river miles from site to confluence Grays Creek (RPW), and approximately 1.3 straight miles to Grays Creek (RPW). Approximately 10 river miles from site to confluence with Missouri River (TNW), and approximately 4 straight miles to Missouri River (TNW).
- Impoundments constructed on jurisdictional streams (waters of the U.S.) do not constitute a breach in jurisdiction and the pool areas of the lakes constructed on jurisdictional streams are also considered to be jurisdictional waters of the U.S. Therefore, the appellant's statement that the unnamed tributary of Dickerson Creek terminates as it flows into Woodward Lake is not correct (see 4 February 2008, approved JD and information listed above).
- Kansas City District's conclusion: The appeal of the approved JD does not have merit.