

ATTACHMENT A: APPEAL DECISION DOCUMENT

ADMINISTRATIVE APPEAL DECISION
PANATTONI DEVELOPMENT COMPANY, INC., c/o LINDY DELLER
APPROVED JURISDICTIONAL DETERMINATION
SACRAMENTO DISTRICT
SPK-2006-00303

Division Engineer: *GENERAL ANTOINETTE GANT, SOUTH PACIFIC DIVISION*

Review Officer: *TRAVIS MORSE, SOUTH PACIFIC DIVISION*

Appellant/Applicant: *LINDY DELLER, PANATTONI DEVELOPMENT COMPANY, INC.*

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

Date Acceptable Request for Appeal Received: *NOVEMBER 22, 2022*

Date of Appeal Meeting and Site Visit: *FEBRUARY 16, 2023*

Summary of Decision: The Appellant is challenging an Approved Jurisdictional Determination (AJD) completed by the Sacramento District, Nevada-Utah Section, Reno Regulatory Field Office (District) which concluded that the U.S. Army Corps of Engineers (Corps) has Clean Water Act (CWA) jurisdiction over 3,200.6 linear feet of a non-relatively permanent water (Unnamed Channel) on a parcel identified as "Mount Rose Commerce Park" (Property) in Reno, Washoe County, Nevada.¹

The Appellant disagrees with the District's AJD and asserts that the District: (1) misidentified the Unnamed Channel as a stream, (2) failed to demonstrate that there is a commerce clause connection between the Unnamed Channel and the Truckee River, and (3) failed to demonstrate that there is a significant nexus between the Unnamed Channel and the Truckee River.

After a review of the Administrative Record (AR), it has been determined that the AR does not contain sufficient documentation to support a finding of CWA jurisdiction pursuant to Section 404. Specifically, the AR does not sufficiently support the District's finding that the Unnamed Channel has a significant nexus with the Truckee River. As a result, the Appellant's third reason for appeal has merit.

The decision is being remanded to the District Engineer for further consideration and final action. The District must reconsider its determination that the Unnamed Channel is a jurisdictional water of the U.S. (WOTUS). In doing so, the District must document its consideration of the Appellant's submittal and assertion that the Unnamed Channel does not have a jurisdictional connection to the Truckee River under the Section 404 of the CWA. The

¹ An approved jurisdictional determination ("AJD") is a document provided by the Corps stating the presence or absence of "waters of the United States" on a parcel or a written statement and map identifying the limits of "waters of the United States" on a parcel. See 33 CFR 331.2; Regulatory Guidance Letter (RGL) 05-02; RGL 16-01.

District must document the evaluation and rationale that leads to its conclusion as to whether the Unnamed Channel is jurisdictional, in accordance with current regulation, guidance, and policy.

As the AJD subject to this appeal is remanded subsequent to March 20, 2023, the effective date of the final rule revising the definition of “waters of the United States” (2023 Rule) and subsequent to the Supreme Court’s decision in *Sackett v. EPA*, 566 U.S. 120 (2023) the Appellant will be provided an opportunity to appeal the decision resulting from the District’s reconsideration under the current regulation, guidance, and policy and any revisions to applicable regulations issued post-Sackett.

Background Information: Panattoni Development Company, Inc. (Appellant), represented by geosUAS, Inc., appealed a Sacramento District (District) Approved Jurisdictional Determination (AJD) for an ephemeral stream channel within an 89-acre parcel located due west of Alt. US Highway 395 and due south of Highway 431 (Mt. Rose Highway), Latitude 39.39883°, Longitude -119.74859°, South Reno, Washoe County, Nevada.

The District issued a Preliminary Jurisdictional Determination (PJD) dated January 18, 2022. On April 11, 2022, the Appellant requested an AJD. On September 23, 2022, the District issued an AJD, which stated, “we have determined that the 3,200 linear feet of ephemeral channel are waters of the United States pursuant to 33 CFR Part 328 and are regulated under Section 404 of the Clean Water Act.”

The AJD was issued by the District under the pre-2015 regulatory regime, which involved implementation of the CWA under the 2019 recodification² of the 1986 regulations³, the 1993 exclusion⁴, and regulatory guidance following the U.S. Supreme Court’s Decision in *Rapanos v. United States* and *Carabell v. United States* (the “*Rapanos* guidance”).⁵ The final “Revised Definition of ‘Waters of the United States’” rule (2023 Rule) was published in the *Federal Register* on January 18, 2023, and took effect on March 20, 2023, during the review of the Appellant’s reasons for appeal.⁶ Also the Supreme Court issued its decision in the case of *Sackett v. EPA*, *supra*, relative to the definition of “waters of the United States” and the jurisdiction that EPA and USACE have under the Clean Water Act during the review of this appeal. At this time, both agencies are reviewing the decision and working on revised guidance post-Sackett. This decision is considering only the AJD issued by the Sacramento District based on the regulations applicable at the time of the determination. Any reconsideration of this AJD will also consider any subsequent revised rules/guidance issued by the regulatory agencies.

² Recodification of Pre-Existing Rules, 84 Fed. Reg. p. 56626 (Oct. 22, 2019). CWA implementation of the 2019 recodification of the 1986 definition of WOTUS with the 1993 exclusions and the 2008 *Rapanos* guidance is referred to as the pre-2015 regulatory regime.

³ Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. pp. 41206, 41216–17 (Nov. 13, 1986). These re-codified regulations, including the 1993 exclusion, are generally called the “1986 Regulations.”

⁴ Clean Water Act Regulatory Programs, 58 Fed. Reg. pp. 45008, 45036 (August 25, 1993).

⁵ U.S. EPA & 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* (June 5, 2007), superseded December 2, 2008 (hereinafter “*Rapanos* guidance”). Per the *Rapanos* guidance, the Corps determined jurisdiction under the 1986 regulations consistent with the two standards established in *Rapanos*; the relatively permanent standard and the significant nexus standard.

⁶ Revised Definition of “Waters of the United States”, 88 Fed. Reg. p. 3004 (Jan. 18, 2023). The EPA and Corps revised definition of WOTUS, hereinafter, the 2023 Rule, became effective 20 March 2023.

Jurisdictional waters of the United States, or WOTUS, continue to be defined under 33 CFR Part 328. The 2023 Rule is based on a framework of the 1986 regulations and similar interpretations of law under the pre-2015 regulatory regime so that jurisdictional determination and scope remain relatively constant. Consistent with the interpretation of WOTUS under the pre-2015 regulatory regime, the 2023 Rule retains tributaries within its definition.⁷ CWA implementation remains unchanged with regard to how the Corps conducts a jurisdictional determination, beginning with whether a geographic feature is a water feature. The Corps then considers whether an exclusion applies. If the feature does not qualify as a water or an exclusion is applicable, then the feature is not jurisdictional under the CWA.

For the Corps to determine the amount and extent of WOTUS at a site, aquatic resources must first be delineated in accordance with established regulatory standards, guidance, and protocol. In rendering an AJD, the Corps is responsible for conducting or verifying the delineation and determining which of the aquatic resources fall under federal jurisdiction, categorically or on a case-by-case basis. The regulatory practice of determining CWA jurisdiction on a case-specific basis stems from the application of diagnostic technical criteria sufficient to identify a water feature as a WOTUS. Under current regulation, non-permanent waters (ephemeral) that have a significant nexus with a Traditional Navigable Water (TNW) are jurisdictional under Section 404 of the CWA.

Information Received and its Disposition During the Appeal Review: The AR is limited to information contained in the record as of the date of the Notification of Administrative Appeal Options and Process (NAO/NAP) 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 AJD. 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 reasons for appeal were evaluated based on the District's AR, the Appellant's Request for Appeal, and information gathered during the appeal meeting and site visit. The AR is limited to information contained in the record as of the date of the September 23, 2022, AJD.⁸

The information received during this appeal review and its disposition is as follows:

1. Request for Appeal sent by the Appellant, received by the South Pacific Division on November 22, 2022. The RFA contains comments and analysis of the District's AJD,

⁷ The 1986 regulations defined WOTUS to include tributaries of TNWs, interstate waters, paragraph (a)(3) "other waters" and impoundments.

⁸ The District incorrectly dated the NAO/NAP form as August 30, 2022. The District's AJD transmittal letter dated September 23, 2022, indicated August 30, 2022, represented the deadline for receipt of the RFA in this case. However, as instructed by Regulatory Guidance Letter 06-01, the date on the NAO/NAP form should have been the same as the District's decision date of September 23, 2022. Therefore, the District's AR is limited to information contained in the record by September 23, 2022.

including an AJD form using the same materials submitted to the District to support their request for an AJD. The comments and basis of the analysis are on materials submitted prior to the District's decision and were accepted as clarifying information in accordance with 33 CFR 331.7(f).

2. On November 23, 2022, the RO received from the Appellant two DVDs containing a copy of the RFA and three mp4 files of video taken from a drone that document the conditions of the Unnamed Channel and surrounding areas. These files also were provided to the RO as weblinks on November 28, 2022. These videos were not included in the AR, but they are not considered new information, as the District did receive and discard the DVDs from the submittal, dated April 11, 2022,⁹ and had been to the site (as recorded on the AJD form).¹⁰ This information had been provided to the District and should have been part of the AR.
3. On November 28, 2022, the RO received from the Appellant copies of materials previously submitted to the District, including a draft AJD form, August 2022 thunderstorm photos, a map depicting video stations, and a Google Earth location file (AR, pages 336-356). The report, photos, map, and location file were included in the District's AR prior to the date of its decision, and, therefore, were considered as part of the evaluation of this RFA.
4. The District provided a copy of the AR to the RO and the Appellant on January 6, 2023. The AR is limited to information contained in the record prior to the date of the AJD and NAO/NAP form. In this case, that date is September 23, 2022.
5. On January 24, 2023, the RO received from the Appellant, an email and an 11-page letter attachment providing documentation of events and exchanges between the Appellant, the District, and the Corps, that are absent from the AR. The information presented to the District during the AJD evaluation process is not new and, although not part of the District's AR, is considered helpful in understanding the District's AR. The RO's review did not consider events or information presented to the District or Corps after September 23, 2022, because the District Engineer did not consider that information in making his AJD decision.
6. On January 27, 2023, the District responded to the Appellant's claim that the AR is incomplete. The District confirmed that correspondence and submittals from the Appellant were omitted from the AR and explained that the information had "no relevance" to their decision-making process. However, the District further admitted that upon receipt of the information, they did not review the information provided. The District explained that the materials submitted were in a format that the District could not open and review. The District did not reach out to the Appellant to seek this information

⁹ The two DVDs contain videography of the Unnamed Channel and surrounding areas and were included with the Appellant's submittal to the District, dated April 11, 2022 (*See* AR, p. 003). During the appeal meeting, the District confirmed receipt of the files at its Utah Regulatory Field Office but explained that the files were not transferred to the District's Project Manager and were not considered in the District's decision.

¹⁰ The District conducted a field determination on July 12, 2022 (*See* AR, page 357).

in any other format. Thus, the District's determination of "no relevancy" was not proper. This information, its evaluation, and a conclusion should have been included in the AR. This decision not to include the information in the AR in this instance was improper.

7. In accordance with 33 CFR 331.7, on February 16, 2023, an informal appeal meeting and site visit were held in Reno, Nevada. The meeting was attended by the RO, the Appellant, her Agent, and three District staff. The informal meeting consisted of clarification of the Appellant's reasons for appeal, and the District's clarification of rationale used in its AJD. The site visit consisted of a tour of the Property. The meeting and site visit were summarized and documented by the RO in a Memorandum for Record (MFR) that was provided to the Appellant and the District on February 23, 2023. The RO considered edits before finalizing the MFR contained in the appeal record (Appendix A).
8. During the informal appeal meeting, the Appellant submitted a written statement. The information was considered as clarifying the reasons for appeal.
9. During the informal appeal meeting, the Agent, provided two documents to the RO that are considered helpful in understanding the reasons for appeal and for clarifying the AR:
 - a. The first Agent-submitted document consisted of a written statement and answers to questions that were provided by the RO in advance of the meeting.
 - b. The second Agent-submitted document consists of a National Oceanic Administration graph generated from precipitation data at the Reno-Tahoe International Airport that illustrate above average amounts between October 2022 and the date of the appeal site visit.
10. Following the informal appeal meeting and site visit, the District submitted written answers to questions that were provided by the RO in advance of the meeting.
11. The District expressed its agreement with the contents of the MFR via email, dated February 24, 2023.
12. The Appellant provided edits to the MFR and additional clarifying information on March 2, 2023.

Evaluation of the Appellant's Reasons for Appeal, Findings, and Instructions to the District Engineer:

The reasons for appeal described below are based on the Appellant's Request for Appeal but have been rephrased to clearly describe the findings that must be made regarding this appeal. The review is limited to whether the District examined the relevant data and articulated a satisfactory explanation for its action including a rational connection between the facts found and the decision made.

First Reason for Appeal: The District misidentified the Unnamed Channel as a stream.

Finding: This reason for appeal does not have merit.

Discussion: This reason for appeal centers on the Appellant's argument that the Unnamed Channel is not, for the purposes of the CWA, a stream and should be excluded from jurisdiction as an erosional feature (i.e., a gully).¹¹ The Appellant contends that the physical characterization of the Unnamed Channel is an ephemeral stream but that it is best characterized according to its function as a gully.¹² During the appeal meeting and site visit, the Appellant claimed the evidence of flow on the Property is the result of extraordinary events and not indicative of the Unnamed Channel's normal function.¹³ As supporting information, the Appellant cites the delineation report and data sheets documenting the physical features that mark the Unnamed Channel's flow path,¹⁴ a stream duration assessment,¹⁵ an evaluation of normal precipitation conditions,¹⁶ an analysis of historic aerial photographs,¹⁷ and drone footage.¹⁸

The stream duration assessment contained in the AR concludes that the Unnamed Channel exhibits ephemeral streamflow.¹⁹ The Appellant provided photographs and videos depicting physical evidence of flow along the Unnamed Channel²⁰ and of indicators of flow at and within the culvert exiting the site.²¹ The Appellant explained a break in the physical indicators of flow to support the functional characterization of the Unnamed Channel as a gully.²² During the appeal meeting, the Appellant acknowledged that water does occasionally flow through the culvert.²³ The Appellant asserts that evidence of a periodic surface water connection is insufficient to establish that the feature is a stream within CWA jurisdiction.²⁴ Referencing the August 22, 2022, submittal (AR, pages 338-356), the Appellant contends that since no flows exited the Property following a five-day, 861% above average rain event then there is no significant nexus.²⁵

A central point to this reason for appeal is that the use of the word "gully" has implications under the CWA. As described in the Appellant's submittals to the District, the physical character, flow path, and flow regime of the Unnamed Channel are not in material dispute.²⁶ The Appellant described the Unnamed Channel as an ephemeral tributary to the Truckee River (a navigable-in-fact TNW²⁷) and explained that following storm events, the Unnamed Channel collects and transports water from the Property.²⁸

¹¹ RFA, pp. 27-29, 34-36.

¹² RFA, pp. 7, 29; AR, pp. 7-10, 15.

¹³ MFR, p. 11.

¹⁴ AR, pp. 7-10, 15.

¹⁵ AR, pp. 5-7, 10, 47-97, 356.

¹⁶ AR, pp. 12-13, 25-31, 256-281.

¹⁷ AR, pp. 256-281

¹⁸ AR, p.335. The file is referenced but was omitted from the record.

¹⁹ AR, pp. 047-097.

²⁰ AR, pp

²¹ AR, pp. 99-100.

²² RFA, pp. 36. Note that the channel is also culverted beneath

²³ MFR, p. 3

²⁴ RFA, p. 30. "...the unnamed channel is part of an ephemeral system that has ... no connection to any TNW or water that is navigable-in-fact. While it may have an indirect connection through the offset culvert..."

²⁵ MFR, p. 11.

²⁶ E.g., AR, p 34, the channel "definitely flows in direct response to [precipitation] and most likely flows continuously in the spring in good snowpack years."

²⁷ June 11, 2008. Navigable-in-Fact Determination for the Truckee River and Pyramid Lake (ID SPK-2007-01872)

²⁸ AR, pp. 358-359.

The District used a single, standardized form (AJD form) to document and support its decision that the Unnamed Channel is the only jurisdictional aquatic resource on the Property.²⁹ A copy of the AJD form was included with the transmittal of the District's decision to the Appellant.³⁰ The District disagrees with the Appellant's definition and use of the term "gully".³¹ Additionally, the District admitted that it had discarded videos and did not consider information submitted by the Appellant reasoning that the respective submittals had no relevance to its decision.

The AJD form indicates that the District confirmed the boundaries of the water feature as mapped by the Appellant according to its OHWM and includes confirmation of the delineation report and datasheets.³² Per the District's AJD form for the Property, in Section III "Summary Of Findings", under part B, the flow path of the ephemeral stream is described from the Property to Steamboat Creek, and then to the Truckee River (i.e., a TNW³³). Per the AJD form, the District observed OHWM indicators, including a line impressed on the bank, changes in the character of the soil, an absence and destruction of vegetation, litter, and debris, scour, and an abrupt change in the plant community.³⁴ The District explained its basis for determining that a continuous tributary connection existed despite the channel being "less defined for approximately 90 feet before entering the 24-inch culvert."³⁵ The District also noted visual evidence of water flowing offsite through the culvert to the downstream reach of the Unnamed Channel (i.e., water staining and sediment deposition in the culvert).³⁶

Erosional water features, such as gullies, that are characterized by low volume, infrequent, or short duration flow were generally considered non-jurisdictional under the pre-2015 regime based on preamble language and guidance.³⁷ For purposes of the CWA, erosional features are distinguished from streams by the absence of a defined channel or lack of an OHWM whereas, an obvious flow path and physical OHWM characteristics are technical criteria diagnostic of a stream.³⁸ Neither the flow regime nor function are directly considered in this distinction. A break in the OHWM is not a distinguishing feature between ephemeral streams and gullies, or other erosional features.³⁹ A tributary connection establishing CWA jurisdiction can exist without a continuous OHWM and discontinuity in the OHWM does not typically sever CWA jurisdiction upstream where the OHWM has been removed by rerouting the tributary through a culvert.⁴⁰ Therefore, a water feature is a stream, regardless of its flow regime, if the feature has a defined channel and an indicator of an OHWM such as a natural line impressed on the bank.⁴¹ A stream

²⁹ AR, pp. 357-370.

³⁰ AR, pp. 357-370.

³¹ AR, p. 367.

³² 33 CFR 328.3(e); RGL 05-05 further explains OHWM.

³³ June 11, 2008. Navigable-in-Fact Determination for the Truckee River and Pyramid Lake (ID SPK-2007-01872)

³⁴ AR, p. 359.

³⁵ AR, p.359.

³⁶ AR, p. 359; SPK Combined Statement, p. 3 of 6.

³⁷ 1986 preamble to 33 CFR 328.3 (51 FR 41217); *Rapanos* guidance; 2023 Rule.

³⁸ 33 CFR 328.3(c)(4); RGL 05-05; *Rapanos* guidance, pp. 10-11; EPA and Corps *Technical Support Document for the Proposed, Revised Definition of Waters of the United States Rule*, dated November 18, 2021, pp. 171-172; 2023 Rule, p. 3116.

³⁹ RGL 05-05; AJD form, footnote 6.

⁴⁰ 2023 Rule, 88 Fed. Register 3083.

⁴¹ Regulatory Guidance Letter 05-05, Ordinary High Water Mark.

is a “tributary,” as defined in the *Rapanos* guidance, whether it is natural, man-altered, or man-made, so long as it carries flow directly or indirectly into a TNW.⁴² The delineation report and ordinary high water mark (OHWM) data sheets contained in the AR record the technical criteria sufficient to identify the Unnamed Channel as a stream (i.e., a flow path and OHWM).⁴³

During the site visit, all parties observed water flowing through the culvert; however, precipitation was recent and purportedly well above average. Regardless of the name a water is given, waters that are technically streams are not excluded erosional features, and streams that flow to TNWs are technically defined as tributaries.

Although law, policy, and guidance provide latitude for the District to determine what should be included in the AR, it is logical to assume that any correspondence from the Appellant will be in support of its project and should be considered and included in the AR. The inclusion of material in the AR that is inconsistent with a decision does not individually or in combination supplant the District’s technical determination. In fact, if the District has determined the relevance of information, it has considered it in its decision. As a matter of good practice, a memorandum should be used to clarify the record, but there is no related documentation requirement for concluding that a water feature is a stream or tributary.

To be “arbitrary and capricious” there would be an absence of a rational connection between the facts found and the choice made. There would be a clear error of judgment; an action not based upon consideration of relevant factors, an abuse of discretion, failure to be in accordance with law, or failure to observe a procedure required by law.⁴⁴ The omission of submittals from the AR based on the District’s determination of relevancy is arbitrary and capricious; however, this portion of the Appellant’s claim is addressed beneath the third reason for appeal.

This reason for appeal does not have merit. Characterization of a water feature as an ephemeral stream is not a determining factor for CWA jurisdiction, in and of itself. Consistent with current regulation, the jurisdictional status of an ephemeral stream hinges upon a significant nexus finding, which is discussed beneath the third reason for appeal.

Second Reason for Appeal: The District failed to show an interstate commerce clause connection between the Unnamed Channel and the Truckee River.

Finding: This reason for appeal does not have merit.

Discussion: In the RFA, the Appellant alleges that the District “has failed to show an interstate commerce clause connection” between the Unnamed Channel and the TNW.⁴⁵ Essentially, the Appellant argues that assertion of CWA jurisdiction over the Unnamed Channel requires documentation of a connection to commerce, stating that there, “is no significant evidence... to support the interstate commerce connection between the unnamed channel and the Truckee

⁴² *Rapanos* guidance, p. 69.

⁴³ AR, pp. 33-45.

⁴⁴ *Natural Resources Defense Council, Inc. v. United States Environmental Protection Agency*, 966 F.2d 1292 (9th Cir. 1992).

⁴⁵ RFA, Attachment 2, page 1.

River.”⁴⁶ During the appeal meeting, the Appellant clarified that they do not believe that the Unnamed Channel is isolated, just that it rarely connects downstream of the Property.⁴⁷

The District refutes that a commerce test is required to support the AJD. The AR does not indicate that the District considered commerce in its decision. The District explained that commerce is a consideration for isolated waters and that the Unnamed Channel is not considered an isolated water because it exhibits a continuous OHWM connection to Steamboat Creek.⁴⁸

Regulation and guidance identify waters that are jurisdictional categorically and on a case-by-case basis.⁴⁹ At the time the AJD was issued, the definition of WOTUS at 33 CFR 328.3(a)(5) stated that all tributaries, as defined in paragraph (c)(3) of that section, of waters identified in paragraphs (a)(1) through (3) of that section are WOTUS. Paragraph (c)(3), among other things, defines and describes the characteristics of tributaries. Together with the *Rapanos* guidance, CWA jurisdiction extended to non-navigable, not relatively permanent (i.e., ephemeral) tributaries that have a significant nexus to a TNW, as defined at 33 CFR 328.3(a)(1).

As discussed under 33 CFR 328, paragraph (a)(3), the Corps would consider commerce when considering the jurisdictional status of all “other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds.”⁵⁰ Together with direction provided by the *Rapanos* guidance, isolated waters were evaluated for an interstate commerce connection.⁵¹ Under the commerce test, staff consider “whether the use, degradation, or destruction” of such other waters could produce a sufficient interstate or foreign commerce connection to establish CWA jurisdiction.⁵²

As discussed beneath the First Reason for Appeal, the District’s characterization of the water feature as an ephemeral stream that is tributary to the Truckee River aligns with the information contained in the AR.⁵³ Per the District’s AJD form for the Property, in Section III “Summary Of Findings”, under part B, the Unnamed Channel is identified as a tributary, as defined in 33 CFR 328.3, of waters identified in paragraphs (a)(1)-(a)(3) of 33 CFR 328.3 (i.e., the Truckee River; a TNW). The District concluded that the ephemeral stream is jurisdictional, as it found it to be a “tributary”, under 33 CFR 328.3(a)(5).

A commerce clause connection was not a relevant consideration for the jurisdictional status of the Unnamed Channel at the time the AJD was issued. Current CWA regulation does not contain

⁴⁶ RFA, p. 44; AR, p. 13, footnote 10.

⁴⁷ MFR, p. 3.

⁴⁸ SPK Combined Statement, p. 4.

⁴⁹ *Rapanos* guidance; 2023 Rule.

⁵⁰ See 33 CFR 328.3(a)(3), which defines jurisdictional “waters of the United States” to include certain “other waters” that are not themselves navigable if their “use, degradation or destruction . . . could affect interstate or foreign commerce.” This “other waters” category relies on an interstate or foreign commerce connection separate from a connection or nexus to navigable waters as the basis for jurisdiction.

⁵¹ *Rapanos* guidance, p. 10.

⁵² Regulatory Program of the Corps of Engineers. 42 FR 37128 (July 19, 1977).

⁵³ AR, p. 357. AJD Form, Section B.1.a.

any commerce connection requirement to ascertain the jurisdiction of ephemeral tributaries.⁵⁴ Accordingly, the consideration of commerce does not apply to the jurisdictional status of the Unnamed Channel.

As applied to the Appellant's reason for appeal, the District's determination that a commerce test was unnecessary to evaluate CWA jurisdiction was not plainly contrary to applicable law or policy. Therefore, this reason for appeal does not have merit.

Third Reason for Appeal: The District failed to demonstrate that there is a significant nexus between the Unnamed Channel and the Truckee River.

Finding: This reason for appeal has merit.

Discussion: The Appellant argues that there is no significant physical, chemical, or biological nexus to the Truckee River. In the AR, the Appellant explains that the Unnamed Channel does not have a significant physical connection to the Truckee River, does not possess the ability to carry pollutants to the TNW, and does not have habitat for aquatic or wildlife diversity. In its RFA, the Appellant further disputes the District's AJD, claims the AJD form is lacking documentation necessary to establish and support a significant nexus determination, and includes its own AJD form for comparison.⁵⁵

The Appellant stated that the flow regime of the Unnamed Channel is episodic and estimated that, on average, there is one flow event each year in the review area that is purely in response to storm events. The AR includes precipitation data and aerial photograph interpretation concluding that the Unnamed Channel rarely contributes water to Steamboat Creek. The Appellant does not dispute that the Unnamed Channel periodically provides drainage for storm events downstream to Steamboat Creek during peak flows.⁵⁶ Instead, the Appellant asserts that evidence of a periodic surface water connection is insufficient to establish a significant nexus. The Appellant provided supporting discussion and technical argument within its RFA of the geomorphology and hydrology of the Unnamed Channel: its geometry, its flow regime, and function.

As discussed beneath the First Reason for Appeal, the Appellant asserts that the District did not consider its submittal. The District omitted material from the AR and explained during the appeal meeting that portions of the Appellant's submittals were not considered relevant to its decision (e.g., precipitation data) and clarified that some information contained in the AR was disregarded based on first-hand knowledge that is counter to that which was submitted (e.g., estimated flows). The District explained it is its policy not to view or retain DVDs. The Appellant noted its intent to contest CWA jurisdiction in its request for a jurisdictional determination.⁵⁷ The Appellant complained that the District would not meet or communicate

⁵⁴ Cf. 1986 Regulations, p. 41250; 2023 WOTUS Rule, p. 3097. The interstate commerce test was replaced with the relatively permanent standard and the significant nexus standard.

⁵⁵ RFA, pp. 4, 23-45.

⁵⁶ AR, pp.4, 34-45.

⁵⁷ AR, p. 1.

with their agent and said that the appeal could have been avoided if the District would have met with them.⁵⁸

The District explained during the appeal meeting that it did not consider the precipitation data or evaluation of normal precipitation conditions provided by the Appellant. The District explained that it did not consider the Antecedent Precipitation Tool either, explaining that it is “not germane to ephemeral streams.” The materials are included in the AR; however, the District stated that the videos submitted by the Appellant were received but discarded without viewing. The District clarified that it is its policy that regulatory project managers do not view or keep CDs, DVDs, or flash drives because “staff have no way of viewing them.”⁵⁹

The Sacramento District Regulatory Division webpage includes instructions for submitting requests to the District.⁶⁰ The instructions allow for submittals on CD and hardcopy formats, with a stated preference for electronic submittals. The instructions direct the public to not send data on USB sticks, explaining that USB sticks are not compatible with its computers. The instruction does not mention DVDs.

The District’s practice of unconditionally disregarding submissions based on file format is an abuse of discretion. It is the District’s responsibility to determine the adequacy of submittals and if any portion of a submittal is unacceptable, the regulatory project manager must respond accordingly and in a timely manner. Although the Sacramento District’s webpage notifies the public that submittals on USB sticks are discouraged, if a USB stick or other unacceptable or unviewable file is received, the District should notify the sender and coordinate means for an acceptable file transfer format and method of delivery.

In the AR, the District concurred with the Appellant’s aquatic resource delineation report and data sheets.⁶¹ The District explained during the appeal meeting observations from its July 2022 site visit; however, the District did not document the findings of its investigation in the AR.⁶² The District recorded that the Unnamed Channel, “has a chemical, biological, and physical nexus that is more than speculative and imperceivable. This channel has a surface water connection to the Truckee River (the nearest TNW) downstream which conveys water, organic materials, and sediment flows necessary for proper health and maintenance of downstream RPWs/TNWs, as well as providing habitat for birds, small mammals, and other wildlife.”⁶³ The District clarified that the significance of the biologic nexus is based on the presence of habitat suitable to rabbits, coyotes, snakes, and quail.⁶⁴ The AR does not explain how the presence of said species affect the downstream TNW. Following the appeal meeting, the District provided correction that it does not believe a biological nexus exists between the Unnamed Channel and the Truckee River.⁶⁵

⁵⁸ MFR, p. 1-2.

⁵⁹ MFR, p. 9.

⁶⁰ <https://www.spk.usace.army.mil/Missions/Regulatory/>

⁶¹ AR, p. 363.

⁶² SPK Combined statement, p. 4.

⁶³ AR, page 361.

⁶⁴ SPK consolidated statement, p. 6.

⁶⁵ SPK consolidated statement, p. 4.

Section IV of the District's AJD form summarizes the data sources used to complete the jurisdictional determination, including the AJD report, data sheets submitted on behalf of the Appellant, USGS NHD data, USGS map, USDA-NRCS Soil Survey, USFWS NWI map, state/local wetland inventory maps, FEMA maps, photographs, and aerials, and post rain site photos. Several of the data sources that are cited are not specific. After the appeal meeting, the District explained to the RO that these items were not used as data sources and were misidentified on the AJD form.

Section IV.B. of the AJD Form allows for additional comments to support the determination; this section is blank.

During the appeal meeting, the District explained that the significant nexus determination was transmitted to the EPA and that the AJD was issued after the 15-day coordination period lapsed, but that the related correspondence was inadvertently omitted from the AR.⁶⁶

As explained beneath the previous reasons for appeal, the Appellant and District agree on the physical attributes that would be necessary to allow for a hydrologic connection sufficient to characterize the Unnamed Channel as a tributary to the Truckee River. Currently, non-permanent tributaries are classes of water bodies that are subject to CWA jurisdiction only if a significant nexus is demonstrated with a TNW. As such, the District was required to complete a significant nexus determination for the Unnamed Channel to determine if it is "likely to have an effect that is more than speculative or insubstantial on the chemical, physical, and biological integrity of a [TNW]."⁶⁷ A significant nexus with a TNW exists where it can be demonstrated that the subject watercourse has the potential to degrade the water quality of the TNW.

The Corps is responsible for performing jurisdictional determinations in a CWA Section 404 context and documenting the findings in a decision.⁶⁸ Staff are expected to exercise appropriate judgment and use appropriate information when making jurisdictional determinations.⁶⁹ Documentation of the AR should allow for reasonably accurate replication of the determination at a future date. In this regard, documentation normally includes information such as data sheets, site visit memoranda, maps, sketches, and, in some cases, surveys and photographs documenting the OHWM.⁷⁰ The integrity of the AR is especially important where CWA jurisdiction will be contested or where litigation is anticipated.⁷¹

Per the *Rapanos* guidance, all reviewed information that contributed to the District's determination should be adequately reflected in the AR.⁷² The *Standard Operating Procedures for the U.S. Army Corps of Engineers Regulatory Program* (SOP) instructs staff to purge ARs of unnecessary data to save on file storage, but "include all documents and materials directly or

⁶⁶ SPK Combined Statement, p. 3 of 6.

⁶⁷ *Rapanos* guidance, pp. 10-11.

⁶⁸ RGL 16-01.

⁶⁹ Questions and Answers for RGL 16-01, #4.

⁷⁰ RGL 07-01. Superseded by RGL 08-02, which was superseded by RGL 16-01.

⁷¹ See AR, page 001. The Appellant declared their intent to contest jurisdiction over the Unnamed Channel should the District disagree that the feature is non-jurisdictional.

⁷² *Rapanos* guidance, page 11.

indirectly considered by the decision-maker." ⁷³ Neither the guidance nor the SOP are specific to acceptable file formats for submission, such as DVDs, but the JD Guidebook explains that the Appellant's communication, requests, and interaction with the District should be acknowledged and considered and this should be evident in the AR. ⁷⁴

Instruction on conducting and documenting significant nexus determinations is provided in the JD Guidebook. The JD Guidebook instructs staff to consider all available hydrologic information (e.g., precipitation data, historical records, personal observations) and utilize maps, photography, surveys, studies, and reports to complete accurate jurisdictional decisions. ⁷⁵ The significant nexus determination needs to include a reasoned basis for determining that the waters being evaluated provide functions that significantly affect the chemical, physical, or biological integrity of a TNW. ⁷⁶ The AR must explain the rationale for the District's determination, disclose the data and information relied upon, and if applicable, explain what data or information received greater or lesser weight, and what professional judgment or assumptions were used in reaching the determination. ⁷⁷ For example, a chemical connection may exist where the aquatic feature retains pollutants that would otherwise flow to a TNW, and the significance of this connection would be weighed against its value to the chemical integrity of that downstream TNW.

Additional documentation and processing guidance for AJDs is provided in RGL 16-01. Importantly, the RGL explains that "[d]istricts should ensure the documentation used to support the AJD addresses any objections from AJD requestors and/or consultants [and] [i]f the requestor submits materials with which the districts do not agree or do not concur (e.g., wetland delineation report), the districts should clearly document the reasons for reaching a contrary conclusion." ⁷⁸

Finally, AJDs involving a significant nexus determination require coordination with EPA. If EPA does not respond to the initial coordination of a jurisdictional determination, the District is to include a statement in the AR documenting the process and steps taken to move the regulatory action forward. ⁷⁹

The application of the significant nexus test and jurisdictional determinations are a permissible exercise of the District's authority. It is within the discretion of the District to determine whether

⁷³ July 1, 2009. *Standard Operating Procedures for the U.S. Army Corps of Engineers Regulatory Program*: Section 2: File Maintenance. The *Standard Operating Procedures for the U.S. Army Corps of Engineers Regulatory Program* provides a summary of policies and procedures and should be used as day-to-day informal guidance by regulatory project managers as they implement the program.

⁷⁴ See JD Guidebook, page 77.

⁷⁵ *Jurisdictional Determination Form Instructional Guidebook*. U.S. Army Corps of Engineers and Environmental Protection Agency (May 30, 2007). The *JD Guidebook* is used as the U.S. Army Corps of Engineers Regulatory National Standard Operating Procedures for conducting and documenting an AJD under the pre-2015 Regulatory Regime.

⁷⁶ *Rapanos* guidance, footnote 11. The Corps "shall document in the administrative record the available information regarding whether a tributary and its adjacent wetlands have a significant nexus with a traditional navigable water, including the physical indicators of flow in a particular case and available information regarding the functions of the tributary and any adjacent wetlands."

⁷⁷ See SOP, p. 9.

⁷⁸ Questions and Answers for RGL 16-01, #8

⁷⁹ See Questions and Answers for *Rapanos* and *Carabell* Decision, page 13, Q&A #36 (2007).

or how much weight to apply to all the information collected when making decisions, including expert opinions. However, the District has not put forth specific facts to rebut the Appellant's showing and has created a genuine factual dispute as to whether or not a significant nexus exists between the Unnamed Channel and the Truckee River.

Although the relevance of the Appellant's submittal is subject to the District's best professional judgment, the *Rapanos* guidance requires staff to support their conclusions with adequate data and rationale, explaining that in documenting their jurisdictional determinations, they should "ensure that the information in the record adequately supports any jurisdictional determination. The record shall, to the maximum extent practicable, explain the rationale for the determination, disclose the data and information relied upon, and, if applicable, explain what data or information received greater or lesser weight, and what professional judgment or assumptions were used in reaching the determination."⁸⁰

The District's analysis did not comply with the *Rapanos* guidance because it did not adequately explain the rationale for the determination, disclose the data and information relied upon, nor explain what data or information received greater or lesser weight, and what professional judgment or assumptions were used in reaching the determination. The AR does not demonstrate that the flow characteristics and functions of the relevant reach of the tributary have more than an insubstantial or speculative effect on the chemical, physical, or biological integrity of a TNW. The District's analysis of the connection between the Unnamed Channel and the Truckee River has not met the standard that the nexus is not more than speculative or insubstantial. Finally, the District did not correctly apply law, regulation, guidance, and policy when it determined that the aquatic features on the Appellant's property had a significant nexus with the nearest downstream TNW and were therefore WOTUS.

As discussed above, the District failed to appropriately follow proper protocol in documenting CWA jurisdiction over the Unnamed Channel. Conclusions and assertions stated on the AJD form were unsupported and the District failed to document its field evaluation or summarize required analyses in the AR. The District inappropriately omitted material from the AR and did not consider information submitted by the Appellant. In making this assessment, the District made a clear error in judgment by not considering and documenting its consideration of information provided by the Appellant.

The District has not shown that the channel is significant to the water quality of the Truckee River. The AR lacks technical analysis or explanation of the professional judgment and available data and observations used to support the District's determination that the Unnamed Channel has a significant nexus to the Truckee River. In the absence of sufficient information to document the District's conclusion and because there is conflicting information provided by the Appellant in the AR, the District's determination of CWA jurisdiction is unfounded.⁸¹ Consequently, this reason for appeal has merit.

⁸⁰ *Rapanos* Guidance, *supra* note 10.

⁸¹ AR, p. 363. The District concurred with the data sheets and mapping but without explanation in the AR, reached contrary conclusions to those offered by the Appellant's submittals.

Conclusion: The third reason for appeal has merit. The AR does not provide an adequate and reasonable basis supporting the District's conclusion that the Unnamed Channel has a significant nexus to the Truckee River, analysis essential to the District's decision has been omitted from the AR, and relevant requirements of regulations and officially promulgated Corps policy guidance have not been satisfied. Therefore, the Commander is remanding it with this decision. This decision is remanded to the District for reconsideration.

The District must document the required findings as part of the AR. The AR should be supplemented accordingly to document and reflect the additional factual data considered in this analysis. This documentation should update the AJD form to capture the rationale of the District's reconsidered decision.

The District is instructed to include and consider the material that the Appellant submitted in support of its position on jurisdiction and for the District to consider said information in any new decision.

As the *Rapanos* guidance has been superseded by the 2023 Rule, the District must document the evaluation and rationale that leads to its conclusion as to whether the Unnamed Channel on the Property is jurisdictional in accordance with the standards and procedures set forth by current applicable regulation, guidance, and policy. The District's documentation must also take into consideration any revised rules relative to the definition of "waters of the United States" and jurisdiction under Section 404 of the Clean Water Act that are issued following the decision in *Sackett*.

The District shall, upon completion of these tasks, provide its final decision to the Division Engineer and Appellant. As the AJD subject to this appeal is remanded subsequent to the effective date of the 2023 Rule and any revised rules issued post-*Sackett*, the Appellant will be provided an opportunity to appeal the decision resulting from the District's reconsideration.

This concludes the Administrative Appeal Process.

27 July 2023
DATE

Gabriel R. Sant
DIVISION COMMANDER

