ADMINISTRATIVE APPEAL DECISION
APPROVED JURISDICTIONAL DETERMINATION
North Santiam Paving Company
Portland District
NWP-2024-00304

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

Review Officer: Melinda Larsen, Northwestern Division (NWD)

Appellant/Applicant: Mr. Dylan Bochsler, North Santiam Paving Company

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

Date Acceptable Request for Appeal Received: February 5, 2025

Summary of Appeal Decision: Mr. John van Staveren of Pacific Habitat Services (consultant), on behalf of Mr. Dylan Bochsler, North Santiam Paving Company (Appellant), is appealing the Approved Jurisdictional Determination (AJD) completed by the Portland District (District) on December 6, 2024. The review area is located at 47129 East Lyons Mill City Drive in Mill City, Linn County, Oregon. The Appellant believes that the District erred in concluding that Pond A is a water of the United States. The Appellant submitted three (3) reasons for appeal, which are discussed below. As detailed below, I find that all three reasons for appeal have merit. Therefore, the AJD decision is being remanded to the Portland District Engineer for further analysis and documentation in accordance with 33 C.F.R. § 331.10(b).

Background Information: The review area is located at approximately 44.7631° latitude, -122.5407° longitude. The District finalized an AJD on December 6, 2024, concluding that the following waters within the review area are waters of the United States in accordance with the definitions at 33 C.F.R. § 328.3, and are regulated under section 404 of the Clean Water Act (CWA):

Paragraph (a)(2) impoundments - Ponds B and C, 7.45 acres
Paragraph (a)(3) tributaries - Cow Creek and Walker Creek
Paragraph (a)(4) wetlands – wetlands B, C, D, E, F, and G, totaling 1.06 acre
Paragraph (a)(5) Pond – Pond A, 5.10 acres

The District also concluded that Pond D (a 6.94-acre gravel mining pond) and Wetland A (0.05 acre) are not waters of the United States. The Appellant submitted a request for appeal (RFA) on February 5, 2025, containing three reasons for appeal. The Appellant

[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.

is only challenging the jurisdictional status of Pond A. NWD determined the request for appeal complete and accepted it on March 4, 2025.

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

Pursuant to 33 C.F.R. § 331.2, the AR is limited to information contained in the record as of the date of the NAO/NAP form (December 6, 2024).[2] All information contained within the provided AR and the RFA was considered in this appeal decision. No additional information was solicited or received outside of the AR for this review.

1. RFA submitted by the Appellant's consultant, Mr. John van Staveren, 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 March 4, 2025.
3. The AR, a copy of which the District provided to NWD and the Appellant on March 18, 2025.
4. An informal virtual appeal meeting, in accordance with 33 C.F.R. § 331.7 on May 1, 2025. The goal of the appeal meeting was to summarize and clarify the Appellant's and the District's positions as they relate to the appeal. Topics discussed at the appeal meeting are summarized in the document titled "Final MFR Appeal meeting NWP-2024-00304" (Appeal MFR). A draft of this document was circulated to the appeal meeting attendees on May 5, 2025, and it was finalized on May 22, 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 is in effect.[3] 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

[2] AR 000022.

[3] 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.

Jurisdictional Determination appeal is located in Oregon, which, as of the date of the District's decision, is one of the states where the 2023 rule, as amended, is in effect.[4]

It is not within a District Engineer's responsibility or scope of expertise to directly interpret Supreme Court decisions. District Engineers, and by extension, regulatory staff, apply regulation, guidance, and policy that is generated by the agencies in response to such decisions or actions by Congress and the courts. The sufficiency of regulation, guidance, and policy available to a district is beyond the scope of the appeal process, because an appeal is associated with a specific Corps action and reasons for appeal are limited to, for example, a district's application of regulation, guidance, or policy specific to that action. Therefore, discussions in this document will focus on available regulation, guidance, and policy rather than court decisions.

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

REASON FOR APPEAL 1: The Appellant asserts that Pond A was constructed in uplands, for the purposes of aggregate mining and therefore meets the exclusion from the definition of WOTUS under 33 C.F.R. § 328.3(b)(5).

REASON FOR APPEAL 2: The Appellant asserts that the location of the culvert, perched above the OHWM of the Pond and only functioning during high flow events, does not meet the relatively permanent standard for the current WOTUS regulations.

REASON FOR APPEAL 3: The Appellant states that Pond A is currently used for ongoing mining activities, which further supports its exclusion from the definition of WOTUS under 33 C.F.R. § 328.3(b)(5).

FINDING: All three reasons for appeal have merit.

ACTION: The AJD is remanded to the Portland District Engineer for reconsideration, additional evaluation, and documentation sufficient to support the decision. Specifically, the District should re-evaluate the status of Pond A in accordance with applicable exclusions and categories of waters of the United States and provide a complete and detailed rationale supporting its conclusions in accordance with the current regulatory regime. The District should ensure that its conclusions are supported by substantial evidence in the AR. Additional information is provided in the discussion below.

DISCUSSION: The Appellant's reasons for appeal refer to the exclusion listed at paragraph (b)(5) of the 2023 rule, but the RO confirmed during the appeal meeting that the intent was to refer to the paragraph (b)(7) exclusion,[5] which reads as follows:

[4]*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.
[5] Final MFR Appeal Meeting NWP-2024-00304, p. 2.

(b)(7) Waterfilled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of waters of the United States.

In evaluating the jurisdictional status of waters, Corps districts are directed to ensure that the information in the AR adequately supports any AJD and 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." Additionally, districts are directed to clearly document their reasoning when reaching a conclusion that contradicts information and data submitted by an applicant.[6]

Procedurally, the 2023 rule indicates that districts should generally first determine if a water qualifies as an (a)(1) traditional navigable water, territorial sea, or interstate water, then whether any of the paragraph (b) exclusions apply, and then evaluate the water under paragraphs (a)(2) (impoundments), (a)(3) (tributaries), or (a)(4) (wetlands) prior to evaluating a water under paragraph (a)(5).[7] Although not every jurisdictional determination requires a detailed analysis of every water under every category, in this case since Pond A is associated with a mining operation and there appears to be conflicting information regarding the historic location of Walker Creek, the District should, at minimum, have evaluated Pond A against the (b)(7) exclusion, and provided rationale for its conclusions in the MFR, then looked at whether Pond A met any of the other (a)(2) through (a)(4) criteria before evaluating it as an (a)(5) water.

In order to determine whether Pond A is not an excluded water under (b)(7), the District would need to show either that it was not created in dry land for the purpose of obtaining fill, sand, or gravel, or, if it was created in dry land, that the excavation operation has been abandoned and the resulting water meets the definition of waters of the United States. Alternatively, if the District determined the water did not meet any of the paragraph (b) exclusions or any of the paragraph (a)(2) through (4) definitions, to support that the water meets the definition of an (a)(5) jurisdictional water, the District would need to show that the potential (a)(5) water meets the relatively permanent standard, meaning it is a relatively permanent, standing or continuously flowing body of water with a continuous surface connection to a traditional navigable water, territorial sea, or tributary that is relatively permanent.[8]

During the appeal meeting, the District stated that it had determined the Pond A was constructed at least partially within the footprint of Walker Creek.[9] However, the resources the District included in the AR do not adequately depict this conclusion, nor

[6] RGL 16-01 Q&A #8.
[7] 88 FR 3067.
[8] 88 FR 3101.
[9] Final MFR Appeal Meeting NWP-2024-00304 p.4.

does the AR contain any narrative regarding this conclusion. The flowpath of Walker Creek on some of the maps in the AR could be interpreted as being within the footprint of Pond A,[10] but others are unclear as to the location of both Ponds in relation to Walker Creek.[11] Additionally, in the Appellant's AJD request, it states that "Pond B was constructed in the location of Walker Creek,"[12] but does not make any such statement regarding Pond A. In the absence of a discussion of these apparent discrepancies, or a clearly documented rationale for how the District determined Pond A was constructed in the footprint of Walker Creek, the District conclusion is unsupported.

In an email dated November 20, 2024, the Appellant states that "Ponds A through C are currently not used for mining purposes," indicating that Pond A is currently being filled and could potentially be mined again in the future. This statement directly relates to the abandonment component of the (b)(7) exclusion. "Currently not used for mining purposes" is not the same as "abandoned." The Appellant has stated that Pond A is currently being filled, it is within the overall mining operation, and future mining is possible. On remand, in addition to documenting a clear rationale for its conclusions regarding whether Pond A was constructed in dry land, the District should also include a discussion of its conclusions regarding abandonment.

The District identified Pond A as an (a)(5) "additional water," with the following rationale:

> Pond A is 5.10 acres (ac) and is located in the western portion of the Review Area. Pond A was excavated for mining and is connected to Pond B by a culvert in the northeast corner. The culvert is placed above the ordinary high water mark and Pond A is currently used for flood control; however, Pond A potentially contributes flow to Pond B and Walker Creek during high flow and storm events. Pond A is not currently used for mining purposes. The source of hydrology for Pond A is rainfall and groundwater. Since 1994, aerial imagery (Google Earth) shows that Pond A contains water year-round every year a satellite image was taken. Therefore, Pond A contains relatively permanent standing water. The Corps has determined that Pond A is a water of the U.S.[13]

According to the 2023 rule, as amended, (a)(5) waters are

> Intrastate lakes and Ponds not identified in paragraphs (a)(1) through (4) of this section that are relatively permanent, standing or continuously flowing bodies of water with a continuous surface connection to the waters identified in paragraph (a)(1) or (a)(3) of this section.[14]

[10] See, e.g., AR 000015, 000074, 00106.
[11] See, e.g., AR 000038, 000168.
[12] AR 000101.
[13] AR 000012.
[14] 88 FR 61969.

All of the aerial imagery in the AR that depicts Pond A reflects that water is present at various times of the year under various climatic conditions.[15] This, along with the District's description of its observations, adequately supports that Pond A contains standing water at least seasonally. However, the AR does not clearly establish that Pond A exhibits a continuous surface connection to Walker Creek, the downstream (a)(3) tributary. Note that per the regulatory definition above, an (a)(5) water cannot be considered jurisdictional based solely on adjacency to an impoundment, which is how the District classified Pond B. The District clearly states that the culvert connecting Pond A to Pond B is placed above the Ordinary High Water Mark (OHWM), and does not mention a continuous surface connection in its description of Pond A. The Appellant stated in its original submittal that Pond B was constructed in the location of Walker Creek, and that Pond A "rarely if ever receives or loses water via surface flows."[16] The District describes Pond B as being an impoundment of Walker Creek but does not make any assertions about Pond A's relationship to Walker Creek, with the exception of "Pond A potentially contributes flow to Pond B and Walker Creek during high flow and storm events." Potential contribution of flow is not adequate to establish that a continuous surface connection exists between Pond A and a downstream tributary, traditional navigable water, or territorial sea.

In accordance with policy guidance issued by the agencies, culverts and other features can serve as part of a continuous surface connection, depending on factual context, such as length of the connection and physical indicators of flow that would demonstrate a physical connection.[17] Thus, in the absence of actual observations of flow, indicators of an OHWM could be provided as one line of evidence supporting flow through the culvert. However, the District did not provide any evidence of a continuous surface connection outside of "potentially contributes flow" which is not adequate to support a conclusion.

Because there is no evidence in the AR supporting that the District adequately considered or documented whether Pond A meets one of the paragraph (b) exclusions, and because the District failed to establish that Pond A has a continuous surface connection to an (a)(1) traditional navigable water, territorial sea, or interstate water, or an (a)(3) tributary, reasons for appeal one, two, and three have merit.

Conclusion: After reviewing and evaluating the RFA, the District's AR, and recommendation of the RO, and for the reasons stated above, I find that this appeal has merit. Therefore, the AJD decision is remanded to the Portland District Engineer for further analysis and documentation in accordance with 33 C.F.R. § 331.10(b). The Portland District Engineer's decision made pursuant to this remand becomes the final Corps decision. This concludes the Administrative Appeals Process.

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[15] See, e.g., AR 000045–46, 000074, 000108–110.
[16] AR000101.
[17] Memorandum on NWK-2022-00809, June 25, 2024 (note that this memorandum was rescinded on March 12, 2025, due to updated guidance released by the agencies).

August 7, 2025
DATE OF APPEAL DECISION

Shawn Worthington

Shawn Worthington
Acting Chief, Operations and Regulatory
Northwestern Division