

ADMINISTRATIVE APPEAL DECISION
FILE NWO-2008-03044 (Blumkin Family Property)
OMAHA DISTRICT (NWO)
SECTION 404 AUTHORITY
DATE: 29 January 2010

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

Appellant: Blumkin Family Trust, (Appellant), represented by Olsson Associates (Olsson).

Receipt of Request For Appeal (RFA): The RFA was received on July 31, 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 October 27, 2009. The site visit was attended by Joan Darling of Olsson Associates, John Moeschen and Laura Banker of the District's Nebraska State Regulatory Program Office, and the NWD RO. The site visit consisted of a tour of the site to inspect the general character of the area. The observations/results of that site visit are incorporated in this document.

Summary of Appeal Decision: The Appellant is challenging the District's JD which concluded that the U.S. Army Corps of Engineers (Corps) has Clean Water Act (CWA) jurisdiction over an unnamed tributary and adjacent wetland located on a property in Douglass County, Nebraska. The RFA challenged the JD on the basis that: (1) the tributary is an upland erosional feature, not a Water of the United States (WOUS); (2) a de-watering basin, described as a wetland, is not a WOUS, based on the preambles to the 1977 and 1986 Final Rules; (3) neither feature has a significant nexus to the nearest Traditional Navigable Water (TNW); and, (4) the JD is inconsistent with other District JDs and the District predetermined jurisdiction before having complete information. After review of the Administrative Record (AR) and a site visit, it has been determined that the AR does not contain sufficient documentation to support a finding of CWA jurisdiction. Specifically, the AR does not sufficiently support that there is a significant nexus between the water(s) and the TNW based on transport of a pollutant (sediment). The AR also does not document that hydrologic information has been adequately considered and it does not document that the Corps' Wetland Determination Manual¹ and/or the Midwest Interim Regional Supplement² have been appropriately applied. Additionally, the Approved Jurisdictional Determination Form (JD Form) contains errors

¹ 1987 CORPS OF ENGINEERS WETLANDS DELINEATION MANUAL, Technical Report Y-87-1 (January 1987), available at <http://el.erdc.usace.army.mil/wetlands/pdfs/wlman87.pdf> (hereafter "THE 1987 MANUAL")

² INTERIM REGIONAL SUPPLEMENT TO THE CORPS OF ENGINEERS WETLAND DELINEATION MANUAL: MIDWEST REGION, FINAL REPORT, ERDC/EL TR-08-27 (September 2008), available at <http://el/erdc.usace.army.mil/elpubs/pdf/tre108-27.pdf> (hereafter "THE REGIONAL SUPPLEMENT")

and omissions. 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. The tributary described as a Non-RPW in the JD is not a Water of the United States (WOUS), it is an upland erosional feature, based on pre-SWANCC guidance, as well as post-Rapanos guidance.

2. The de-watering basin, described as a wetland adjacent to a Relatively Permanent Water (RPW) in the JD, is not a WOUS, based on the preamble to the 1977 and 1986 Final Rules.

3. Neither feature has a significant nexus to the nearest Traditional Navigable Water (TNW), the Missouri River.

a. These features have significantly less than a speculative effect on the chemical, physical, and biological integrity of the downstream TNW, the Missouri River.

b. The JD contains inaccuracies and inconsistencies that have led the Omaha District to err in the JD.

4. This JD is arbitrary and capricious, an abuse of discretion, and contrary to law.

a. The JD is inconsistent with numerous other JDs issued by the Omaha District on similar facts.

b. The Omaha District predetermined that jurisdiction existed over these features before having complete information regarding the features or the site.

Background Information:

The AR was provided to NWD and the Appellant on September 1, 2009. On January 4, 2010, the RO requested that the District provide a wetland determination prepared by Mr. Pat Sward, formerly of ATC Associates Inc. that was associated with a previous action on this site. That information was received; however, it was not considered during the appeal process as it was determined to be new information not contained in the AR compiled by the District for this appeal.

The property is located in Omaha, Douglass County, Nebraska, at 122nd & West Dodge Road (T15N, R12E, Sec 18). The Appellant requested an approved JD for the property on December 3, 2008. The Appellant has an interest in future utilization of the property for unspecified commercial/residential development.

The District's Approved Jurisdictional Determination Form (JD Form) concluded the property contained (1) a non-RPW (the unnamed tributary) and (2) wetlands adjacent, but not directly abutting, an RPW that are subject to CWA authority in its Summary of Findings³ dated June 2, 2009. The appellant was notified of the District's jurisdictional determination on June 3, 2009.

The flow route to a TNW identified on the JD Form is from the unnamed tributary, to Candlewood Reservoir (RPW) to Big Papillion Creek to Papillion Creek (RPW) to Missouri River (TNW).

The RFA identifies the flow path as "runoff from West Dodge Road and other upland areas through the gully on the property and the de-watering basin, through a storm sewer riser into Lake Candlewood, from Lake Candlewood into another storm sewer, under 120th Street and into a roadside ditch, into Big Papillion Creek, then into Papillion Creek, and then into the Missouri River."

Site Conditions:

There are two features on the property that are at issue in the RFA: a former dredged material settling basin and the unnamed tributary.

The basin was created by constructing a retention berm in June 1998. It served as a temporary de-watering or settling basin associated with the dredging of a nearby man-made residential lake (Candlewood Lake). The basin incorporated a perforated riser to return water to the residential lake; the riser appears to remain functional. According to the District, this area was originally upland, with the exception of an existing channel, the unnamed tributary. According to the RFA, the dredging activities were completed in 1998. The basin has remained since that time and during the site visit it was clear the basin has subsequently developed at least some wetland characteristics. Subsequent to the use of the basin for de-watering, at least one adjacent property has been developed and the runoff from at least one large parking lot is being directly conveyed to the basin via a culvert.

The second feature is a channel which the Appellant describes as "an upland erosional feature, or gully, that has been expanding over several decades by the highly erodible nature of the soils in this area." According to the District, this channel, the unnamed tributary, was in existence prior to the creation of the settling basin. The channel varies in character, mostly having a steep sided, heavily eroded bank with an immediate riparian zone consisting of bare soils and/or vegetation characteristic of upland portions of the site. Other sections of the channel have more stable banks, showing less severe erosion and a narrow riparian zone, including some small to medium-sized trees. Review of photos in the AR⁴ show what could be some small scale channel meanders; meanders generally are not characteristic of an erosional feature. It appears that channel slope influences the degree of erosion on the site, with steeper areas having evidence of greater

³ AR at 84.

⁴ AR at 71.

erosion. The channel flows to the north and into the basin described above; there was a small volume of flow in this channel during the visit.

At approximately the point where the channel enters the basin, there is a man-made drainage way that may divert at least some flow around the eastern perimeter of the diked basin; this drainage way is a third feature that was not treated in the JD under appeal. That feature had been graded and seeded recently prior to the site visit. There was no surface flow observed in that drainage way during the visit.

It was agreed by the District and Olsson that the vegetation growing in the basin was of the type that is adapted for life in wetland conditions. It was also recognized that at least some, if not all, of the vegetation growing in the basin is also known to sometimes occur in areas that are not within CWA authority.

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).⁵ 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 that require a significant nexus determination include: (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 an RPW.

⁵ U.S. Environmental Protection Agency and U.S. Army Corps of Engineers, CLEAN WATER ACT JURISDICTION FOLLOWING THE U.S. SUPREME COURT'S DECISION IN RAPANOS V. UNITED STATES & CARABELL V. UNITED STATES (December 2, 2008), available at http://www.epa.gov/owow/wetlands/pdf/CWA_Jurisdiction_Following_Rapanos120208.pdf (hereafter "THE RAPANOS GUIDANCE")

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

Reason for Appeal 1: The tributary described as a Non-RPW in the JD is not a Water of the United States (WOUS), it is an upland erosional feature, based on pre-SWANCC guidance, as well as post-Rapanos guidance.

Finding: This reason for appeal has merit.

Action: The RFA is being remanded to the District for further evaluation, analysis, and documentation.

Discussion: The Appellant referred to the Supreme Court Opinion in *Rapanos v. United States* and the Rapanos Guidance in challenging the JD. The Appellant specifically pointed to the following statement in the Rapanos Guidance:

The following geographic features generally are not jurisdictional waters: Swales or erosional features (e.g. gullies, small washes characterized by low volume, infrequent, or short duration flow).⁶

The Appellant pointed to the United States Geological Service (UGGS) topographic map (depicting the entire subject property as upland, with no "blue lines" or other water features shown), the Natural Resources Conservation Service (NRCS) Soil Survey of Douglas and Sarpy Counties (indicating unclassified" drainage lines on the property, but no permanent drainage features and having mapped the area as having upland soils), and the National Wetlands Inventory (not showing any wetland features on the property) as evidence that they believed was "ignored" by the District while making the JD.

The AR indicates the District relied on observations made during at least two field visits, its evaluation of historical information that a culvert was necessary to convey flow in the area, and historical aerial photography (1959, 1971, 1993, 1999, and 2001), in addition to the information the Appellant identified above, in concluding the unnamed tributary had been in existence prior to construction of the basin. The District used the same information to also conclude the unnamed tributary is an eroded channel, not an erosional feature, as is further discussed below. It is appropriate to consider multiple sources in drawing conclusions regarding the history of the site, and it is appropriate to consider the overall weight of evidence, as well as the limitations and/or reliability of those sources. The District's approach was reasonable.

Severe erosion associated with the channel was confirmed during the site visit. Erosion is a natural process associated, to some degree, with all streams. Erosion is most prominent where gradients are steep and where flow regimes have been impacted by urbanization, such as in this case. Evidence of severe erosion, alone, is not the determining factor that a channel is an erosional feature that is "generally" not jurisdictional, per the Rapanos Guidance.

⁶ THE RAPANOS GUIDANCE at 1.

The Appellant disputed the District's finding the channel in question has an Ordinary High Water Mark (OHWM), offering instead that the characteristics the District had observed were actually a result of highly erosive flows entering the "drainage gully" from offsite, coupled with "the readily gullied nature of the soils." Although the unnamed channel is heavily impacted by erosion in some places, the District's determination that an OHWM was present is not unreasonable and is within the zone of discretion delegated to the District by Corps regulations. It would not be appropriate for the Division to substitute its judgment for that of the District on this matter of fact.

The Appellant pointed out contradiction(s) in the JD Form where the tributary is identified as a non-RPW but describes it as having "seasonal flow" (a characteristic of an RPW). This inconsistency does exist on the JD Form. However, the AR also indicates the District evaluated the unnamed tributary as a non-RPW. The District completed the appropriate section of the JD Form (Significant Nexus Determination for non-RPW's).⁷ The standard for determining jurisdiction is higher for a non-RPW than it is for an RPW; hence the District's error, if there was one, had the effect of increasing the burden of proof to determine jurisdiction. Therefore, any error on the part of the District by indicating the tributary had seasonal flow, or in its definition of seasonal flow, was inconsequential and would not be expected to have had a substantive impact on its JD.

The Appellant challenged the District's findings regarding the chemical and habitat characteristics of the tributary as lacking evidence, being unsupported, and of being speculative. The JD Form contains the District's findings regarding chemical and habitat characteristics which appear to be based primarily on the best professional judgment of District staff. Although more detailed observations would increase the strength of the findings, best professional judgment is acceptable. It is intuitively obvious, in light of the nature of the immediate watershed, that most of the identified pollutants could be transported to the TNW. However, the AR does not contain sufficient support that sediment would be transported via the tributary system to the TNW, after passing through Candlewood Lake which might retain that pollutant. The AR does not contain sufficient information/analysis to support a sedimentation tie between the unnamed tributary and the TNW. There is some validity in this challenge point.

The Appellant pointed out that a permit issued in 1997 had referred to the site as an upland area, and characterized that as "binding." Although the District should consider previous permit actions involving the site, it is not bound by information or decisions associated with prior actions. It is appropriate for the District to rely on the best available information in determining jurisdiction. It is not unreasonable for the District to assert CWA jurisdiction over areas where it had previously not, when more detailed, more reliable, or new information has become available. The Rapanos decision has resulted in a greater emphasis on documenting JDs, and as a result, the increased level of effort required to make a positive or negative determination could result in conclusions that differ from those associated with a general permit decision made over 10 years ago.

⁷ AR at 79.

The U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook (Guidebook)⁸ indicates principal considerations when evaluating significant nexus include the volume, duration, and frequency of the flow of water in the tributary and the proximity of the tributary to a TNW. It instructs field staff to consider all available hydrologic information (e.g., gauge data, flood predictions, historical records of water flow, statistical data, personal observations/records, etc.) and physical indicators of flow including the presence and characteristics of a reliable OHWM with a channel defined by bed and banks (see page 55). The Rapanos Guidance recognizes that “as the distance from the tributary to the navigable water increases, it will become increasingly important to document whether the tributary and its adjacent wetlands have significant nexus rather than a speculative or insubstantial nexus with a traditional navigable water.” Likewise, in cases such as this where there has been substantial anthropogenic impact to the site/tributary system, it is important to document the characteristics of the tributary. The AR lacks sufficient documentation regarding the volume, duration, and frequency of flow in the tributary.

As specifically discussed in preceding paragraphs, the AR does not provide sufficient basis to support 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 2: The de-watering basin, described as a wetland adjacent to a Relatively Permanent Water (RPW) in the JD, is not a water of the United States, based on the preamble to the 1977 and 1986 Final Rules. Note: Although the preceding statement is verbatim from the Appellant’s RFA, based on the analysis in the JD Form, the District viewed the wetland as being adjacent to a non-RPW, not an RPW.

Finding: This reason for appeal has merit.

Action: The RFA is being remanded to the District for further evaluation, analysis, and documentation.

Discussion: The RFA included specific citations from the preambles to the 1977 and 1986 Final Rules, which includes discussion specifically relating to settling basins. The RFA states the Appellant’s conclusion from the preamble, “There are two key requirements to meet the intent of the preamble: 1) the area in question must be an artificial lake or pond created by excavating and/or diking dry land; and 2) it must be used for one of the purposes listed in the preambles.” The purpose in this case is a settling basin. The Appellant’s interpretation of the preamble is consistent with the Corps application of 33 C.F.R. § 328.3.

There are two points of difference between the District and the Appellant with respect to this reason for appeal. First, the District finds that the basin in question was not created solely by diking “dry land”, or uplands, rather, that the unnamed tributary existed at the

⁸ This document is intended to be used as the U.S. Army Corps of Engineers Regulatory National Standard Operating Procedures for conducting an approved jurisdictional determination (JD) and documenting practices to support an approved JD.

location of the settling basin prior to its construction and it currently maintains connection to a tributary system via a standpipe and surface flow. Second, the District finds the basin currently meets the criteria for being wetland. There is no dispute that the area in question no longer serves as a settling basin for dredged spoils; it has been abandoned for that purpose.

The District's AR indicates it relied on its evaluation of historical information that a culvert was necessary to convey flow in the area, and historical aerial photography (1959, 1971, 1993, 1999, and 2001) to support its determination that there was a tributary prior to construction of the settling basin. This is a reasonable and acceptable approach.

The RFA again notes the 1997 issuance of a permit authorizing discharge of return water from an upland site to support the appeal. As discussed in the Discussion under the first Reason for Appeal, the District is not bound by a previous action when additional, more detailed, more reliable, and/or new information has become available that supports a different conclusion.

The Appellant also challenges that the soils in the basin retain hydric characteristics that developed prior to their being dredged from Candlewood Lake and placed in the basin. The Appellant puts forth that those characteristics are remnant and are not indicative of current or normal circumstances.

Man-induced wetlands, including dredged material disposal areas, are discussed in the Atypical Situations Section (Part IV.F.4) of the 1987 Corps of Engineers Wetlands Delineation Manual (1987 Manual).⁹ Problematic (relic) hydric soils are also discussed in the Interim Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Midwest Region (Supplemental Manual).¹⁰ Both documents recognize that relict hydric soil features may be difficult to distinguish from contemporary features, as well as that if hydrophytic vegetation and wetland hydrology are present, then hydric soil indicators can be assumed to be contemporary (normal circumstances). Both documents outline steps and procedures to be applied to address circumstances such as the basin in question.

Information regarding wetland indicators and/or the wetland determination is found at several points in the AR.¹¹ It appears that the District relied heavily on soil characteristics (color) to support their finding the normal circumstances for the basin is wetland. It is not clear from the AR if or how the District applied the appropriate steps from the 1987 Manual or the Supplemental Manual.

⁹ 1987 CORPS OF ENGINEERS WETLANDS DELINEATION MANUAL, Technical Report Y-87-1 (January 1987), available at <http://el.erdc.usace.army.mil/wetlands/pdfs/wlman87.pdf>

¹⁰ INTERIM REGIONAL SUPPLEMENT TO THE CORPS OF ENGINEERS WETLAND DELINEATION MANUAL: MIDWEST REGION, FINAL REPORT, RERDC/EL TR-08-27 (September 2008), available at <http://el/erdc.usace.army.mil/elpubs/pdf/tre108-27.pdf>

¹¹ AR at 19-22, 23, 25-28, 29, 33, 34.

The AR does not contain sufficient documentation to support its determination that this former dredged material disposal basin is a wetland area and that the normal circumstance for the basin is wetland. Therefore, this reason for appeal has merit.

Reason for Appeal 3: Neither feature has a significant nexus to the nearest Traditional Navigable Water (TNW), the Missouri River.

a. These features have significantly less than a speculative effect on the chemical, physical, and biological integrity of the downstream TNW, the Missouri River.

b. The JD contains inaccuracies and inconsistencies that have led the Omaha District to err in the JD.

Finding: This reason for appeal has merit.

Action: The RFA is being remanded to the District for further evaluation, analysis, and documentation.

Discussion: The RFA states that the flow path description (from the unnamed tributary to the Missouri River) does not establish that there is a significant effect on the "chemical, physical, and biological integrity" of the Missouri River. The RFA also states the District failed to provide any fact-specific evaluation of the frequency, volume, and duration of flow; proximity to the TNW; capacity to transfer nutrients and organic carbon vital to support food webs; habitat services such as providing spawning areas for important aquatic resources; functions related to the maintenance of water quality such as sediment trapping; and other relevant factors. The RFA also stated the evidence that has been provided by the District is inaccurate.

The RFA argued the "erosional feature" does not trap sediments and nutrients, but is a source for these materials. It also argues the de-watering basin allows most pollutants to pass through it and it does not reduce flood flows. It also indicates a belief that Lake Candlewood provides these functions and would provide those functions with or without the de-watering basin.

The JD Form discusses the biological, chemical, and physical functions being performed in Section III(B), documents the District's Significant Nexus Determination in Section III(C)(2) and provides additional analysis/documentation to support its findings in Section IV(B). This information is in addition to identifying the tributary flow path. Assuming that the data/observations that this analysis was based upon are correct, it is within the zone of discretion delegated to the district engineer by Corps regulations and current policy to make the significant nexus determination that it did. It would not be appropriate to substitute the Division's judgment.

The RFA included a listing of what the Appellant termed inaccuracies and inconsistencies that led the District to an erroneous judgment (Attachment E of the RFA). The listing includes what appear to be:

a) typos or minor, harmless errors that were unlikely to affect the decision (failing to list a site visit, checking a box indicating that wetlands adjacent to an RPW were being evaluated when the remainder of the JD Form suggests a wetland adjacent to a non-RPW was in question, classification and specific location wetlands, stream order, whether a culvert was installed or replaced over 70 years ago, precise width and depth of channel, precise distance to TNW),

b) disputes of recorded characteristics that may or may not affect the JD evaluation (estimated size of the wetland, size of the watershed, flow frequency, duration and volume, tributary length),

c) omissions/oversights that affect the credibility of the JD (specific observations and/or the basis for statements regarding aquatic/wildlife diversity, wetland quality), and

d) disagreements with conclusions discussed in other parts of the RFA (evaluation of biological, chemical, and physical functions).

Some of what the Appellant has pointed out are, in fact, errors and omissions, therefore this reason for appeal has merit and the JD should be remanded to the District to revise, clarify, and supplement the JD Form, where appropriate, and to reevaluate its decision.

Reason for Appeal 4: This JD is arbitrary and capricious, an abuse of discretion, and contrary to law.

a. The JD is inconsistent with numerous other JDs issued by the Omaha District on similar facts.

b. The Omaha District predetermined that jurisdiction existed over these features before having complete information regarding the features or the site.

Finding: This reason for appeal does not have merit.

Action: No further action is required.

Discussion: The Appellant submitted JD forms that the District completed for four other properties, in support of its contention that the Blumkin JD was inconsistent with similar JDs.

The four examples do have some commonalities with the JD under appeal, but the jurisdictional finding differed. The RFA points out that the USGS quad map lacked a “blue line”, the NWI map did not indicate wetlands, and/or the soil surveys indicated the site had an “unclassified drainage” for three of these sites. This is similar to what is shown on the same sources for JD under appeal. USGS quads, NWI maps, and soil surveys are useful informational tools that can be considered in the JD, however, they are

not determining factors for JDs, particularly in cases where more reliable or more detailed information is available. The JD being appealed contained substantially more information and detail in analysis than the examples provided as part of the RFA.

The JD Forms provided by the Appellant in support of the RFA contain very limited information and do not, by themselves, demonstrate that the District's JD was not consistent with those JD's.

The RFA states the District "predetermined that jurisdiction existed...before having complete information regarding the features or the site". The Appellant referenced a site inspection report dated July 3, 2006, which included a notation "Told Pat all was JD", as well as notes from a February 20, 2007 meeting, which indicate "once it forms wetland, its wetland" attributed to the Corps Nebraska Program Manager.

Corps Regulations allow for pre-application consultations so that potential applicants may begin to assess the viability of potential alternatives.¹² Corps staff is expected to be forthright and candid during such meetings to maximize the value of such meetings. However, the approved JD constitutes the Corps' official, written representation that the JD's findings are correct.¹³ Statements made during pre-application or pre-jurisdictional determination request meetings are not final actions, even if they were to reflect personal bias or prejudice. The merits of a JD are based on the evidence and analysis contained in the AR and documented on the JD Form. It is not practicable nor within the scope of the Corps Administrative Appeal Program to evaluate/review the pre-decisional statements the Appellant feels are evidence of "predetermination".

This reason for appeal does not have merit.

INFORMATION RECEIVED AND ITS DISPOSITION DURING THE APPEAL REVIEW:

The Division Engineer has the authority to consider appeal of this JD.¹⁴ 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 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

¹² 33 C.F.R. § 325.1(b).

¹³ U.S. ARMY CORPS OF ENGINEERS, REGULATORY GUIDANCE LETTER 08-02: SUBJECT: JURISDICTIONAL DETERMINATIONS (2002), available at <http://www.usace.army.mil/cw/cecwo/reg/rglsindx.htm>.

¹⁴ 33 C.F.R. § 331.3(a) (2).

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 rebuttal to the RFA, that document is considered clarifying information.

The RO requested that the District provide a wetland determination prepared by Mr. Pat Sward, formerly of ATC Associates Inc., on behalf of Noddle Companies, in conjunction with a previous action on this site. That information was provided, however, it was not considered during the appeal process as it was determined to be new information that was not contained in the AR identified by the District.

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