

**ADMINISTRATIVE APPEAL DECISION
FILE NWS-2007-1757 (Scherger)
SEATTLE DISTRICT (NWS)
SECTION 404 AUTHORITY**

DATE:

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

Appellant: John Scherger (Appellant).

Receipt of Request For Appeal (RFA): December 8, 2008. The Appellant requested an appeal of an Approved Jurisdiction Determination (JD).

Site Visit and Appeal Conference: A Site Visit and Appeal Conference was held on April 17, 2009. A copy of the Memorandum for Record, documenting the visit/conference is attached and will be provided to the Appellant and the Seattle District Engineer along with this decision document.

Summary of Appeal Decision: The Appellant is challenging a Seattle District (District) JD that the U.S. Army Corps of Engineers has Clean Water Act (CWA) jurisdiction over a property located in Ridgefield, Clark County, Washington. The RFA raises several issues, two of which have merit and are being remanded to the District for further action. Those issues are: 1) the Administrative Record (AR) does not contain sufficient analysis and documentation to address "normal circumstances" for the property, including evaluation of the Appellant's claim that activities on adjacent properties have resulted in the creation of wetland conditions on his property, and 2) the AR does not contain sufficient support for the District's finding that wetlands on the Appellant's property are part of a wetland complex that is contiguous to Whipple Creek, a Relatively Permanent Water (RPW). The Appellant also raised issues regarding access/trespass, equitable CWA enforcement with respect to adjacent properties, the applicability of the Rapanos Guidance (swales/significant nexus), and JD authorities/responsibilities when potential Prior Converted Croplands or normal farming activities are involved. Those issues are not within the scope of consideration for appeal and/or do not have merit.

Reasons for appeal:

1. The Appellant's property would not contain jurisdictional wetland but for filling and grading activities in wetlands on adjacent properties (Pedrin and Resleff). Activities on those properties have created wetland hydrology on the Appellant's property. According to materials submitted by the Appellant in support of the RFA, fill activities have created "unusual circumstances" and the current character of the Appellant's property is an "abnormal circumstance." The 1987 Wetland Delineation Manual requires consideration of the impacts of fill activity on adjacent properties.

2. The District did not follow correct procedures in obtaining access to adjacent properties, as part of their investigation of the Appellant's alleged violation.
3. The District has failed to enforce the CWA with respect to activities on adjacent properties (Pedrin and Resleff).
4. The wetlands in question are not part of the headwaters of Whipple Creek and they are isolated; there is no surface connection to the south.
5. The water flowing along the Scherger-Pedrin property line is flowing through a "swale" and not a channel or streambed; the Rapanos Guidance recognizes "swales" as being not jurisdictional. According to the Appellant, "the swale itself is a product of the filling and grading by Pedrin".
6. The site is Prior Converted Cropland (PCC) and the Natural Resources Conservation Service has the authority to determine if the property is PCC. Also, the unauthorized discharge is exempt from CWA regulation per 33.C.F.R § 323.4 (normal farming activities)

Background Information:

The AR was provided to NWD and the Appellant as part of the Appeal Review Process.

The property is located south of NE 194th Street, between NE 10th Avenue and NE 15th Avenue in Ridgefield, Washington. According to the District, the Appellant has discharged material in wetlands in association with construction of a pond; the discharge was not authorized by Department of the Army permit.

Based on the AR, the Appellant has indicated the purpose of the discharge(s) were to place topsoil to improve soil quality for agricultural use, "to improve the groundwater aquifer recharge", to create a wildlife pond, and/or to address flooding that is occurring as a result of fill activity on adjacent properties.

History:

April 2007 – District received a copy of a Clark County State Environmental Policy Act (SEPA) notice of a proposal by the Appellant to discharge 4999 cubic yards of material to create a plant nursery.

May 8, 2007 – District letter informing the Appellant his property has a "high probability" of containing regulated wetlands.

May 17, 2007 – District met with the Appellant onsite to confirm jurisdiction.

Summer/Fall 2007- The Appellant constructs a pond on property, with associated (unauthorized) discharge(s) of fill.

September 11, 2007 – District observes unauthorized discharges of fill while driving past the Appellant’s property.

September 16, 2007 – District contacts the Appellant via phone and arranges a site visit to determine if there is a CWA violation.

September 20, 2007 – District attempts to conduct site visit; Appellant had previously agreed to participate and to allow site access on this date but declined participation via FAX, as well as when the District arrived.

October 3, 2007 – District letter requesting information from the Appellant regarding unauthorized fill, and requesting permission to access the property.

January 7, 2008 – District e-mail to the Appellant’s attorney following up on their October 3, 2007 letter. The District acknowledged the Appellant’s assertion that the wetlands were isolated, but stated the District’s finding that the wetlands on the Appellant’s property were the headwaters of Whipple Creek.

February 7, 2008 – Appellant’s attorney provides the District authorization to access the Appellant’s property and alleges that unauthorized fill on adjacent properties has altered the flow of water in the area.

March 17, 2008 – Scheduled meeting onsite between the District and the Appellant to inspect the alleged violation; meeting did not take place due to the Appellant rescinding his permission to access the site. The District did visit the area and made observations from NE 194th Street.

March 19, 2008 – District e-mail declining request by Appellant’s attorney to meet at the Clark County Public Works-Resources Office; no reason was given. The Appellant’s attorney indicated that fill and grading on adjacent properties and the effects on storm water runoff would be the subject of the meeting. The Appellant’s attorney also indicated his client’s desire to record the meeting.

March 25, 2008 – The District accesses properties adjacent to the Appellant’s property (Hammerstaedt and Watkins) and views a third property (Huddleston) to examine conditions on those properties and observes “The wetland complex on the Scherger’s, Watkin’s, Hammerstaedt’s, and Pedrin’s property is contiguous and the headwaters for Whipple Creek.”

May 12, 2008 – The District’s letter to the Appellant’s attorney outlining status/history of the District’s involvement and reiterating request for information previously outlined in October 3, 2007 letter.

July 11, 2008 – The District met with the Appellant onsite to conduct a wetland delineation and discuss the unauthorized fill. The District “verified” the violation.

July 14, 2008 - The District completes the Approved Jurisdictional Determination Form.

August 21, 2008 – The District sends a copy of the Approved Jurisdictional Determination Form to the Appellant and informs him of his right to appeal the JD.

December 8, 2008 – Receipt of the RFA.

TIMELINESS: The RFA was received more than 60 days after issuance of the JD. According to the Corps Administrative Process Regulations (33 C.F.R. § 331.5), an RFA must be received by the Division Engineer within 60 days of the date the Appellant is provided a copy of the JD and informed of the criteria and procedures of the administrative appeal process. Due to uncertainty over whether the Appellant had received the JD, the RO agreed to have the 60-day period begin when the District provided a second copy of the JD.

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

REASON 1: The Appellant’s property would not contain jurisdictional wetland but for filling and grading activities in wetlands on adjacent properties (Pedrin and Resleff). Activities on those properties have created wetland hydrology on the Appellant’s property. According to materials submitted by the Appellant in support of the RFA, fill activities have created “unusual circumstances” and the current character of the Appellant’s property is an “abnormal circumstance.” The 1987 Wetland Delineation Manual (1987 Manual) requires consideration of the impacts of fill activity on adjacent properties.¹

Finding: This reason for appeal has merit for the reasons contained in the Discussion section below.

Action: Further evaluation, analysis, and documentation are required by the District regarding this reason for appeal.

Discussion: The Appellant challenged the District that his property was wetland only as a result of (unauthorized) fill activities on adjacent properties that altered the normal hydrology of the area; the effect was to redirect and or cause water to impound on his

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”)

Action: Further evaluation, analysis, and documentation are required by the District regarding this reason for appeal.

Discussion: The Appellant challenged the District that his property was wetland only as a result of (unauthorized) fill activities on adjacent properties that altered the normal hydrology of the area; the effect was to redirect and or cause water to impound on his property.² The Appellant identified altered drainage patterns, impacts to his property, and consideration of what are the normal circumstances for the property as factors that should be considered by the District, prior to their finalizing the JD.

The Appellant indicated at the Site Visit/Appeal Conference that fill activities on the adjacent properties have occurred progressively since 1992.

According to the 1987 Manual, man-induced wetlands are atypical situations (See Part IV, Section F. of the 1987 Manual). The 1987 Manual states "It is also important to consider whether the man-induced changes are now the "normal circumstances" for the area. Both the relative permanence of the change and the functioning of the area as a wetland are implied." Section F. Subsection 4 – Man-induced Wetlands, requires consideration of whether there has been a recent man-induced change in hydrology that caused the area to become significantly wetter.³ There is no discussion/analysis by the District in the AR regarding this factor.

Although not discussed in the AR, in recognition that hydric soils require long periods (hundreds of years) for development of wetness characteristics⁴, the District's observation of positive indicators of soils⁵ on the adjacent property is evidence that the subject area has been wetland, long term. However, confirming the mapped soil type might provide further insight as to the long term character of the area. The AR does not contain discussion/analysis of if/how soil observations relate to the normal circumstances for the site and support the JD.

The District did not specifically address the relevant history of the immediate area, the technical validity of the Appellant's claims, the timing, potential impacts, or applicable policy related to the alleged unauthorized fill on adjacent properties and its impact/influence on CWA jurisdiction on the Appellant's property. The District did not specifically address what was "normal circumstances" for this property and how it factored into the JD.

This reason for appeal, therefore, has merit and should be remanded to the District for further analysis and documentation.

² AR at 86 and 95.

³ THE 1987 MANUAL, at 82-83.

⁴ THE 1987 MANUAL, at 82.

⁵ AR at 39, 41, 61, 63, 65, 67.

REASON 2: The District did not follow correct procedures in obtaining access to adjacent properties, as part of their investigation of the Appellant's alleged violation.

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 Appellant argues that the District obtained permission from neighbors (Hammerstaedt and Watkins) to gain access to their property, 1) without fully disclosing the purpose of that access, and 2) from individuals who may not have fully understood the purpose of access or the full ramifications of allowing access.

The AR contains a telephone conversation record dated March 24, 2008⁶ and a Memorandum For the Record dated March 26, 2008⁷ which indicate the District requested and received permission to go on the Hammerstaedt and Watkins properties.

Corps of Engineers Regulatory Program representatives are required to seek permission to access private property. However, there are no specific Corps Regulatory Program procedures or guidelines addressing this issue. Other Corps Districts may have developed state or District specific policies, but application of those policies in this region is not required.

However, the issue of whether the District obtained proper access agreement(s) is beyond the purview of the Corps' Administrative Appeals Program. Determining if the District trespassed or not (i.e. obtained data by unlawful means) is not within the scope of appeal.

This Reason for Appeal does not have merit.

REASON 3: The District has failed to enforce the CWA with respect to activities on adjacent properties (Pedrin and Resleff).

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.

⁶ AR at 79.

⁷ AR at 68.

Discussion: The Appellant pointed out the Corps Regulatory Program has a long standing public service commitment that includes the following principles⁸:

- Fair and Reasonable - We will be open-minded, impartial, and consistent in our interactions with all our customers to ensure all actions and decisions are free from bias and are not arbitrary or capricious. Customers will be treated equally and with tolerance.
- Honesty – We will be truthful, straightforward, and candid in all dealings with our customers.
- Accountability – We will be decisive in all actions and accept responsibility for any of our decisions and resulting consequences. All decisions will be factual and properly documented.

The Appellant alleges that unauthorized fill activity in wetlands has occurred on adjacent properties and the Corps has failed to enforce the CWA in those cases. The Appellant has argued that fill activity has resulted in redirection of runoff and floodwaters to his property and is directly responsible for wetland characteristics being “created” on his property. He has also expressed frustration with being unable to obtain information regarding Corps enforcement action(s) associated with those properties. The issue of the potential hydrologic impact of activities on adjacent properties on the Appellant’s property is discussed under Reason 1, above.

After-the fact enforcement of the CWA presents particular challenges to administering a regulatory program that is fair, equitable, and consistent. The specific circumstances associated with each investigation can vary and influence enforcement ability, even in cases where sites are in proximity and circumstances appear similar. This can lead to a perception that similar actions are being treated differently, whether or not that is actually the case.

Evaluation of the fairness or effectiveness of a District’s enforcement activities on adjacent properties is not within the scope of an appeal. The focus of the Corps’ Administrative Appeal Program is on such issues as procedural error; incorrect application of law, regulation or officially promulgated policy; omission of material fact; incorrect application of the current regulatory criteria and associated guidance for identifying and delineating wetlands; or use of incorrect data.⁹

⁸ REGULATORY MISSION, GOALS AND PUBLIC SERVICE COMMITMENT, available at http://www.usace.army.mil/CECW/Pages/reg_mission.aspx

⁹ 33 C.F.R. § 331.5

The District indicated during the Appeal Conference that its involvement on the Pedrin and Resleff properties is an ongoing investigation. The release of information associated with ongoing investigations has limitations, and those limitations are within the zone of discretion of the District. Also, the determination of releasable information under the Freedom of Information Act rests with the District; this is not an appealable action.

The issues raised by the Appellant associated with this reason for appeal are beyond the purview of the Corps' Administrative Appeals Program; therefore, this reason for appeal does not have merit. The Applicant provided a great deal of information during the course of the Appeal that may or may not have been received by the District previously and may assist the District with CWA enforcement on adjacent properties.

REASON 4: The wetlands in question are not part of the headwaters of Whipple Creek and they are isolated; there is no surface connection to the south.

Finding: This reason for appeal has merit for the reasons contained in the Discussion section below.

Action: Further evaluation, analysis, and documentation are required by the District regarding this reason for appeal.

Discussion: The AR indicates, and the District clarified at the Appeal Conference that the basis of jurisdiction was that the site is part of a wetland complex, contiguous to Whipple Creek. The District did not assert that there was a tributary connection between the water flowing south along the Scherger-Pedrin property line and Whipple Creek in determining jurisdiction.

Based upon information contained in the AR, as well as clarification at the Appeal Conference, the District relied on the following information to conclude the site is part of a wetland complex contiguous to Whipple Creek:

- a. Observations of flow on the property from north to south (toward Whipple Creek) during site visits.
- b. The National Wetland Inventory (NWI) map¹⁰
- c. The Hydric Soils map¹¹
- d. The County Wetlands Map¹²

Additionally, the AR contains documentation that the District observed wetlands extending from the Appellant's property to the Hamerstaedt and Watkins properties (to the south) and continuing to extend south to another property (Huddleson), from a vantage point on the Watkins property.¹³

¹⁰ AR at 19.

¹¹ AR at 17.

¹² AR at 18.

¹³ AR at 68.

The District used its observations that water was flowing to the south to conclude the area was part of the Whipple Creek watershed. The AR does not however, include an analysis of the magnitude, frequency, and duration of flow to support a conclusion the observed flow will eventually reach Whipple Creek, as opposed to flowing to and remaining on a location that is isolated from Whipple Creek and/or other tributaries.

NWI maps are among potential sources of information that may be useful in making a wetland determination. The 1987 Manual includes the following cautions with respect to NWI maps: 1) since not all delineated areas on NWI maps are wetlands under Department of Army jurisdiction, NWI maps should not be used as the sole basis for determining whether wetland vegetation is present and 2) due to the scale of aerial photography used and other factors, all NWI map boundaries are approximate. NWI maps can contribute to the evidence supporting a wetland determination, but their reliability is limited without some degree of ground truthing.

The 1987 Manual also includes cautions regarding the use of soil survey information, specifically, that the smallest mapping unit is 3 acres, and a given soil series as mapped may contain small inclusions of other series. Again, this reference is useful as part of the evidence supporting a wetland determination, however, the reliability of this resource is limited unless there has been ground truthing. Although the District did identify hydric soil indicators by examining soils on the Appellant's property and on adjacent properties¹⁴, the record does not contain any indication that the District verified that the profile description of the mapping unit conforms to that of the actual soil. Verification of the soil type requires soil identification expertise. Without verifying the soil mapping unit, the use of soil maps to support a determination that the subject area is part of a larger wetland complex has limitations.

The AR does not contain any information regarding the accuracy and reliability of Clark County Wetland Maps. However, after viewing the Clark County Digital Atlas¹⁵, it appears that the County Wetland Map's wetland boundaries closely correspond to, and likely were based upon the Hydric Soils Map. Therefore, without evidence in the record to the contrary, the reliability of the Clark County Wetland Map likely has the same limitation(s) as the Hydric Soils Map.

The District appears to have relied heavily on maps and surveys with known potential limitations to conclude continuity of wetland conditions. The strength of this conclusion would be increased if there was at least some on site verification of the accuracy of these resources.

It is not clear in the record if/how topographical maps were analyzed with respect to the wetland complex and/or the Whipple Creek continuity question.

¹⁴ AR at 39, 41, 61, 63.

¹⁵ <http://gis.clark.wa.gov/imf/imf.jsp?site=digitalatlas>

The JD form¹⁶ also lists aerial photography as a resource utilized for the wetland determination. There is no discussion/analysis of how the aerial photos support the conclusion that the subject site is part of a complex contiguous to Whipple Creek.

Therefore, the AR does not contain sufficient information/analysis to support the conclusion in the approved JD that the site is part of a wetland complex that is contiguous to Whipple Creek.

This reason for appeal has merit and should be remanded to the District for further investigation.

REASON 5: The water flowing along the Scherger-Pedrin property line is flowing through a “swale” and not a channel or streambed; the Rapanos Guidance recognizes “swales” as being not jurisdictional. According to the Appellant, “the swale itself is a product of the filling and grading by Pedrin”.

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: As a result of the *Rapanos* Supreme Court decision, 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, and amended 2 December 2008 (Rapanos Guidance).¹⁷ 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 wetlands directly abut the waterbody.

¹⁶ AR at 15.

¹⁷ 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

In addition, the agencies may assert jurisdiction over a waterbody that is not an RPW if that waterbody is determined (on the basis of a fact-specific analysis) to have a significant nexus with a TNW. Waterbodies such as, (1) non-navigable tributaries that do not typically flow year-round or have continuous flow at least seasonally; (2) wetlands adjacent to such tributaries; and, (3) wetlands that are adjacent to but that do not directly abut an RPW require a significant nexus determination.

The Appellant points to the Rapanos Guidance in arguing that the Corps does not have jurisdiction over the site. Specifically, he points to the mention of “swales” in that Guidance. The Appellant’s position is that the area along the Scherger-Pedrin property line, where water has been observed flowing in a southerly direction, is a swale and not an RPW or non-relatively permanent tributary; the swale is not part of a surface water tributary system. He reasons that a significant nexus to a Traditional Navigable Water can not be established based upon the flows observed in this area.

The Rapanos Guidance states swales or erosional features (e.g., gullies, small washes characterized by low volume, infrequent, or short duration flow) are generally not waters of the United States because they are not tributaries or they do not have a significant nexus to downstream traditional navigable waters.

However, the District established jurisdiction over the site on the basis that it was part of a wetland complex that was contiguous to Whipple Creek, an RPW. That being the case, a significant nexus finding is not required under the Rapanos Guidance. As clarified during the Site Visit/Appeal Conference, the District’s basis for jurisdiction was not that the southerly flowing water it observed at the Scherger-Pedrin property line was a tributary feature. The JD was not based on this flowage being the connection to other waters of the United States. The District did rely heavily on observations of the direction of flow in this area to reason that the hydrology/topography of the area was such that water movement was south, to Whipple Creek.

The District did not err by not conducting a significant nexus determination as part of the JD, as the District had determined the area was a wetland abutting an RPW. Note, the merits of the District’s “abutting” finding are discussed under Reason for Appeal 4, above.

The District’s conclusion that a wetland complex contiguous to an RPW (Whipple Creek) can establish CWA Jurisdiction is valid and consistent with the Rapanos Guidance, and that by virtue of being contiguous to an RPW, a significant nexus finding between the Scherger-Pedrin property line “flowage” and a TNW is not required. Therefore, this reason for appeal does not have merit.

REASON 6: The site is Prior Converted Cropland (PCC) and the Natural Resources Conservation Service has the authority to determine if the property is PCC. Also, the unauthorized discharge is exempt from CWA regulation per 33 C.F.R. § 323.4.

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 Appellant made various references to his property being PCC, and to the discharge of fill being a normal farming activity which is exempt from the CWA in the RFA and during the Site Visit/Appeal Conference. Although the Appellant was emphatic in his review of the Draft Memorandum of Record for the Site Visit/Appeal Conference that “My farm was never a wetland period.”, a brief discussion of PCC and farm exemptions is warranted.

Corps and EPA regulations at 33 C.F.R. § 328.3 and 40 C.F.R. § 230.3, respectively, state:

Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area’s status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

This provision was added by rulemaking in 1993¹⁸ with the purpose of lending consistency to how different Federal agencies and programs address wetlands. However, the regulatory language was vague as to how to implement this provision.

While the 1993 regulations are clear that waters of the United States do not include PCC, they are not clear about what constitutes PCC. Neither the Corps nor EPA regulations implementing the CWA define the term PCC. In the 1993 regulations, there is reference to the Soil Conservation Service (now NRCS) program and language that the Corps will generally rely on determinations made by the Soil Conservation Service. PCC currently is defined in U.S. Department of Agriculture regulations at 7 C.F.R. § 12.2 as wetlands that were dredged, drained, filled, leveled or otherwise manipulated for the purpose of producing an agricultural commodity.

The 1993 Corps and EPA rulemaking referenced Soil Conservation Service definitions and criteria, but failed to address how PCC would be viewed with respect to CWA jurisdiction when the NRCS did not have an agricultural program interest in the land.

¹⁸ Clean Water Act Regulatory Programs, 58 Fed. Reg. 45008 (Aug. 25, 1993) (Final Rule)

In 1994, the Departments of Agriculture, Interior, and the Army, and the EPA entered into an agreement concerning the delineation of wetlands for purposes of the CWA and the Food Security Act.¹⁹ Under that agreement, Soil Conservation Service delineations made on agricultural lands were to be accepted by EPA and the Corps for purposes of determining CWA authority. However, in January 2005, the Department of the Army and the Department of Agriculture withdrew from that agreement.

In February 2005, the Corps and NRCS promulgated Joint Guidance (2005 Guidance),²⁰ which outlined how the Corps would deal with potential PCC calls. The 2005 Guidance was intended to clarify the 1993 Rule, and reflects a recognition that the relationship(s) and program responsibilities of the NRCS and the Corps' Regulatory Program had evolved since the 1993 Rule. According to the 2005 Guidance, it is appropriate for Corps Districts, not NRCS, to make CWA jurisdictional determinations.

Paragraph III.D.2. of the 2005 Guidance establishes that the Corps will use appropriate procedures in the current Corps or Federal wetland delineation manual applicable to the region, including current national guidance, to make wetland determinations. In this case, the District relied upon the 1987 Manual criteria for wetlands in determining whether the subject property contained regulated wetlands. The District did not err in using the 1987 Manual to determine CWA jurisdiction on the subject property.

Since 1977, the Corps and EPA have defined wetlands as: "areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions..." 33 C.F.R. § 328.3(b). "Normal circumstances" for PCC lands consist of the existing soils and hydrologic conditions, as modified by the agricultural activities, without regard to whether the vegetation has been removed or replaced with agricultural crops. PCC lands that have been so altered that wetland hydrology has been eliminated would not be wetlands under normal circumstances. The 1987 Manual is useful in determining whether the soils and hydrology have been sufficiently modified so that the area previously identified as PCC could not support a prevalence of hydrophytic vegetation, and no longer meets the criteria for wetlands. The District's AR indicates that their JD was based upon application of the 1987 Manual criteria.²¹

¹⁹MEMORANDUM OF AGREEMENT AMONG THE DEPARTMENT OF AGRICULTURE, THE ENVIRONMENTAL PROTECTION AGENCY, THE DEPARTMENT OF THE INTERIOR, AND THE DEPARTMENT OF THE ARMY CONCERNING THE DELINEATION OF WETLANDS FOR PURPOSES OF SECTION 404 OF THE CLEAN WATER ACT AND SUBTITLE B OF THE FOOD SECURITY ACT

²⁰ On February 25, 2005, the USDA Natural Resources Conservation Service and the United States Department of the Army issued a Memorandum to the Field titled *Guidance on Conducting Wetland Determinations for Food Security Act of 1985 and Section 404 of the Clean Water Act.*

²¹ AR at 9.

The Corps of Engineers Administrative Appeals Process regulations²² define a JD as a written determination that a wetland and or waterbody is subject to regulatory jurisdiction under Section 404 of the CWA (33 U.S.C. § 1344). Those regulations also explicitly state that JDs do not include determinations that a particular activity requires a permit. The determination whether an activity is exempt from regulation lies within the zone of discretion of the District and is not appealable. It is beyond the scope of an appeal to evaluate a District's determination with respect to whether an activity is or is not a normal farming activity that would be exempt under the CWA.

INFORMATION RECEIVED AND ITS DISPOSITION DURING THE APPEAL REVIEW:

The Division Engineer has the authority to hear the appeal of this JD.²³ 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 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 Appellant provided a volume of material in support of the Appeal. Some of that information was not contained in the AR provided by the District in response to the RFA. This information ranges from statements by neighboring property owners and others to aerial photography of the site during flood events. New information not contained in the AR can not considered in this appeal decision. The Appellant can submit this and any additional new information to the District and request reevaluation of the JD; that information will then become a part of the Districts administrative record for the file. The District Engineer has the discretion to determine if that information is substantive,

²² 33 C.F.R. § 331.2

²³ 33 C.F.R. § 331.3(a) (2).

whether a reevaluation is warranted, and whether the JD should be revised as a result of that new information. Those decisions would not be not appealable actions. However, if the District Engineer ultimately determines that a permit application should be denied or a proffered permit is appropriate, such actions could be appealed and the reasons for appeal may include jurisdictional issues; that appeal would consider the record at the time that appeal is filed.

The Appellant has submitted information concerning alleged CWA violations on adjacent properties. This information is outside the scope of this Appeal; however, the District can utilize any of that information to assist in any enforcement action on those properties.

OVERALL CONCLUSION: After reviewing and evaluating information provided by the Appellant and the District's AR, I find that two of the reasons for appeal put forth by the Appellant have merit. The JD is being remanded to the District per the discussion at Reason 1. and Reason 4. above.



LORELYN M. RUX
Chief, Program Support Division