

**ADMINISTRATIVE APPEAL DECISION
CORRALES ACEQUIA
APPROVED JURISDICTIONAL DETERMINATION
ALBUQUERQUE DISTRICT
SPA-2024-00420**

Division Engineer: Colonel James Handura, South Pacific Division¹

Review Officer: Travis Morse, South Pacific Division

Appellant: Middle Rio Grande Conservancy District

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

Date Acceptable Request for Appeal Received: February 3, 2025

Date of Appeal Meeting: May 14, 2025

Summary of Appeal Decision: The Middle Rio Grande Conservancy District (MRGCD) is appealing a Jurisdictional Determination (AJD) made by the Army Corps of Engineers Albuquerque District (District), which determined that the Corrales Acequia, a manmade irrigation ditch operated by the MRGCD, is a "water of the United States" (WOTUS) under the Clean Water Act (CWA).

The Appellant, MRGCD, submitted three issues for consideration in its appeal. I find that issue 1 has merit. I further find that issues 2 and 3 do not have merit. The decision is remanded to the District for further analysis and documentation.

Background: The District determined that the Village of Corrales' Trosello Lane realignment project, involving a culvert crossing of an irrigation canal, the Corrales Acequia, required a CWA Section 404 permit.² The District notified the Village of Corrales of this requirement, explaining that the Acequia is considered a WOTUS. MRGCD, which owns an easement for the Corrales Acequia, expressed disagreement, claiming that its projects are typically only subject to MRGCD licensing. The District subsequently issued an AJD reaffirming CWA jurisdiction over the Corrales Acequia.³

¹ Pursuant to 33 CFR 331.3(a), the Division Engineer has the authority and responsibility for administering the administrative appeal process. While the Review Officer served to assist the Division Engineer in reaching and documenting the Division Engineer's decision, the Division Engineer made the final decision on the merits of this specific appeal. The District Engineer retains the final Corps decision-making authority for the approved jurisdictional determination.

² AR 387-403.

³ AR 012, 017-023.

On February 3, 2025, the South Pacific Division (SPD) received a Notification of Administrative Appeal Options and Process and Request for Appeal (NAO/NAP) form completed by the Appellant, challenging the AJD through the appeal process established in 33 CFR Part 331. The Appellant's request for an administrative review of the action through the appeal process, outlining its reasons for appeal is collectively referred to as the RFA.

Information Received and its Disposition During the Appeal: The administrative appeal was evaluated based on the District's administrative record (AR), the Appellant's RFA, and discussions at the appeal meeting with the Appellant and the District.

The AR is limited to information contained in the record as of the date of the Notification of Administrative Appeal Options and Process form (*i.e.*, December 6, 2024).⁴ No new information may be submitted to support an RFA and, therefore, neither the Appellant nor the District may present new information to the Appeal Review Officer (RO).⁵ 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, 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.⁶

A general account of the timeline and information received during this appeal review and its disposition is as follows:

1. On February 18, 2025, SPD notified the Appellant that the RFA met the required criteria for an administrative appeal and requested that the AR be provided to all parties.
2. On February 26, 2025, the District provided a copy of the AR to the RO and the Appellant.
3. On May 14, 2025, the RO conducted a virtual meeting with the Appellant and the District.
4. On May 20, 2025, the RO provided a draft Appeal Meeting Memorandum for Record (MFR) to the Appellant and the District. Comments on the draft MFR, which were received from the District and the Appellant, were used to update the final Los Corrales Appeal Meeting MFR, dated May 27, 2025.

Evaluation of the Appellant's Reason for Appeal, Findings, and Instructions to the District Engineer. The review is limited to whether the District examined the relevant data and articulated a satisfactory explanation for its action, including a rational

⁴ AR 017-023.

⁵ See 33 CFR 331.2.

⁶ See 33 CFR 331.7(f).

connection between the facts found and the decision made. The reasons for appeal below are based on the Appellant's RFA but have been rephrased to clearly describe the findings that must be made regarding this appeal.

Reason for Appeal 1: The District erred in determining the Corrales Acequia qualifies as a jurisdictional tributary because it lacks a relatively permanent flow and does not connect to the Rio Grande.

FINDING: This reason for appeal has merit.

DISCUSSION: The Appellant disputes the Corrales Acequia classification as a jurisdictional tributary due to its artificial construction, intermittent flow, and regulated water management regime. Also, the Appellant refutes its connection to a traditional navigable water (TNW), asserting that the Acequia terminates in an isolated oxbow lake.

According to the Standard Operating Procedures for the U.S. Army Corps of Engineers Regulatory Program, the District must provide a clear and comprehensive rationale for its decision, disclose the data and information relied upon, and explain any professional judgment or assumptions used in reaching the determination.⁷ The level of documentation required varies depending on the complexity of the site, the availability of data, and the presence of any conflicting evidence.

Per 33 CFR 328, to be considered a paragraph (a)(3) tributary, a water body must:

1. Exhibit an Ordinary High Water Mark (OHWM)⁸;
2. Be part of a tributary system that flows directly or indirectly to a TNW, the territorial seas, or an interstate water⁹; and
3. Meet the "relatively permanent standard" (exhibiting flowing or standing water year-round or continuously during certain times of the year but excluding waters with flowing or standing water for only a short duration in direct response to precipitation).¹⁰

The OHWM identifies the lateral extent of CWA jurisdiction in non-wetland waters to

⁷ See 2009 Standard Operating Procedures for the U.S. Army Corps of Engineers Regulatory Program (SOP), p. 9.

⁸ 33 CFR 328.3(e). Regulatory Guidance Letter (RGL) 05-05: *Ordinary High Water Mark*. 88 FR 3083, "The agencies will utilize the Corps' well-established definition of an ordinary high water mark (OHWM) to assist in identifying tributaries for purposes of this rule."

⁹ 33 CFR 328.3(a)(3), "Tributaries of waters identified in paragraph (a)(1) or (2) of this section that are relatively permanent, standing or continuously flowing bodies of water."

¹⁰ *Id.* See 88 FR 3085 and 61969. See also Slide 25, *Updates for Tribes and States on Waters of the United States*. November 15, 2023. Available online at:

https://www.epa.gov/system/files/documents/2023-11/wotus-overview_tribes-and-states_11-15-23_508.pdf.

diagnostic physical features, like a line on the bank, soil changes, or vegetation destruction.¹¹ Corps' policy is clarified by Regulatory Guidance Letter 05-05 with direction to document the physical characteristics forming the OHWM "unless inconclusive, unreliable, or not evident."¹²

To be part of a tributary system, there must be a surface water connection that allows water to flow from the feature to the TNW, territorial sea, or interstate water.¹³ An (a)(3) tributary does not have to flow to a TNW a specific number of days per year.¹⁴ The key is that it must have a relatively permanent flow regime.¹⁵ Additionally, the source of flow is not a determining factor.¹⁶ Sources of flow may include unnatural upstream contributions.¹⁷

To determine whether a tributary meets the relatively permanent standard, the entire reach of the tributary that is of the same Strahler stream order must be evaluated.¹⁸ The method for assigning stream order is outlined in the *Rapanos* guidance and is used to identify the relevant reach of each tributary.¹⁹ Districts are directed to assess flow characteristics at the farthest downstream limit of a tributary, while considering whether those characteristics are representative of the entire relevant reach.²⁰ If the flow regime changes within the relevant reach, the downstream point *may not* be representative.

In summary, to support a determination of jurisdictional tributary status under 33 CFR 328.3(a)(3), the District must demonstrate that a feature meets the definition of a tributary (i.e., OHWM, tributary of an (a)(1) or (a)(2) water, and meets the relatively permanent standard). The AR must include sufficient documentation of OHWM

¹¹ 33 CFR 328.3(e).

¹² RGL 05-05.

¹³ See 88 CFR 3079-3088.

¹⁴ 88 FR 3083, "[A]lthough tributaries are required to flow directly or indirectly through another water or waters to certain downstream waters, tributaries are not required to have a specific flow regime to meet the agencies' interpretation of 'tributary.'"

¹⁵ 88 FR 3084-3088; see section IV.C.4.c.ii.

¹⁶ 88 CFR 3086-3087.

¹⁷ 88 CFR 3085, "[F]low characteristics, onset and cessation of streamflow in some tributaries may be more closely tied to changes in water use associated with irrigation than with seasons of the year. In such flow-altered tributaries, streamflow may change abruptly throughout the year due to adjustments in facility operations or may vary from year to year due to changes in water rights or water management regimes."

¹⁸ 88 FR 3086, "[T]o determine the flow characteristics of a tributary for purposes of implementing this rule, the agencies will evaluate the entire reach of the tributary that is of the same Strahler stream order (i.e., from the point of confluence, where two lower order streams meet to form the tributary, downstream to the point such tributary enters a higher order stream".

¹⁹ *Id.* The concept of how to identify tributary reaches for purposes of assessing tributaries was not affected by the decision in *Sackett v. Environmental Protection Agency*, 598 U.S. 651 (2023). See 27 September 2023 Joint Coordination Memorandum, "[b]ecause the Supreme Court in *Sackett* adopted the *Rapanos* plurality standard and the January 18, 2023 rule preamble discussed the *Rapanos* plurality standard, the implementation guidance and tools in the January 2023 rule preamble that address the regulatory text that was not amended by the conforming rule, including the preamble relevant to the *Rapanos* plurality standard incorporated in paragraphs (a)(3), (4), and (5) of the amended 2023 rule, generally remain relevant to implementing the amended 2023 rule."

²⁰ 88 FR 3086-3087; 2008 *Rapanos* guidance, p. 6, footnote 24.

indicators, reach limits, flow characteristics, and surface water connections.²¹ This documentation should be detailed enough to allow for replication of the analysis.²²

A key point of contention is the flow path of the Acequia and its connection, or lack thereof, to the Rio Grande. The AJD describes a specific flow path, and the MFR asserts that water flows "directly" back into the Rio Grande near the Lower Corrales Riverside Drain gage 304.²³ However, the Appellant contends that the Acequia extends approximately two miles south of the District's depicted terminus to a seasonal oxbow lake, potentially isolated from the Rio Grande. Review of aerial imagery suggests that the AJD's determination that the water flows back into the Rio Grande at the Lower Corrales Riverside Drain gage 304 is not supported by the facts.

The District oversimplified the flow path, stating that the "Acequia is a tributary to the Rio Grande."²⁴ The Appellant's submittals reveal an indirect path via a system of canals, diversions, and pumps that are managed according to a water delivery schedule. Furthermore, the MFR does not discuss the role of these pumps in diverting water into the Acequia or whether evidence of an OHWM exists above and below the pumps. The pumps, combined with other factors discussed below, may create a sufficient break in the hydrologic connection to affect the Acequia's jurisdictional status. According to the Appellant, even if there were a flowpath to the Rio Grande, water is delivered for irrigation and does not typically exit the MRGCD system.

The Appellant submitted information not contained within the AR that bears on the jurisdictional determination.²⁵ Specifically, the Appellant submitted three years of flow data, supplementing the ten months of data included in the AR. Additionally, the Appellant disputed the District's depicted flow path to the Rio Grande, asserting that the flowpath extends approximately two miles further south to an oxbow lake and contending that this oxbow lake is isolated from the Rio Grande. This information was not included in the AR as of the date of the AJD.

The District has not characterized this information as 'new,' suggesting it was either previously considered or determined not to warrant altering the initial jurisdictional determination.²⁶ Despite the relevance of this information to the key determination of the Acequia's connection to a TNW and its flow regime, the AR does not reflect consideration of the Appellant's historical data, flow measurements, or an alternate flow path.²⁷ This raises the question of whether the District either overlooked this information, or determined, perhaps incorrectly, that it did not warrant altering their initial conclusion.

²¹ See 88 FR 3084-3089; Regulatory Guidance Letter (RGL) 05-05: *Ordinary High Water Mark*; 2008 Rapanos guidance.

²² See, e.g., 2009 SOP; RGL 05-05; 2008 Rapanos guidance, footnote 24.

²³ AR 017-023, 382-383.

²⁴ AR 019.

²⁵ The District said that the RFA did not contain any new information. See Los Corrales AJD Appeal Meeting MFR.

²⁶ 33 CFR 331.6(c).

²⁷ See AR 020. For example, the District's analysis does not address the extended dry periods shown in the Appellant's more comprehensive flow records.

Based on an evaluation of the approach described in the January 2023 rule preamble, the District did not appropriately identify or characterize the entire tributary reach and its jurisdictional status.

The MFR does not identify hydrologic indicators along the Corrales Acequia, nor does it clearly connect the observed data, the methodology employed to assess flow characteristics, and the resulting determination of a relatively permanent flow regime. This issue is compounded by indications that the District misidentified the Acequia's flow path and assessed a reach not representative of the Acequia's flow characteristics.

The AR lacks supporting data. While RGL 05-05 allows for flexibility in identifying and delineating the OHWM of non-wetland waters, the AR provides no specific documentation detailing how the District identified, delineated, or mapped the OHWM of the Acequia beyond an apparent flow path indicated on an aerial photograph. The AR provides evidence to support the District's assertion of a direct return flow that stem from an inferred flow path traced on an aerial photograph.²⁸

The District has not put forth specific facts to rebut the Appellant's showing and has created a factual dispute as to whether the Corrales Acequia is an (a)(3) tributary.

ACTION: The District's determination of a jurisdictional water of the United States lacks sufficient evidence to support the finding that the Corrales Acequia is a "relatively permanent" tributary of a TNW, given the managed flow regime and the lack of a clear connection to the Rio Grande. The District must review its decision to ensure accurate and sufficient information and analysis are included in the AR to provide adequate basis for its determination. The District must:

1. Reassess the jurisdictional status of the Corrales Acequia, documenting the OHWM and flow regime, as necessary, and follow applicable regulations, guidance, and policy, including 33 CFR Part 328 and RGL 05-05.
2. Analyze whether water control structures or water management practices create a sufficient break in the hydrologic connection to affect the Acequia's jurisdictional status. The AR must also provide an analysis of the pump's impact, if any, on the connectivity of the Acequia to the Rio Grande.
3. Provide a more detailed analysis of the flow regime in the Corrales Acequia, addressing the extended dry periods documented by the Appellant and the impact of managed water releases. The AR must include a more detailed justification for why periodic flows during the irrigation season constitute "relatively permanent" flow, especially considering the Appellant's argument that the Acequia is dry for most of each year. This analysis should include a more comprehensive review of available flow data and, as applicable, address the Appellant's concerns about the reliability of the gage data.
4. Provide a detailed explanation of how stream order was determined for the Corrales Acequia and why Study Reach 1 is representative of the entire relevant reach. Include evidence, such as maps, hydrological studies, or other data, to support the

²⁸ AR 023, 382, 383.

assertion that return flows from the Corrales Acequia directly enter the Rio Grande. Additionally, the District must address the Appellant's claim that return flows terminate in an isolated oxbow.

5. Document the presence or absence of an OHWM within the relevant reach. If an OHWM is not present, explain why. In the event the OHWM is documented, the District shall, as necessary, provide documentation that allows for a reasonably accurate replication of the determination at a future date.

Reason for Appeal 2: The Corrales Acequia is expressly excluded from CWA jurisdiction as a ditch excavated wholly in and draining only dry land that does not carry a relatively permanent flow of water.

FINDING: This reason for appeal does not have merit.

DISCUSSION: The 2023 Rule includes an exclusion from the definition of WOTUS at 33 CFR 328.3(b)(3) for ditches that meet specific criteria. To qualify for this exclusion, a ditch (or canal) must:

1. Be excavated wholly in dry land;
2. Drain only dry land; and
3. Not carry a relatively permanent flow of water.

The 2023 Rule clarifies that the term "dry land" refers to areas of the geographic landscape that do not include waters such as streams or rivers.²⁹

Due to wording contained in the RFA, it is important to distinguish this jurisdictional exclusion from the regulatory exemptions under CWA Section 404(f). The exclusion determines whether a water body falls within the scope of CWA jurisdiction *at all*. The exemptions, on the other hand, apply to activities occurring within jurisdictional waters but exempt certain activities from the requirement to obtain a CWA 404 permit.³⁰

The District's MFR explicitly states that there are no aquatic resources or features within the review area that meet the exclusion listed in 33 CFR 328.3(b).³¹ However, the Appellant contends that the Corrales Acequia meets all three criteria for the ditch exclusion. Specifically, the Appellant argues that the Acequia:

- Was built in dry land;
- Receives only return flows and occasional runoff; and
- Carries water only when water is available and on a rotating schedule.

²⁹ 88 FR 3111-3112.

³⁰ See Joint Memorandum to the field between the U.S. Department of the Army, Corps of Engineers, and the U.S. Environmental Protection Agency concerning exempt construction or maintenance of irrigation ditches and exempt maintenance of drainage ditches under Section 404 of the Clean Water Act. Dated July 24, 2020. Available online at: <https://usace.contentdm.oclc.org/digital/collection/p16021coll11/id/4653/>

³¹ AR 021.

However, the fact that the water source for the Acequia is a jurisdictional water is critical. The Acequia actively diverts water from the Rio Grande, and, therefore, does not drain only dry land. While the Acequia delivers water for irrigation, the initial diversion from a jurisdictional water body is a key consideration. An irrigation ditch that conveys water diverted from a WOTUS is not considered to be draining only dry land under 33 CFR 328.3(b)(3).³²

According to the record, the Corrales Acequia receives water from a jurisdictional water (the Rio Grande). The Appellant does not contend this fact. As such, the Acequia does not meet the requirement of "draining only dry land" as specified in 33 CFR 328.3(b)(3) because it drains a river. Therefore, the ditch exclusion does not apply.

ACTION: No further action is required regarding this reason for appeal.

Reason for Appeal 3: The District's assertion of jurisdiction over the Corrales Acequia impermissibly infringes upon the State of New Mexico's primary authority to manage water resources and conflicts with the principles of federalism enshrined in the CWA.

FINDING: This reason for appeal is without merit.

DISCUSSION: The issue is whether the District's assertion of jurisdiction over the Corrales Acequia is a valid exercise of federal authority under the CWA, or an overreach that infringes on the State of New Mexico's water management responsibilities.

The CWA establishes a balance between federal oversight and state primacy, but also establishes a federal regulatory framework to prevent pollution.³³ The Corps has the authority to regulate WOTUS to ensure compliance with the CWA's objectives.³⁴ If the Corrales Acequia is determined to be a WOTUS, the District has a legitimate federal interest in regulating activities within it, regardless of state regulations.

There is no evidence or reason to suggest that the District's handling of the AJD request constituted an abuse of discretion or was plainly contrary to any law, regulation, Executive Order, or officially promulgated Corps policy guidance. The argument regarding federalism does not demonstrate why the District's AJD was incorrect.

ACTION: No further action is required regarding this reason for appeal.

CONCLUSION: This AJD is remanded to the Albuquerque District Engineer for further analysis and documentation in accordance with 33 CFR 331.10(b) for reconsideration due to inadequate documentation and procedural compliance, as outlined above in Reason for Appeal 1.

³² 88 FR 3004, 3111-3112.

³³ 33 USC 1251(b).

³⁴ See 33 CFR 320, 323, and 328.

The District must thoroughly review its decision to ensure accurate and sufficient information and analysis are included in the AR to provide adequate basis for its determination. The District should follow applicable regulations, guidance, and policy. The revised AR must contain detailed methodology, rationale, data sources, assumptions, and conclusions to support the District's final determination. The reconsideration will account for all relevant subsequent revised rules or guidance.

The District need not limit its reexamination of the AJD to the issues identified by this decision. The District is free to gather additional data or request additional information to support the reevaluation. Likewise, the Appellant has the right to submit additional evidence or argument. If new and material evidence is presented, the District must review and document its consideration, document any disagreement using memoranda to the file, and explain the rationale for its actions.

In sum, I find that the District's decision on relevant matters was not compliant with officially promulgated policy and not supported in the AR. This is the final decision of the Division Engineer on the merits of the appeal and concludes the administrative appeal process. Authority to make the final Corps decision on the jurisdictional determination resides with the Albuquerque District Engineer pursuant to this remand. The District Engineer shall, upon reconsideration of this appeal as indicated, provide the final Corps decision to the Division Engineer and Appellant. This concludes the administrative appeal process.

15 July 2025

DATE

James J. Handura

James J. Handura
Colonel, U.S. Army
Commanding