

**ADMINISTRATIVE APPEAL DECISION
APPROVED JURISDICTIONAL DETERMINATION
Mr. Kirk Mathewson
Seattle District
NWS-2023-00055**

Division Engineer: Brigadier General William C. Hannan, Jr., Northwestern Division¹

Review Officer (RO): Melinda Larsen, Northwestern Division (NWD)

Appellant: Mr. Kirk Mathewson

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

Date Acceptable Request for Appeal Received: June 11, 2025

Summary of Appeal Decision: Mr. Kirk Mathewson is appealing the Approved Jurisdictional Determination (AJD), completed by the Seattle District (District), and dated April 15, 2025. The Appellant submitted four narrative reasons for appeal, stating that the District erred in its conclusion that Drainage 1 is a water of the United States. As detailed below, I find that reason for appeal 2 has merit, and reasons for appeal 1, 3, and 4 do not have merit. Therefore, the AJD is being remanded to the Seattle 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 905 3rd Street South, at approximately latitude 47.6686, and longitude -122.20374. The District received a request for a jurisdictional determination from the Appellant's consultant, Wetland Resources Environmental Consulting, on October 11, 2023. The District finalized the AJD on April 15, 2025. In the AJD, the District concluded that the U.S. Army Corps of Engineers (Corps) has CWA jurisdiction over an approximately 700-foot drainage feature (Drainage 1) within the review area, having determined the feature is a relatively permanent tributary that connects indirectly to Lake Washington, a traditional navigable water (TNW). On June 11, 2025, Mr. Kit Roth of Goldfarb & Huck Roth Riojas, PLLC, submitted a request for appeal (RFA) on behalf of the Appellant. The RFA contains four narrative reasons for appeal, as described below. NWD determined the RFA complete and accepted it on July 8, 2025.

Information Received and its Disposition During the Appeal: The Administrative Record (AR) is limited to information contained in the record as of the date of the

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.

Notification of Administrative Appeal Options and Process form, which is April 15, 2025. No new information may be submitted on appeal; however, 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 AJD decision. Consistent with Corps regulations, 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 information received during this appeal review, and its disposition, is as follows:

1. RFA sent by the Appellant's counsel, Mr. Kit Roth, received by NWD on June 11, 2025.
2. Notice from NWD to the Appellant accepting the RFA and stating that the RFA met the required criteria for an administrative appeal, sent by letter dated July 8, 2025.
3. The AR, a copy of which the District provided to NWD and the Appellant on July 15, 2025.

Waters of the United States: Waters of the United States (WOTUS) are those waters that are subject to Corps jurisdiction under Section 404 of the Clean Water Act. 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, Supreme Court decision in *Sackett v. Environmental Protection Agency*, 598 U.S. 651 (2023), the 2023 rule was amended by the conforming rule, which took effect on September 8, 2023 (2023 rule, as amended). Due to litigation, some states are not currently implementing the 2023 rule, as amended. The subject AJD appeal is located in Washington, which, as of the date of the District's decision, is one of the states where the 2023 rule, as amended, is in effect.²

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 interpretation of court decisions.

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

As noted above, the RFA contained four narrative reasons for appeal. The RO summarized the reasons for appeal, as described below. The summarized reasons were approved by Mr. Roth via email on October 20, 2025.

² See <https://www.epa.gov/wotus/definition-waters-united-states-rule-status-and-litigation-update>.

Reason for appeal 1: The Appellant asserts that because the District determined the feature in question to be intermittent, it cannot therefore be relatively permanent, in accordance with the *Rapanos* and *Sackett* decisions.

Finding: This reason for appeal does not have merit.

Action: No further action.

Discussion: In this reason for appeal, the Appellant states that the District acknowledges in its AJD that the Streamflow Duration Assessment Method (SDAM) indicates intermittent flow in the subject feature.³ The Appellant cites the *Rapanos* and *Sackett* Supreme Court Decisions,⁴ claiming that those decisions establish that intermittent and ephemeral channels are not waters of the United States.⁵ As discussed above, district staff evaluate jurisdiction based regulation, guidance, and policy generated by the agencies in response to such decisions.

In accordance with the 2023 rule, as amended, tributaries of traditional navigable waters (TNWs), territorial seas, interstate waters or jurisdictional impoundments that are relatively permanent, standing or continuously flowing bodies of water are jurisdictional.⁶ Tributaries can include rivers, streams, lakes, ponds, and impoundments, as well as ditches and canals.⁷

The 2023 rule, as amended does not exclude intermittent tributaries from being relatively permanent waters. The relatively permanent standard encompasses surface waters that have flowing or standing water year-round or continuously during certain times of the year. There is no prescribed duration of flow required for a feature to meet the relatively permanent standard, but it excludes waters with flowing or standing water for only a short duration in direct response to precipitation.”⁸ Thus, the Appellant’s assertion that Drainage 1 cannot be relatively permanent because it is intermittent does not have merit.

Reason for appeal 2: The Appellant asserts that the evidence does not support a relatively permanent finding for Drainage 1, stating that in order to assert jurisdiction, the District “must be able to point to affirmative evidence in the record,” that it cannot rely on speculative or hypothetical evidence not in the record.

Finding: This reason for appeal has merit.

³ AR 013.

⁴ *Rapanos v. United States*, 547 U.S. 715 (2006), and *Sackett v. EPA*, 598 U.S. 651 (2023), respectively.

⁵ RFA p. 5.

⁶ 88 FR 61968.

⁷ 88 FR 3080.

⁸ 88 FR 3084.

Action: Reason for appeal 2 is remanded to the Seattle District Engineer for reconsideration, additional evaluation, and documentation sufficient to support the decision. Specifically, the District should re-evaluate the status of Drainage 1, providing complete and detailed rationale supporting its conclusions in accordance with the most current regulatory regime, policy, and guidance. In particular, the District should fully and accurately describe Drainage 1, including identifying the upstream and downstream limits of the reach, clearly describing how the reach was determined and how the flow regime was determined. If the flow regime is inconsistent throughout the reach, or the flow regime is based on flow characteristics that are not present at the downstream end of the reach, the District should describe how flow regime was determined for each portion of the tributary and justify why the overall flow regime determination is appropriate. Statements regarding wet or dry season dates should be supported by data in the AR.

Discussion: In this reason for appeal, the Appellant states that the District's determination that Drainage 1 is relatively permanent is unsupported by information in the AR, stating that the District cannot rely on speculation or hypothetical evidence that is not in the record. The Appellant states that the AR (including the SDAM and photographs) demonstrate that flow in Drainage 1 is "highly variable in response to rain events and ceases entirely during periods without rain – i.e., that flow is merely "intermittent."⁹

The Appellant states that there is no evidence in the AR supporting that the District's conclusion that Drainage 1 is relatively permanent, stating that the District relies on "only two alleged pieces of evidence in support of its conclusion, but neither is sufficient (either individually or collectively)."¹⁰ First, the Appellant states that the District provided no support that the ordinary high water mark (OHWM) itself proves relatively permanent flow. Second, the Appellant objects to the District's statement that "data presented by Wetland Resources Environmental Consulting demonstrates that Drainage 1 flows continuously during some months of the year,"¹¹ and again states that Drainage 1 is "merely 'intermittent,' pointing to the discussion of the rainfall prior to the June 6, 2024 survey and citing that as evidence that Drainage 1 flows after major rain events. The Appellant also states that June is not necessarily "dry season" in the region, as the District refers to it, and that specifically, 2024 was wetter than normal. The Appellant states that observed flow on a single day during a wetter than normal period does not indicate continuous flow during the wet season. The Appellant also states a lack of riparian life in Drainage 1 confirms that Drainage 1 lacks an "ecological connection" to navigable waters (i.e., Lake Washington).¹²

The Appellant's statement regarding lack of riparian life is not supported by information contained in the AR. The SDAM provided by the Appellant identified multiple

⁹ RFA p. 5.

¹⁰ RFA p. 5-6.

¹¹ RFA p. 6, citing AR 014.

¹² RFA p.7.

macroinvertebrates, Sitka willow and giant horsetail being present within Drainage 1.¹³ Additionally “Ecological connection” is not the standard required to establish relative permanence under the 2023 Rule, as amended. The District’s task is to identify whether a feature meets the definitions included in the rule, as amended, and associated guidance.

The January 2023 rule defines tributaries as “rivers, streams, lakes, ponds, and impoundments that flow directly or indirectly through another water or waters to a traditional navigable water, the territorial seas, an interstate water, or a paragraph (a)(2) impoundment.”¹⁴ A tributary may flow through multiple downstream waters, including non-jurisdictional features. In evaluating whether a water is jurisdictional as a relatively permanent tributary under paragraph (a)(3) of the 2023 rule, as amended, it must first be determined if the water meets the definition of tributary, then whether that tributary meets the relatively permanent standard.¹⁵ A water is not required to have any particular flow regime to meet the definition of tributary, but the District must support its assertion that the tributary meets the relatively permanent standard in order to claim jurisdiction.

When assessing the jurisdictional status of a ditch, the 2023 rule directs users to evaluate the entire reach of the ditch to determine if it has relatively permanent flow, consistent with the reach approach for tributaries. Additionally, flow characteristics will be evaluated at the farthest downstream limit of the ditch reach (*i.e.*, the point the ditch enters a higher order in the network). Where data indicate the flow characteristics at the downstream limit is not representative of the entire reach of the ditch, the flow characteristics that best characterizes the entire ditch reach will be used.¹⁶

The Appellant is correct that OHWM does not independently indicate relative permanence, as non-relatively permanent features can also exhibit some indicators of an OHWM. The District described several indicators of OHWM, but there is no evidence in the AR that the District relied solely on OHWM as an indicator of relative permanence. The District also stated that it considered information submitted by Wetland Resources Environmental Consulting (WRI).¹⁷ Although the AJD does not explicitly describe the data it is referring to in this statement, there are multiple locations in the information submitted by WRI that refer to the flow regime of Drainage 1. For example, the mitigation plan submitted by WRI and dated January 16, 2023, states that “The watercourse is perennial during years of normal rainfall and does not provide fish habitat,”¹⁸ and an email from WRI, dated April 17, 2024, states “In a normal year flows begin in mid-October and can persist through July.”¹⁹

¹³ AR 489.

¹⁴ 88 FR 3083.

¹⁵ The 2023 rule, as amended, did not alter the definition of tributary but removed the significant nexus standard for jurisdiction.

¹⁶ 88 FR 3113.

¹⁷ AR 014.

¹⁸ AR 105.

¹⁹ AR 403.

However, the AR does not contain information regarding the upstream and downstream limits of the entire reach that includes Drainage 1. In order to adequately evaluate the reach, the up-stream and downstream limits must be identified and evaluated to determine if the observations of flow within the review area are reflective of the entire reach. The District also did not define what it means by “dry season,” and there is no data in the District-provided analyses that indicates whether the referenced June 6, 2024, is included in the dry season for the area. Appellant supplied information included as part of the Stormwater Pollution Prevention Plan implies that the dry season is May 1 – September 30 in areas west of the Cascade Mountains crest, but it is not clear where those dates come from, or their accuracy.²⁰ For these reasons, reason for appeal 2 has merit.

Reason for appeal 3: The Appellant states that the District did not give appropriate weight to evidence that Drainage 1 is not relatively permanent, indicating that the decision does not discuss the SDAM conclusion that the animal life identified in the channel is consistent with intermittent rather than perennial flow, or the photos indicating that Drainage 1 stopped flowing during periods lacking significant rain. The Appellant asserts that, to the extent the District disagrees with this evidence, there is no explanation as to why it disagrees.

Finding: This reason for appeal does not have merit.

Action: No further action.

Discussion: This reason for appeal appears to again reflect the Appellant’s incorrect belief that an intermittent feature cannot be relatively permanent for purposes of CWA jurisdiction. As previously discussed in this document, intermittent streams are not inherently excluded from being RPWs under the 2023 rule, as amended. The District’s AJD does reference the SDAM: “the Streamflow Duration Assessment Method indicates that flow in Drainage 1 is intermittent.”²¹ Although this conclusory statement does not explicitly address the animal life that was identified in Drainage 1, it does not need to because that information is inherent to the SDAM analysis. The Appellant also states that photographs taken in the summer and early fall of 2024 confirming that Drainage 1 is not flowing continuously were ignored by the District. There is no evidence in the AR to support the Appellant’s implication that there is a disagreement about the SDAM conclusion, and while the District did not directly address the photographs, there is also no evidence that it made any particular conclusions one way or the other relative to them. If there is no disagreement regarding the intermittent conclusion, there is no reason for the District to provide an explanation for disagreement. Therefore, reason for appeal 3 does not have merit.

Reason for appeal 4: The Appellant states that even assuming evidence of “relatively continuous flow” during some portions of the year, this evidence is not enough to

²⁰ AR 137.

²¹ AR 013.

support the decision. The Appellant cites *Rapanos*, stating that plain language and logic indicates a feature must be both “seasonal” and a “river.”

Finding: This reason for appeal does not have merit.

Action: No further action.

Discussion: In this reason for appeal, the Appellant asserts that even when Drainage 1 is flowing, it does not exhibit characteristics of a natural stream, stating that the primary source of flow comes from stormwater, and that natural streams rely on factors like groundwater, snowmelt, and inputs from other natural streams. The Appellant additionally claims that the volume of water is typically less than what would be found in a creek or a seasonal river. The Appellant also asserts that the SDAM confirmed that Drainage 1 “does not biologically resemble a relatively permanent natural stream.”

The 2023 rule, as amended indicates that the source of hydrology is not a relevant factor in determining whether a feature meets the relatively permanent standard:

“Implementation of the relatively permanent standard for tributaries in this rule does not require that relatively permanent flow come from particular sources. This rule’s approach is consistent with the plurality opinion in *Rapanos*, which lays out the relatively permanent standard and does not require that relatively permanent waters originate from any particular source. See, e.g., 547 U.S. at 739.” And: the source of a tributary’s flow does not influence its effect on downstream waters, including paragraph (a)(1) waters.”²²

The Appellant’s statement that the SDAM confirms that Drainage 1 does not biologically resemble a relatively permanent natural stream is incorrect. The SDAM analysis makes no such conclusions. SDAM is a rapid-assessment tool designed to assist people in distinguishing ephemeral, intermittent, or perennial streams. It makes no distinctions between natural and manmade or man-altered features, nor does it make any conclusions relative to CWA jurisdiction. It is one of many tools used by regulators, environmental professionals, and the public to better understand site conditions. The 2023 rule, as amended, also makes no distinction between natural, manmade, or man-altered tributaries, when it comes to evaluating such features for jurisdiction.²³

²² 88 FR 3086.

²³ 88 FR 3082.

CONCLUSION: After reviewing and evaluating the Appellant's reasons for appeal, the District's AR, and recommendation of the RO, and for the reasons stated above, I find that this appeal has merit, as detailed in reason for appeal 2. Therefore, the Approved Jurisdictional Determination decision is being remanded to the Seattle District Engineer for further analysis and documentation in accordance with 33 C.F.R. § 331.10(b). The reconsidered AJD should be made consistent with the most current applicable regulations, policy, and guidance. The District Engineer's decision made pursuant to this remand becomes the final Corps permit decision. This concludes the Administrative Appeals Process.

JANUARY 10, 2026
DATE OF APPEAL DECISION

Joyce M. McDonald
Chief, Operations and Regulatory
Northwestern Division