ADMINISTRATIVE APPEAL DECISION
APPROVED JURISDICTIONAL DETERMINATION
Ulrich Gravel, Mr. Wes Ulrich
Omaha District
NWO-2022-01243

Division Engineer: Brigadier General William C. Hannan, Jr., Northwestern Division[1]

Review Officer: Melinda Larsen, Northwestern Division (NWD)

Appellant/Applicant: Mr. Wes Ulrich, Ulrich Gravel

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

Date Acceptable Request for Appeal Received: February 5, 2025

Summary of Appeal Decision: Mr. Wes Ulrich, of Ulrich Gravel, Inc. (Appellant), is appealing the Approved Jurisdictional Determination (AJD) completed by the Omaha District (District) and dated December 26, 2024. The review area is located between East River Road and the North Loup River, in Sections 4 and 5, Township 19 North, Range 14 West, Valley County, Nebraska. The Appellant believes that the District erred in concluding that wetlands 1, 2, 3, and 4 are waters of the United States because they are adjacent to an offsite relatively permanent water (RPW). The Appellant submitted five (5) reasons for appeal. As detailed below, I find that the reasons for appeal do not have merit. The final Corps decision on jurisdiction in this case remains the Omaha District's December 26, 2024, decision.

Background Information: The review area is located at latitude 41.645757°, longitude -98.944360°. The District finalized an AJD on July 30, 2024, concluding that there are approximately 17 acres of wetlands within the review that are regulated under section 404 of the Clean Water Act (CWA). The Appellant submitted a request for appeal (RFA) on August 30, 2024, which contained new information. The Appeal request was returned to the District for reconsideration in accordance with 33 CFR 331.6(c). The District finalized the reconsidered AJD on December 26, 2024, with unchanged conclusions about the nature and quantity of jurisdictional wetlands on the property. The Appellant submitted a new appeal request on February 5, 2025. The reasons for appeal were submitted as a narrative statement, which the RO summarized into 4 reasons for appeal. These reasons for appeal were approved by the Appellant's

[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 AJD.

consultant via email on February 12, 2025. NWD determined the request for appeal complete and accepted it on February 25, 2025.

Information Received and its Disposition During the Appeal

1. Request for Appeal submitted by the Appellant's counsel, Mr. Keith Tillotson, on February 5, 2025.
2. Notice from NWD to the Appellant accepting the request for appeal and stating that the request met the required criteria for an administrative appeal, sent by letter dated February 25, 2025.
3. The AR, a copy of which the District provided to NWD and the Appellant on March 24, 2025.

Waters of the United States: Waters of the United States are those waters that are subject to Corps jurisdiction under Section 404 of the CWA. The final "Revised Definition of 'Waters of the United States"' rule was published in the Federal Register on January 18, 2023, and took effect on March 20, 2023 (2023 rule). In light of the May 25, 2023, decision in *Sackett v. EPA, (Sackett)* the 2023 rule was amended by the conforming rule, which took effect on September 8, 2023. However, due to litigation, the 2023 Rule, as amended, is not currently operative in certain states and for certain parties. Where the 2023 rule, as amended, is not operative, the pre-2015 regulatory regime[2] is in effect. Under both regimes, the U.S. Environmental Protection Agency and the Department of the Army (the agencies) are interpreting "waters of the United States" consistent with the Supreme Court's decision in *Sackett.* The subject Approved Jurisdictional Determination appeal is located in Nebraska, which, as of the date of the District's decision, is one of the states where the pre-2015 regulatory regime is in effect.[3]

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

REASON FOR APPEAL 1: The Appellant believes the District erred in evaluating the wetlands for adjacency to the perennial ditch because the hydrology for wetlands 1–4 comes from the North Loup River, and not the perennial ditch.

FINDING: This reason for appeal does not have merit.

ACTION: No further action.

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[2] The "pre-2015 regulatory regime" refers to the agencies' pre-2015 definition of "waters of the United States," implemented consistent with relevant case law and longstanding practice, as informed by applicable guidance, training, and experience.
[3] *Operative Definition of "Waters of the United States"*; Environmental Protection Agency https://www.epa.gov/wotus/definition-waters-united-states-rule-status-and-litigation-update.

DISCUSSION: In this reason for appeal, the Appellant asserts that the District should have evaluated the subject wetlands for adjacency to the North Loup River, rather than the perennial ditch.

Under the pre-2015 regulatory regime, the published definition of wetlands is as follows:

> The term "wetlands" means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.[4]

There does not appear to be a disagreement between the parties that the review area contains resources that meet the wetland definition. The District consolidated information provided by the Appellant for two review areas (East Masin Tract and West Masin Tract), but did not modify the consultant's delineated boundaries of those wetlands, and there is no information in the AR that suggests there is a disagreement about the submitted delineation materials.

Procedurally, once a district has identified the boundaries of wetlands in a review area, it must then determine if those wetlands meet the definition of waters of the United States. For the pre-2015 regulatory regime, consistent with *Sackett*, a wetland must be adjacent to an otherwise jurisdictional water (i.e., traditional navigable water, interstate water, territorial sea, or relatively permanent tributary or impoundment). Adjacent means "having a continuous surface connection." Tributaries are natural, man-altered, or man-made water bodies that flow directly or indirectly into a traditional navigable water (TNW). To be jurisdictional, a tributary must be relatively permanent. Relatively permanent waters (RPWs) include tributaries that typically have flowing or standing water year-round, or continuously at least seasonally (e.g., typically three months).[5]

The District identified the offsite drainage ditch as an RPW, stating that "flowing water, bed and bank were observed during the Corps' site visit conducted on May 22, 2024," and that review of aerial photos indicates that water is continuously flowing.[6] Both the District and the Appellant identify the ditch as perennial.

The District determined that wetlands 1–4 directly abut the RPW ditch, which is just outside the review area to the east.[7] The District's written description and the photos

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[4] 51 Fed. Reg. 41251 (Nov. 13, 1986).
[5] Presentation, "Updates on "Waters of the United States"": https://www.epa.gov/system/files/documents/2024-09/wotus-overview_9-24-24_508c.pdf, slides 44–45. The duration of seasonal flowing or standing water may vary regionally, but the tributary must have predictable flowing or standing water seasonally.
[6] AR 000009.
[7] AR 0000010–11.

from the site visit dated May 22, 2024, support this conclusion. The District identified a fringe wetland outside the review area and abutting the drainage ditch that is contiguous with wetlands 1 and 2. The District also determined that wetlands 3 and 4 were functioning as one wetland, and that this larger feature (wetland 3/4) directly abuts the drainage ditch. The District described a continuity of wetland vegetation, a lack of topographic break between the wetlands and the ditch, and provided photographic evidence of connectivity, as demonstrated at AR 19, 21, and 23–25. This information adequately demonstrates that wetlands 1–4 abut the RPW ditch.

As discussed above, there does not appear to be any dispute about the wetland status of the areas identified as wetlands 1–4. The information submitted by the consultant indicates that the areas were delineated in accordance with the 1987 Corps of Engineers Wetland Delineation Manual (’87 Manual) and the Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Great Plains Region.[8]

Relative to the source of hydrology, there is no law, regulation, executive order, or officially promulgated Corps policy guidance which requires a particular source of hydrology when determining the jurisdictional status of a wetland area. The ’87 Manual, in discussing the influencing factors of hydrology, lists possible sources as: “runoff from direct precipitation, headwater or backwater flooding, tidal influence, ground water, or some combination of these sources,”[9] and defines inundation as: “A condition in which water *from any source* temporarily or permanently covers a land surface”[10] (emphasis added). Because the AR adequately supports the District’s conclusion that the ditch is an RPW, that the wetlands abut the ditch, and because the source of hydrology is not a relevant factor in making a determination about the jurisdictional status of a wetland, reason for appeal 1 does not have merit.

REASON FOR APPEAL 2: The Appellant states that there is insufficient information to determine the extent of surface water west of the perennial ditch in wetlands 1–4, outside of the ~5-foot wetland fringe.

FINDING: This reason for appeal does not have merit.

ACTION: No action.

DISCUSSION: In its AJD, the District documented that wetlands 1 and 2 are contiguous with the 5-foot wetland fringe associated with the drainage ditch along and outside the eastern boundary of the review area. The District did not observe any upland break between the wetlands 1 and 2 and the wetland fringe, or between the wetland fringe and the drainage ditch, thus concluding that wetlands 1 and 2 have a continuous

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[8] AR 000046.
[9] Environmental Laboratory. (1987). "Corps of Engineers Wetlands Delineation Manual," Technical Report Y-87-1, U.S. Army Engineer Waterways Experiment Station, Vicksburg, MS., page 29.
[10] Ibid., page A6.

surface connection (CSC) with the drainage ditch, which the District determined was relatively permanent.[11] Similarly, for wetlands 3 and 4, the District determined they are functioning as one wetland, and that they directly abut the RPW drainage ditch.[12]

The Appellant states that there is not enough evidence to determine the extent of surface water west of the drainage ditch outside of the 5-foot wetland fringe. This reason for appeal seems to rest on an incorrect assumption that surface water needs to be present to establish a CSC. However, in accordance with applicable guidance and longstanding practice, water is not required to be continuously present between the wetland and the requisite water in order to satisfy the CSC requirement.[13] The District determined, and adequately supported, that the wetlands within the review area are contiguous with the wetland fringe that abuts the drainage ditch, utilizing data collected from desktop tools, data collected during a May 22, 2024 site visit, and information submitted on behalf of the Appellant in delineation reports. Because there is no requirement for surface water as part of a CSC, and because the District adequately supported its conclusion that wetlands 1–4 are contiguous to the ditch, this reason for appeal does not have merit.

REASON FOR APPEAL 3: The Appellant further states that any surface water present west of the drainage ditch is likely due to cattle compaction, and that absent the cattle disturbance, the wetland hydrology would likely be subsurface rather than surface in wetlands 1–4

FINDING: This reason for appeal does not have merit.

ACTION: No further action.

DISCUSSION: As previously stated in reason for appeal 3, surface water is not required to be continuously present between the wetland and the tributary (or other requisite water), in order to satisfy the CSC requirement. Surface water is also not required to be present in order to meet hydrology requirements associated with wetland delineations. The wetland definition, cited above in Reason for Appeal 1, uses the phrase “normal circumstances,” and wetland delineations conducted in accordance with the 1987 wetland delineation manual rely on this definition in providing guidance for conducting delineations. According to the manual:

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[11] AR 000010–11.
[12] AR 000011.
[13] December 2, 2008, *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States*, page 7, footnote 28; “Memorandum on NWK-2024-00392” and “Memorandum on LRB-2023-00451”, available at https://www.epa.gov/wotus/pre-2015-regulatory-regime (note that these memos were rescinded and replaced by updated guidance dated March 12, 2025, but were still in place at the time of the District’s decision on the subject AJD).

> "Normal circumstances" has been further defined as "the *soil and hydrologic conditions* that are normally present, without regard to whether the vegetation has been removed." The determination of whether normal circumstances exist in a disturbed area "involves an evaluation of the extent and relative permanence of the physical alteration of wetlands hydrology and hydrophytic vegetation" and consideration of the "purpose and cause of the physical alterations to hydrology and vegetation."[14]

MILCO Environmental Services, on behalf of the Appellant, submitted wetland delineations on December 12, 2023 (East Half Masin Tract) and on December 14, 2023 (West Half Masin Tract).[15] The report for the West Half consisted of a desktop delineation, while the East Half report includes observations recorded in the field. MILCO provided four wetland data forms for the East Half delineation, all of which state that "normal circumstances" are present.[16]

Agricultural practices, including cattle grazing, can have an effect on wetlands, and have the potential to alter the soil surface to the extent that surface water is present where it might not otherwise have been. However, the presence or absence of surface water does not by itself reflect the presence or absence of wetlands, or of a CSC. The AR does not contain any information that disputes the presence of cattle compaction as reported by MILCO or anything that contradicts the determination that the conditions on the site represent normal circumstances. The District adequately supported its determination of the presence and extent of wetlands and supported the conclusion that there is a CSC between the wetlands and the RPW ditch, by documenting that the wetland is contiguous between the review area and the ditch. For these reasons, reason for appeal 3 does not have merit.

REASON FOR APPEAL 4: The Appellant believes the District omitted material facts by not evaluating the North Loup River's hydrologic influence over wetlands 1–4

FINDING: This reason for appeal does not have merit.

ACTION: No further action.

DISCUSSION: As discussed above in reason for appeal 1, the source of hydrology for a wetland is not one of the determining factors for evaluating wetland hydrology or jurisdiction. Therefore, this reason for appeal does not have merit.

REASON FOR APPEAL 5: The Appellant believes wetlands 1–4 are not adjacent to the North Loup River because they are separated from the river by forested uplands.

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[14] Ibid., page 4 (emphasis added).
[15] AR 000040-112 (East Half Masin Tract); AR 000113-172 (West Half Masin Tract). The AR contains an additional report regarding the East Half Masin Tract, dated November 30, 2022. AR 000295–356.
[16] AR 000090–97.

FINDING: This reason for appeal does not have merit.

ACTION: No further action.

DISCUSSION: As discussed above in reason for appeal 1, the source of hydrology for a wetland is not one of the determining factors for evaluating jurisdiction. Additionally, the District made no assertions in its AJD that the wetlands were adjacent to the North Loup River. The District concluded that wetlands 1–4 are adjacent to the RPW drainage ditch east of the review area, not to the river, and provided adequate documentation to support its conclusions. Therefore, reason for appeal 5 does not have merit.

Conclusion: After reviewing and evaluating the RFA, the District's AR, and recommendation of the RO, I have determined that the District's conclusions regarding the jurisdictional status of wetlands 1–4 is reasonable, supported by the AR, and does not conflict with laws, regulations, executive orders, or officially promulgated policies of the Corps Regulatory Program. The RFA does not have merit and remand of the District's decision is not warranted. The final Corps decision on jurisdiction in this case remains the Omaha District's initial decision.

06/26/2025
DATE OF APPEAL DECISION

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Joyce M. McDonald
Chief, Operations and Regulatory
Northwestern Division