

**ADMINISTRATIVE APPEAL DECISION
CLEAN WATER ACT
UNIVERSITY OF NEBRASKA – FILE NO. NWO-2014-01919
OMAHA DISTRICT**

01 OCT 2015

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

Appellant: University of Nebraska, Board of Regents, Ms. Stacia L. Palser, Associate General Counsel

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

Receipt of Request for Appeal: January 27, 2015

Site Visit/Appeal Meeting: May 28, 2015

Summary: The appellant is challenging an approved jurisdictional determination (JD) completed by the Omaha District (District) which concluded that the U.S. Army Corps of Engineers (Corps) has Clean Water Act (CWA) jurisdiction over a drainage channel on the appellant's property located in Section 18, Township 10 North, Range 7 East in the City of Lincoln, Lancaster County, Nebraska. The appellant challenges the approved JD on the following:

1. The appellant asserts that the Maxwell Drainage channel is "at most a hard lined swale with infrequent and short duration flow" and "therefore should not be classified as jurisdictional waters of the United States."
2. The appellant believes that the District did not support its basis of jurisdiction over the Maxwell Drainage channel through the significant nexus determination.

As detailed in this document, the appellant's reasons for appeal are found to not have merit. The Corps jurisdictional determination made by the Omaha District Engineer, dated November 28, 2014, remains in effect. However, this does not preclude the appellant from requesting Department of the Army authorization to work within the subject channel.

Background Information: The appellant submitted a request for an approved JD to the District on August 22, 2014. The District utilized reference resources and information submitted on behalf of the appellant by KDG Consultants, to reach its approved JD decision. Maxwell Drainage is a remnant of a natural drainage channel. Much of the original channel has been heavily altered or eliminated by urbanization and construction of the University's East Campus.

The subject channel is located in a highly disturbed landscape where the natural drainage has been channelized and piped under urban infrastructure both upstream and downstream of the 500 foot reach analyzed under this approved JD. The drainage channel has been in its current

location for more than 35-40 years. In the 1980s the channel walls were lined with vertically-placed railroad ties and the bottom of the channel was lined with concrete ties. Underground pipes from adjacent campus parking lots were installed to collect and discharge runoff into the subject channel. In addition, gabion structures were installed at the northern, downstream inlet to a municipal storm sewer system where the channel's flow is directed underground. These actions contributed to present conditions where the subject channel is constricted and appears to be altered to such a degree that a floodplain no longer exists. In its present state, the channel appears to generally function as a storm water conveyance with runoff from precipitation, snowmelt and adjacent parking lots.

Through field investigation and background research the District concluded that the 500-foot long Maxwell Drainage channel is a 1st order non-reasonably permanent water (non-RPW) that contributes ephemeral flow to Deadman's Run, a 2nd order perennial reasonably permanent water (RPW) via an underground storm sewer system. Deadman's Run is a tributary of Salt Creek, a 3rd order perennial traditional navigable water (TNW).

The District notified the appellant in a letter dated November 28, 2014, that Maxwell Drainage is a jurisdictional water of the United States, regulated per authority of Section 404 of the Clean Water Act (33 USC 403).

The appellant submitted a complete Request for Appeal (RFA) on January 27, 2015. The appellant was informed by letter dated March 27, 2015 that the reasons presented in the RFA are accepted under this appeal.

Background: Federal Clean Water Act Jurisdiction. Federal CWA jurisdiction is determined according to implementing regulations found at 33 CFR 328, current agency guidance and standard procedures including 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),¹ the U.S. Army Corps of Engineers *Jurisdictional Determination Form Instructional Guidebook*² (JD Guidebook), 1987 *Corps of Engineers Wetlands Delineation Manual*, and Regulatory Guidance Letters.³

In 2007, as a result of the U.S. Supreme Court *Rapanos* decision,⁴ the Environmental Protection Agency (EPA) and the Corps, in coordination with the Office of Management and Budget and the President's Council on Environmental quality, issued a guidance memorandum (*Rapanos* guidance) to ensure that jurisdictional determinations, permit actions, and other relevant actions are consistent with the *Rapanos* decision and supported by the AR. The two agencies issued

¹ Combined cases of *Rapanos v. United States* and *Carabell v. United States*. 126 S. Ct. 2208 (2006).

² *Jurisdictional Determination Form Instructional Guidebook*. U.S. Army Corps of Engineers and Environmental Protection Agency. 30 May 2007. This *JD Guidebook* is intended to be used as the U.S. Army Corps of Engineers Regulatory National Standard Operating Procedures for conducting an approved jurisdictional determination (JD) and documenting practices to support an approved JD.

³ <http://www.usace.army.mil/Missions/CivilWorks/RegulatoryProgramandPermits/GuidanceLetters.aspx>

⁴ Combined cases of *Rapanos v. United States* and *Carabell v. United States*. 126 S. Ct. 2208 (2006).

joint revised *Rapanos* guidance on December 2, 2008 in response to public comments received and the agencies' experience in implementing the *Rapanos* decision.⁵

The *Rapanos* guidance requires the application of two standards to support an agency jurisdictional determination for certain water bodies. The first standard, based on the plurality opinion in the *Rapanos* decision, recognizes regulatory jurisdiction over TNWs and their adjacent wetlands, as well as a water body that is not a TNW, if that water body is "relatively permanent" (i.e. it flows year-round, or at least "seasonally") and over wetlands adjacent to such water bodies if the wetlands directly abuts the water body. In accordance with this standard, the Corps and EPA may assert jurisdiction over the following categories of water bodies: (1) TNWs, (2) all wetlands adjacent to TNWs, (3) relatively permanent non-navigable tributaries (with at least seasonal flow) of TNWs, and (4) wetlands that directly abuts relatively permanent, non-navigable tributaries of TNWs.

The second standard, for tributaries that are not relatively permanent, is based on the concurring opinion of Justice Kennedy and requires a case-specific "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. Consequently, the agencies may assert jurisdiction over any water body that is not a relatively permanent water if that water body is determined (on the basis of a fact-specific analysis) to have a significant nexus with a TNW. The classes of water bodies that are subject to CWA jurisdiction, if such a significant nexus is demonstrated, are: (1) non-navigable tributaries that do not typically flow year-round or have a continuous flow at least seasonally, (2) wetlands adjacent to such tributaries, and (3) wetlands that are adjacent to but that do not directly abuts a relatively permanent, non-navigable tributary. Manipulating the flow pathway of waters of the United States into artificial ditches, channels, culverts, or similar features (i.e., storm sewer pipes) does not sever federal jurisdictional status of the water.⁶

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:

⁵ Grumbles, Benjamin H. and John Paul Woodley, Jr. 2007, 2008. Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v United States* and *Carabell v. United States*. Original guidance released June 5, 2007; revised guidance released December 2, 2008.

⁶ *ibid*

1. The District provided a copy of the AR to the RO and the appellant on April 10, 2015. The AR is limited to information contained in the record prior to November 28, 2014, which is the date of District's approved JD decision, and the Notification of Administrative Appeal Options and Process form.

2. In accordance with the Corps Appeal Program regulations, the RO held an informal appeal meeting and site visit on May 28, 2015.⁷ 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 that was reached.

3. The appellant, through Terracon Consultants, Inc., provided an assessment of the District's approved JD form for the Maxwell Arboretum Drainage Way⁸ [also known as Maxwell Drainage channel] which was received by NWD on June 9, 2015. This information/assessment 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 this assessment is, however, retained in the appeal decision record file.

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

Appellant's First Reason for Appeal: The appellant asserts that the Maxwell Drainage channel is "at most a hard lined swale with infrequent and short duration flow" and "therefore should not be classified as jurisdictional waters of the United States."

Finding: This reason for appeal does not have merit

Action: No further action

Discussion: The District indicates in multiple locations in the AR that it relied on information provided by the appellant in their request for the jurisdictional determination, observations made during a field visit, an evaluation of historical aerial photography and information, in addition to information discussed at a pre-application meeting (September 10, 2014) in reaching a conclusion that the Maxwell Drainage channel is a man-altered ephemeral tributary of Salt Creek, the nearest TNW, via Deadman's Run, which is a RPW. The District considered multiple resources in drawing conclusions regarding the history of the site.

According to the Rapanos Guidance, CWA jurisdiction will be asserted over a water body that is not a relatively permanent water if that water body is determined (on the basis of a fact-specific analysis) to have a significant nexus with a TNW.

The applicant's description of the water as having infrequent and short duration flow and the District's finding the water is a non-relatively permanent water (in this case ephemeral) are not

⁷ 33 CFR 331.7(c)

⁸ Letter from Terracon to University of Nebraska, dated May 27, 2015

in substantial conflict. Additionally, the “hard lined” physical character of the channel is not in material dispute. Neither of these characteristics are the determining factor for jurisdiction, in and of themselves. The jurisdictional determination in this case hinges upon a significant nexus finding (see RFA #2 below).

This reason for appeal does not have merit.

Appellant’s Second Reason for Appeal: The appellant alleges that the District did not support its basis of jurisdiction over the Maxwell Drainage channel through the significant nexus determination.

Finding: This reason for appeal does not have merit

Action: No further action

Discussion: The appellant disputes the District’s estimated average number of flow events, the reliability of the ordinary high water mark (OHWM) characteristics identified, the reliability of the District’s use of rocks, cobble, and displacement of structures (railroad ties) as characteristics of water flow, the ability of the channel to carry pollutants to the TNW, and classification of the channel as habitat for aquatic/wildlife diversity.

The JD Guidebook states that the Corps will decide jurisdiction over non-navigable tributaries that are not relatively permanent, (as is the case regarding the Maxwell Drainage channel) based on a fact-specific analysis to determine whether they have a significant nexus with a TNW.⁹ The JD Guidebook 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. Manipulating the flow pathway of waters of the United States into artificial ditches, channels, culverts, or similar features (i.e., storm sewer pipes) does not sever federal jurisdictional status of the water.¹⁰ Further the presence or addition of storm water effluent into a water of the United States does not change federal jurisdiction of the water.

The District completed a fact-specific analysis which included both an onsite evaluation on September 10, 2014 and analyzing reference materials within the office. In its analysis the District determined (through GIS calculations¹¹) that the drainage area for the channel is approximately 250 acres. Climatic and precipitation data for this location was obtained from the National Weather Service¹² for the 6-month period prior to the site visit. The District used this data to estimate the yearly average number of flow events. The District found that the average annual rainfall is 29.91 inches, with an additional annual snowfall of 28.3 inches. Using this data

⁹ *ibid*

¹⁰ *ibid*

¹¹ Discussed during Appeal meeting on May 28, 2015.

¹² AR pp 007

the District estimated the yearly average number of flow events, and determined the channel/tributary provides ephemeral flow with a flow regime that flows following rainfall events and snowmelt runoff.

The legal definition of the OHWM provided in federal regulations¹³ leaves substantial room for interpretation. This is due in part to its necessary application to a wide variety of stream types in a wide variety of landscape settings, thus precluding a definition that is both universally applicable and highly specific. Thus, investigations into the OHWM inherently require site specific professional judgments be made regarding both the conceptual basis of the OHWM and the indicators used to identify it. Generally the OHWM would be expected to correspond with the outer limits of the active channel, using macro-scale geomorphic features to delineate the OHWM, based on the reasoning and interpretations of the District's observations and analysis of on-site conditions.

However, problematic OHWM delineations arise where land-use practices have greatly altered the system, as in the case of the Maxwell Drainage channel. Even so, the District's OHWM determination ultimately relied on the preponderance of evidence as determined by the District at the time of assessment. The District evaluated physical features of the channel, and observed that the installation of the vertical railroad ties and horizontal concrete structures within this reach of the Maxwell Drainage channel (approximately 30 years ago) has constrained the channel and essentially prevented the channel from developing characteristics which would normally be used to identify an OHWM. According to the AR, the District observed that the channel/tributary has a confined bed and banks, albeit man-altered, which is lined with wood and concrete railroad ties, and some rock-filled gabion structures. The AR states that the District observed OHWM indicators which included a clear, natural line impressed on the bank, shelving, sediment deposition, water staining, the presence of litter and debris, the presence of a wrack line, and sediment sorting.¹⁴ The District states that the presence of large rocks and cobble in the channel, as well as displacement of some of the concrete ties is evidence of high water events.

The AR contains the District's observations of the channel, the presence of an OHWM, and bed and banks within the man-altered portions of the channel. The District considered hydrologic and climatic information, flow frequency, duration and volume, in addition to chemical and biological characteristics in Section III.B. of the approved JD form.¹⁵ These data were used in the District's overall significant nexus determination, as summarized in Section III.C.:

[Maxwell] Drainage has the capacity to transport flood water, sediment, urban pollutants, transfer nutrients and organic carbon, and assist in maintaining the natural integrity of the TNW into which the water ultimately flows. Even minor changes in flow velocities can disrupt the equilibrium of downstream waters, causing a chain reaction of channel degradation or aggradations up and down stream. These affects could result in adjustments in channel dimensions resulting in impacts to the chemical, physical, and biological integrity downstream. Taking into consideration the drainage area (~250 acres), the average monthly precipitation, and the close proximity to the downstream

¹³ 33 CFR 328.3(e)

¹⁴ AR pp 007

¹⁵ AR pp 006-008

RPW, and eventually the TNW. In conclusion, this channel has a significant chemical, physical, and biological nexus to the downstream TNW.¹⁶

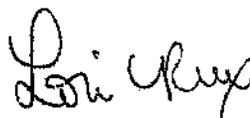
The District also used reference maps and aerial photographs to follow and confirm that Maxwell Channel is a tributary of, and has a surface and piped sub-surface¹⁷ hydrological connection with, Deadman's Run (nearest RPW), which flows approximately 7,000 feet to Salt Creek (nearest TNW).¹⁸

Per the Rapanos Guidance for significant nexus finding for non-RPWs that flows directly or indirectly into a TNW, field staff will assert jurisdiction over tributaries that are not relatively permanent where the tributary has a significant nexus with a TNW. The District documents its reasoning in Section III.C.1 with respect to the characteristics and the underlying basis for its conclusions regarding the presence of a significant nexus between the tributary and the TNW.

The District followed the *Rapanos* guidance as well as the *U.S. Army Corps of Engineers Jurisdictional Form Instructional Guidebook*¹⁹ (Guidebook) to record its analysis of the site. The District's determination contains an analysis of the facts, observations, and characteristics leading to its conclusion. The level of detail is reasonable to support the District's finding of jurisdiction through a significant nexus. 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. I conclude that this Request for Appeal does not have merit. The Corps jurisdictional determination made by the Omaha District Engineer, dated November 28, 2014, remains. This concludes the Administrative Appeal Process.

FOR THE COMMANDER:



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

¹⁶ AR pp 009

¹⁷ Through a municipal storm sewer system, AR p. 005-012

¹⁸ AR pp 006-007

¹⁹ The Guidebook was issued on June 1, 2007, as Regulatory National Standard Operating Procedures for conducting an AJD and documenting practices to support an AJD. Information on *Rapanos* may be found at <http://www.usace.army.mil/Missions/CivilWorks/RegulatoryProgramandPermits/RelatedResources.aspx>