

**ADMINISTRATIVE APPEAL DECISION  
UTAH DEPARTMENT OF TRANSPORTATION  
APPROVED JURISDICTIONAL DETERMINATION  
SACRAMENTO DISTRICT  
FILE NO. SPK-2007-01985**

**DATE: November 13, 2018**

**Division Engineer:** Kimberly M. Colloton, Colonel, U.S. Army Corps of Engineers, South Pacific Division, San Francisco, California<sup>1</sup>

**Review Officer:** Elliott N. Carman, U.S. Army Corps of Engineers, Southwestern Division, Dallas, Texas

**Appellant/Applicant:** Utah Department of Transportation

**Regulatory Authority:** Section 404 of the Clean Water Act (CWA) (33 U.S.C §1344)

**Date Acceptable Request for Appeal Received:** October 3, 2017

**Appeal Meeting:** March 27, 2018

**Summary of Appeal Decision:** The Utah Department of Transportation (Appellant) is appealing a U.S. Army Corps of Engineers (Corps) Sacramento District (District) approved jurisdictional determination (AJD) for portions of multiple properties located in West Point, Syracuse, Layton, Kaysville, Farmington, and Centerville, Utah. In their request for appeal (RFA), the Appellant submitted two reasons for appeal that asserted that the District incorrectly applied law, regulation, or officially promulgated policy when it determined that two different wetland areas were adjacent to the Great Salt Lake (hereafter referred to as the Lake).<sup>2</sup> For reasons detailed in this decision document, these two reasons for appeal have merit. The AJD is remanded to the District for reconsideration.

**Background Information:** The Appellant is proposing the West Davis Corridor linear transportation project, which encompasses portions of multiple properties located in West Point, Syracuse, Layton, Kaysville, Farmington, and Centerville, Utah. In response to the Appellant's request, the District provided an AJD for the properties associated with this project on August 4,

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<sup>1</sup> Pursuant to 33 CFR § 331.3(a)(1), the Division Engineer has the authority and responsibility for administering the administrative appeal process. The Division Engineer may delegate the authority and responsibility of the administrative appeal process for approved jurisdictional determinations, including the final appeal decision. Regardless of these delegations, the Division Engineer retains overall responsibility for the administrative appeal process. The District Engineer retains the final Corps decision-making authority for the approved jurisdictional determination.

<sup>2</sup> It should be noted that the RFA refers to five different wetland identifiers: 12-IW-59, 12-IW-58A, 12-IW-58B, 08-IW-26A, and 08-IW-26B. During the appeal meeting, the Appellant clarified that the appeal is focused on two, large wetland areas that are comprised of these five specific wetland identifiers: one wetland comprised of identifiers 12-IW-59, 12-IW-58A, and 12-IW-58B, and the second wetland comprised of identifiers 08-IW-26A and 08-IW-26B. This decision document was written consistent with that clarification.

2017, which concluded that approximately 793.5 acres of aquatic resources comprised of wetlands, streams, canals, and ponds were waters of the U.S. regulated under Section 404 of the Clean Water Act.<sup>3</sup> The Appellant submitted a complete request for appeal (RFA), which was received by the South Pacific Division (Division) office on October 3, 2017. The Appellant was informed by letter dated January 24, 2018 that their appeal was accepted.

### **Information Received and its Disposition During the Appeal**

Title 33 Code of Federal Regulations (CFR) § 331.3(b)(2) states that, upon appeal of the District Engineer's decision, the Review Officer (RO) should conduct an independent review of the District's administrative record (AR) to examine the reasons for appeal cited by the Appellant. Pursuant to 33 CFR § 331.2, no new information may be submitted on appeal. The District's 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. Neither the Appellant nor the District may present new information to the Division. To assist the Division Engineer in making a decision on the merits of the appeal, the RO may allow the parties to interpret, clarify, or explain issues and information already contained in the District's 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 permit. However, in accordance with 33 CFR § 331.7(f), the Division Engineer may use such interpretation, clarification, or explanation in determining whether the District's AR provides an adequate and reasonable basis to support the District Engineer's decision. The information received during this appeal process and its disposition is as follows:

- A. The District provided a copy of the AR to the RO and the Appellant. The AR is limited to information contained in the record by the date of the NAO/NAP form. In this case, that date is August 4, 2017.
- B. An appeal meeting was held on March 27, 2018. The meeting followed the agenda provided to the District and the Appellant by the RO via email on March 20, 2018.
- C. During the appeal meeting, the Appellant stated that, since the completion of the District's AJD, they had further investigated the flow path between the wetland comprised of identifiers 08-IW-26A and 08-IW-26B and the Lake. The RO indicated the results of this additional investigation may be new information and would provide further instructions regarding this information after the conclusion of the appeal meeting.
  - i. After the appeal meeting, the RO requested that the Appellant provide the flow path information to the District so they could review and determine whether it was new or clarifying information.<sup>4</sup> Upon receipt of the information, the District determined that the information was new (i.e. had not been considered as part of the District's decision dated August 4, 2017).

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<sup>3</sup> Administrative Record (AR) page 01.

<sup>4</sup> The flow path information is included as Appendix C to the final appeal meeting memorandum for record dated May 18, 2018.

- ii. The RO then informed the Appellant that they could either choose to withdraw the appeal and have the District reconsider the AJD relative to the new information, or proceed with the appeal without consideration of the new information.
  - iii. The Appellant indicated they wished to proceed with the appeal without consideration of this new information. Therefore, this flow path information is considered new information and was not considered as part of the evaluation of this RFA.
- D. On May 4, 2018, the RO forwarded, via email, a draft memorandum for record (MFR) summarizing the appeal meeting topics to the Appellant and the District for review and comment. In an email dated May 7, 2018, the Appellant provided comments regarding sections 4.a., 4.c., and 4.d. of the draft MFR. In an email dated May 9, 2018, the District indicated they did not have any comments. The Appellant's comments were incorporated into the final MFR which was provided to the Appellant and the District by the RO on May 18, 2018.

### **Evaluation of the Appellant's Reason for Appeal**

#### **REASON 1: The District incorrectly applied law, regulation, or officially promulgated policy when it determined that the wetland comprised of identifiers 12-IW-59, 12-IW-58A, and 12-IW-58B was adjacent to the Lake.**

FINDING: This reason for appeal has merit.

DISCUSSION: In their RFA, the Appellant described the potential flow path from the wetland comprised of identifiers 12-IW-59, 12-IW-58A, and 12-IW-58B and the Lake and how upland barriers, including a small berm, prevent a hydrologic connection with the Lake under normal flow conditions. In addition, the Appellant stated that they objected to the District's statement that, "All wetlands and waters within the review area are reasonably close to the [Lake], supporting the science-based inference that they each have an ecological interconnection with the [Lake]."<sup>5</sup> The Appellant further stated that, other than potential migratory bird use, "...there is no evidence of any organisms relying on both the [Lake] and these wetlands in order to complete life cycle requirements." Based on this rationale, the Appellant believes this wetland lacks a direct hydrologic connection to the Lake and is not reasonably close to (i.e. lacks an ecological interconnection with) the Lake. Therefore, the Appellant believes this wetland is isolated and, thus, non-jurisdictional.

Regulation at 33 CFR § 328.3(a)(7) indicates waters of the U.S. include adjacent wetlands. The term "adjacent" is defined at 33 CFR § 328.3(c) as, "...bordering, contiguous, or neighboring," and that, "[w]etlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands.'" Revised *Rapanos* guidance issued by the Corps in 2008 further clarifies the regulatory definition of adjacency, stating that wetlands are adjacent if one of three criteria are satisfied: (1) there is an unbroken surface or shallow subsurface connection to jurisdictional waters; (2) they are physically separated from jurisdictional waters by man-made dikes or barriers, natural river

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<sup>5</sup> The District's statement is found on AR page 42.

berms, beach dunes, and the like; or (3) their proximity to a jurisdictional water is reasonably close, supporting the science-based inference that such wetlands have an ecological interconnection with jurisdictional waters.<sup>6</sup>

In a MFR dated July 25, 2017, the District described the flow path as generally southwest from the wetland comprised of identifiers 12-IW-59, 12-IW-58A, and 12-IW-58B to the Lake.<sup>7</sup> The District also stated that numerous surface connections are evident between the wetland and the Lake,<sup>8</sup> and stated during the appeal meeting that the flow path could go a number of directions due to potential diversions through irrigation canals located down gradient from the wetland.

In stating that upland barriers prevent a hydrologic connection between the wetland and the Lake, the Appellant is essentially asserting that the wetland does not meet the *Rapanos* guidance criteria that a wetland is adjacent if there is an unbroken surface or shallow subsurface connection to jurisdictional waters. However, as noted above, this criteria is one of three listed in the *Rapanos* guidance and is not the sole requirement for the determination that a wetland is adjacent.

During the appeal meeting, the District acknowledged that they included in the AR various discussions about the flow path between specific wetlands and the Lake. They further indicated they gathered this information during the early stages of their evaluation and before they concluded the wetland was adjacent, because its proximity to a jurisdictional water was reasonably close. It was not necessary for the District to include detailed information about the flow path in the AR as the District's basis of jurisdictional determination (or AJD form) indicated they did not rely on an unbroken surface or shallow subsurface connection to jurisdictional waters to establish adjacency, but rather, they relied solely upon the concept that the wetland's proximity to a jurisdictional water was reasonably close.<sup>9</sup>

Considering the reasonably close criteria, the District stated in their AJD form that, "All wetlands and waters within the review area are reasonably close to the [Lake], supporting the science-based inference that they each have an ecological interconnection with the [Lake]."<sup>10</sup> In addition, the District stated in the July 25, 2017 MFR that, "...these wetlands are all regulated under Section 404 because...they are adjacent to a Traditionally Navigable Water (TNW), the [Lake]..."<sup>11</sup> The District further stated that there is not, "...a national standard regarding a maximum distance limit for reasonably proximity..."<sup>12</sup> but that reasonable considerations include, "...the scale of the waterbody in question and its association with the surrounding

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<sup>6</sup> Grumbles, Benjamin H. and John Paul Woodley, Jr. 2008. Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* and *Carabell v. United States*, p. 5-6.

<sup>7</sup> AR pages 54-56.

<sup>8</sup> AR page 54.

<sup>9</sup> It should be noted that, while the District's AJD form indicates the District relied solely upon the reasonably close criteria to establish adjacency, a MFR dated July 25, 2017 indicates this wetland also has an unbroken surface connection to the Lake. The MFR does not clearly describe the entire flow path between the wetland and the Lake and the District stated during the appeal meeting that only those portions of the MFR that are referenced in the AJD form were applicable to their decision. Based on this comment, the discussion in the MFR pertaining to the surface connection would not be applicable to the decision as it was not referenced in the AJD form. However, this concept was not at all evident in the District's AR.

<sup>10</sup> AR page 42.

<sup>11</sup> AR page 50. It should be noted that "these wetlands" were described in this MFR as being wetlands 08-IW-26B, 08-IW-26A, 12-IW-59, 12-IW-58A, and 12-IW-18.

<sup>12</sup> AR page 50.

wetlands within the landscape, as well as the characteristics and functions of the specific wetland being evaluated.”<sup>13</sup> The District provided some discussion in the AR about the position of the wetlands in the landscape relative to the Lake as well as some of the functions the wetlands provide including flood water retention, pollutant filtration/sequestration, and habitat provision.<sup>14</sup> Finally, the District stated during the appeal meeting that the Lake’s salinity level limits organisms that are able to use it to brine flies, brine shrimp, migratory water fowl, and some fish and amphibians, and that the AR lacks a discussion on any specific species to support the ecological interconnection because the District understood that the *Rapanos* guidance describes the ecological interconnection as a science based inference.

The District is correct that the *Rapanos* guidance indicates that the reasonably close adjacency criteria is supported by a science-based inference; however, the *Rapanos* guidance indicates this criteria is supported by more than just the inference. The *Rapanos* guidance indicates that an assessment is necessary in order to determine that a wetland is reasonably close to a jurisdictional water, and that the assessment should only be based on the wetland in question and should not include other wetlands in the area. Furthermore, the *Rapanos* guidance indicates the assessment is a species specific assessment, but that the ecological interconnection cannot be supported by migratory species.<sup>15</sup>

As previously stated, the District’s assessment was not specific to the wetland in question as the District referred to at least two wetland areas in one location in the AR and “all the wetlands in the review area” in another location in the AR. In addition, the assessment lacked a species specific discussion as required by the *Rapanos* guidance in order to support the ecological interconnection. Therefore, based on the above, the District did not correctly apply law, regulation, or officially promulgated policy when it determined that the wetland comprised of identifiers 12-IW-59, 12-IW-58A, and 12-IW-58B was adjacent to the Lake.

**ACTION:** The District shall reconsider its AJD by utilizing existing applicable regulation, guidance, and policy to determine whether the wetland comprised of identifiers 12-IW-59, 12-IW-58A, and 12-IW-58B is adjacent to a jurisdictional water. The AR should be supplemented accordingly to document and reflect any additional information or data considered in this analysis. This documentation should include a revised AJD form that captures the rationale of the District’s reconsidered decision.

**REASON 2: The District incorrectly applied law, regulation, or officially promulgated policy when it determined that wetland comprised of identifiers 08-IW-26A, and 08-IW-26B was adjacent to the Lake. The Appellant stated this wetland is connected to a non-relatively permanent water (RPW) drainage ditch and would, therefore, require a significant nexus determination in order to determine if it is jurisdictional.**

**FINDING:** This reason for appeal has merit.

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<sup>13</sup> AR pages 50-51.

<sup>14</sup> AR page 51.

<sup>15</sup> Grumbles, et al. 2008. p 6.



DISCUSSION: In their RFA, the Appellant stated that the wetland comprised of identifiers 08-IW-26A and 08-IW-26A is not adjacent to the Lake, but is rather connected to a non-RPW drainage ditch. The Appellant believes that because the wetland is connected to a non-RPW drainage ditch, a significant nexus analysis is required in order to determine whether this wetland is jurisdictional. The Appellant clarified during the appeal meeting that they believe the wetland is not adjacent to the Lake due to the lack of an ecological interconnection with the Lake. They further stated the non-RPW drainage ditch with which they believe the wetland is connected was man-made. Here, the Appellant is essentially arguing that the wetland is not adjacent to the Lake, but rather to the non-RPW, man-made drainage ditch.

As previously discussed, the term “adjacent” is defined in Regulation at 33 CFR § 328.3(c) and the revised *Rapanos* guidance further clarifies the regulatory definition, stating that wetlands are adjacent if one of three criteria are satisfied. First, a wetland is adjacent when there is an unbroken surface or shallow subsurface connection to jurisdictional waters.<sup>16</sup> The *Rapanos* guidance states that, even when not jurisdictional themselves, ditches may contribute to a surface hydrologic connection.<sup>17</sup> In addition to the first criteria, the *Rapanos* guidance indicates a wetland is adjacent when it is physically separated from jurisdictional waters by man-made dikes or barriers, natural river berms, beach dunes, and the like. And finally, the third *Rapanos* guidance adjacency criteria states that a wetland is adjacent when its proximity to a jurisdictional water is reasonably close.<sup>18</sup>

It is important to note that the regulatory definition and *Rapanos* criteria both indicate adjacency is between a wetland and a jurisdictional feature, not between a wetland and a non-jurisdictional feature. As a result, the Appellant is incorrect in their belief that the wetland in question should be adjacent to what they consider a non-jurisdictional drainage ditch. However, based on regulation and guidance, this same non-jurisdictional drainage ditch could serve as part of an unbroken surface hydrologic connection between the wetland and a jurisdictional water.

In the July 25, 2017 MFR, the District acknowledged that the Appellant believed the roadside ditch may have conveyed flow from the wetland to the Lake.<sup>19</sup> Along with this acknowledgement, the District provided inconsistent descriptions regarding the flow path between the wetland and the Lake. For example, in one location, the District provided a definitive statement that, “These wetlands have a discrete surface connection to downstream jurisdictional waters...”<sup>20</sup> while in another location the District provided a less definitive statement that, “...it is unclear to where the currently-existing culvert flows...” but that, “...it is highly probable that any water introduced into the managed drainage system...is ultimately routed to the [Lake].”<sup>21</sup> But as with the wetland associated with the first reason for appeal, it was not necessary for the District to include detailed information about the flow path in the AR as they did not rely on an unbroken surface or shallow subsurface connection to jurisdictional

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<sup>16</sup> Grumbles, et al. 2008. p. 5.

<sup>17</sup> Grumbles, et al. 2008. p. 12.

<sup>18</sup> Grumbles, et al. 2008. p. 5-6.

<sup>19</sup> AR page 53.

<sup>20</sup> AR page 52.

<sup>21</sup> AR page 53.

waters to establish adjacency, but rather, they relied upon the concept that the wetland's proximity to a jurisdictional water was reasonably close.<sup>22</sup>

As previously discussed, in order to conclude that the wetland comprised of identifiers 08-IW-26A and 08-IW-26A was reasonably close to the Lake, the District conducted a broad assessment that included other wetlands in the area and was not specific to this wetland. In addition, the assessment lacked a species specific discussion as required by the *Rapanos* guidance in order to support the ecological interconnection. It should be noted that the District did mention in the July 25, 2017 MFR that waterfowl, including the black-necked stilt and the white-faced ibis, contribute to an ecological interconnection between the wetland and the Lake.<sup>23</sup> This entire approach is inconsistent with the *Rapanos* guidance which limits the assessment to the wetland in question and indicates that the assessment cannot be supported by migratory species. Therefore, based on the above, the District did not correctly apply law, regulation, or officially promulgated policy when it determined that the wetland comprised of identifiers 08-IW-26A and 08-IW-26A was adjacent to the Lake.

**ACTION:** The District shall reconsider its AJD by utilizing existing applicable regulation, guidance, and policy to determine whether the wetland comprised of identifiers 08-IW-26A and 08-IW-26A is adjacent to a jurisdictional water. The AR should be supplemented accordingly to document and reflect any additional information or data considered in this analysis. This documentation should include a revised AJD form that captures the rationale of the District's reconsidered decision.

**Conclusion:** For the reasons stated above, I have determined that these two reasons for appeal have merit. The AJD is remanded to the Sacramento District for reconsideration consistent with the discussion detailed above. The final Corps decision on jurisdiction in this case will be the Sacramento District Engineer's decision made pursuant to this remand.



Thomas J. Cavanaugh  
Administrative Appeal Review Officer

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<sup>22</sup> See footnote 9.

<sup>23</sup> AR page 53.