

**ADMINISTRATIVE APPEAL DECISION
CLEAN WATER ACT
TIN CUP, LLC – FILE No. POA-2003-1422
PROFFERED PERMIT
ALASKA DISTRICT**

Review Officer: Elliott N. Carman, U.S. Army Corps of Engineers (Corps),
Southwestern Division

Appellant/Applicant: Tin Cup, LLC

Regulatory Authority: Section 404, Clean Water Act (Section 404)

Date Request for Appeal Received: 10 January 2014

Proffered Permit Appeal Conference: 15 July 2014

1. ACCEPTED REASONS FOR APPEAL. The U.S. Army Corps of Engineers, Pacific Ocean Division (Division) accepted the following reasons for appeal (RFA) submitted by Tin Cup, LLC (Appellant) on 10 January 2014.

1.1 The District incorrectly applied current regulatory criteria and associated guidance for identifying and delineating wetlands when it did not solely rely on the *1987 Corps of Engineers Wetland Delineation Manual*, the only congressionally authorized document for identifying wetlands in the field.

1.2 The subject wetlands are independent of, and separated from wetlands found in Channel B. Therefore, the District omitted material fact when it determined that the subject wetlands were continuous with those found in Channel B.

1.3 Flow measurements within Channel B, regional topography, and the presence of permafrost demonstrate there is no surface or subsurface connection between the subject wetlands and Channel B. Therefore, the District incorrectly applied law, regulation, or officially promulgated policy when it determined that the subject wetlands were connected (adjacent) to Channel B.

1.4 “The contribution from the entire Channel B watershed is less than one percent of total flow in the [Chena River] and is insignificant.” Therefore, the District incorrectly applied law, regulation, or officially promulgated policy when it determined that Channel B, in combination with similarly situated wetlands (including the subject wetland), had a significant nexus with the Chena River, the nearest downstream traditionally navigable water.

1.5 The District lacked, “...sufficient guidance, policy, and regulation to conduct and publish significant nexus findings.” Therefore, the District was arbitrary and

capricious when it concluded Channel B and its adjacent wetlands (including the subject wetlands) had a significant nexus with the Chena River.

2. SUMMARY OF APPEAL DECISION. Tin Cup, LLC. (Appellant) is appealing jurisdiction issues related to a U.S. Army Corps of Engineers, Alaska District (District) proffered permit for the Appellant's property near North Pole, Alaska. The Appellant submitted five main reasons for appeal in which they contend that the District incorrectly applied current regulatory criteria and associated guidance for identifying and delineating wetlands; incorrectly applied law, regulation, or officially promulgated policy; omitted material fact; and was arbitrary and capricious when it concluded the wetlands on the Appellant's property were waters of the United States (U.S.). For reasons detailed in this document, these reasons for appeal do not have merit.

3. BACKGROUND INFORMATION. The Appellant's property is located between the Old Richardson Highway and Bradway Road approximately 1.5 miles east of the intersection of Dennis Road and the Old Richardson Highway near North Pole, Alaska. More specifically, the Appellant's property is located within Sections 26, 27, 34 and 35, T. 1 S., R. 1 E., Fairbanks Meridian, USGS Quad Maps Fairbanks (D-1) SW and Fairbanks (D-2) SE.; Latitude 64.7958° N., Longitude 147.4966° W.

The timeline for history of events is as follows. A detailed description of the events is provided below.

- 8 November 2010: District issued AJD.
- 29 December 2010: Appellant appealed AJD.
- 18 August 2011: Division Commander found AJD appeal to have partial merit and AJD remanded to District.
- 13 April 2012: District finalized AJD appeal remand response.
- 22 October 2012: District issued initial proffered permit.
- 13 December 2012: Appellant objected to initial proffered permit.
- 14 November 2013: District proffered permit.
- 7 January 2014: Appellant appealed proffered permit.
- 16 January 2014: Division Commander accepted Proffered permit request for appeal.

The District issued an approved jurisdictional determination (AJD) dated 8 November 2010, which concluded that the Appellant's property contained, "...waters of the [U.S.], including wetlands, under the [U.S. Army] Corps of Engineers' regulatory jurisdiction." The letter further stated that the subject wetland was, "...adjacent to the Tanana River, a traditional navigable water [TNW], due to its reasonably close proximity and separation from the water only by berms."¹ The Appellant appealed the AJD via

¹ 2011 Administrative Record (AR) page 62. For clarity, the District provided the AR to the Appellant and the Review Officer in two parts. The first part, the portion of the AR associated with the 2010 appeal of the AJD associated with this proffered permit, is referred to as the 2011 AR. The second part, associated with the current appeal of the proffered permit, is referred to as the 2014 AR.

letter dated 29 December 2010.² The appeal was found to have partial merit and the AJD was remanded to the District on 18 August 2011 for further evaluation, documentation, and reconsideration.³ The District responded to the remand via letter to the Appellant dated 13 April 2012, in which the District reaffirmed that the subject wetland was a water of the U.S. However, the reconsidered AJD now indicated the subject wetland, "...extends off site and is adjacent to Channel B, a relatively permanent water [RPW]," and has "...a significant nexus with the Chena River, a water more readily understood as 'navigable.'"⁴

Upon completion of their permit evaluation, the District provided an initial proffered permit to the Appellant via letter dated 22 October 2012 authorizing the permanent fill of 142 acres of wetlands and temporary fill of 1 acre of wetlands associated with the construction of a pipe storage and fabrication facility for the purpose of industrial development⁵ The Appellant responded via letter dated 13 December 2012, objecting to all the special conditions of the initial proffered permit due to the Appellant's assertion that the Corps lacked jurisdiction over the subject wetland.⁶ In response, the District reconsidered their decision, and then proffered the permit (without changing any of the special conditions) to the Appellant for reconsideration via letter dated 14 November 2013. The proffered permit included a revised AJD that indicated the subject wetland was now determined to, "...directly abut Channel B, a RPW," and was, "...jurisdictional based on both its significant nexus with the Chena River...and its directly abutting a [RPW]."⁷

The Appellant declined the proffered permit and submitted a Request for Appeal (RFA) to the Division, dated 7 January 2014. The RFA was received by the Division on 10 January 2014. The Appellant was informed, by letter dated 16 January 2014, that the RFA was accepted.

4. INFORMATION RECEIVED DURING THE APPEAL AND ITS DISPOSITION.

33 Code of Federal Regulations (CFR) § 331.3(a)(2) states that, upon appeal of the District Engineer's decision, the Division Engineer or his Review Officer (RO) conducts an independent review of the District's administrative record (AR) to address the reasons for appeal cited by the Appellant. 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. Pursuant to 33 CFR § 331.2, no new information may be submitted on appeal. Neither the Appellant nor the District may present new information to the Division. 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 District's AR. Such interpretation, clarification, or explanation does not become part of the District's AR, because the

² 2011 AR pages 4-60.

³ 2014 AR pages 499-512.

⁴ 2014 AR pages 290-348.

⁵ 2014 AR pages 115-146.

⁶ 2014 AR pages 97-114.

⁷ 2014 AR pages 10-50.

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:

4.1 The District provided a copy of their 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. That date for the AJD is 8 November 2010 which includes 2011 AR pages 62-653.⁸ For the proffered permit associated with this appeal, that date is 14 November 2013 which includes 2014 AR pages 9-515.

4.2 An appeal conference was held on 15 July 2014. The conference followed the agenda provided to the District and the Appellant by the RO via e-mail on 8 July 2014. During the appeal conference, the District clarified the location of a document in their AR, identified a typographical error in a document in their AR, and stated that they inadvertently omitted several items from the copies of the AR provided to the RO and the Appellant. These items were as follows:

4.2.1 The District clarified that the memorandum for record (MFR) referenced on 2011 AR page 83 is that found on 2011 AR pages 67-81 and that the reference to field work on 7 July 2010 in the letter on 2011 AR page 62 was a typographical error as the correct date was 2 July 2010. These documents were considered as part of the evaluation of this RFA as they were present in the District's AR prior to the District's decision.

4.2.2 The District indicated they inadvertently omitted from the copies of the AR provided to the RO and the Appellant the spreadsheet attached to the email found on 2014 AR page 260, the "enclosed sheets" referenced in the public notice found on 2014 AR page 234, and a copy of the U.S. Environmental Protection Agency's (EPA) request to extend the public notice referenced in the email found on 2014 AR page 216. The District provided these documents to the RO and the Appellant via e-mail dated 21 July 2014.⁹ These documents were considered as part of the evaluation of this RFA as they were present in the District's AR prior to the District's decision, but inadvertently omitted from the copies of the District's AR provided to the RO and the Appellant due to an error.

⁸ The 2011 portion of the District's AR provided to the RO and the Appellant originally contained 382 pages. However, during the course of the appeal process it was discovered that the District inadvertently omitted 271 pages of the 2011 AR. These pages, which comprise 2011 AR pages 383-653, were later provided to the RO and the Appellant. This is discussed further in Section 4.3 of this decision document below.

⁹ In a follow up email dated 22 July 2014, the District noted that the "enclosed sheets" associated with the public notice found on 2014 AR page 234 did not have the same date (two of the sheets were dated 23 May 2012, while two others were dated 22 May 2008). The District clarified that the two pages dated 2008 were included in the 2012 public notice as they were unchanged since their submittal in 2008.

4.3 During the appeal conference, the Appellant asserted that the copy of the AR the District provided for this appeal was incomplete as it only included information since 2009 and not since 2003 when the original action associated with this Department of the Army permit number (POA-2003-1422) began. The District responded that the first permit associated with this project number expired thereby ending that action, and that the AR provided for this appeal was a copy of the record prepared in response to a newer action that began in 2009 for the same property as that of the expired permit. After the appeal conference, it was discovered that the action being appealed did not begin in 2009, but in 2008 with the Appellant's permit request (as the previous permit had expired). So while the District's response was conceptually correct, it was determined that the District inadvertently omitted approximately 271 pages between 2008 and 2009 from their AR. These pages were provided to the RO and the Appellant on 16 January 2015 and were numbered as 2011 AR pages 383-653. These pages were considered as part of the evaluation of this RFA as they were present in the District's AR prior to the District's decision, but inadvertently omitted from the copies of the District's AR provided to the RO and the Appellant due to an error.

4.4 On 3 October 2014, the RO forwarded a draft MFR summarizing the appeal conference topics to the Appellant and the District for review and comment. In an e-mail dated 8 October 2014, the Appellant provided comments regarding sections 1 and 4.b. of the draft MFR. In an e-mail dated 10 October 2014, the District indicated they did not have any comments on the draft MFR. The Appellant's comments were incorporated into a final MFR, which was provided to the Appellant and the District by the RO on 22 October 2014.

5. Evaluation of the Appellant's Reasons for Appeal.

5.1 Appeal Reason 1: The District incorrectly applied current regulatory criteria and associated guidance for identifying and delineating wetlands when it did not solely rely on the *1987 Corps of Engineers Wetland Delineation Manual*, the only congressionally authorized document for identifying wetlands in the field.

5.1.1 Finding: This reason for appeal does not have merit.

5.1.2 Discussion: In their RFA, the Appellant asserted that the District's use of the definition of the growing season in the *Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Alaska Region*¹⁰ (Regional Supplement) was in error because the Appellant believed the *1987 Corps of Engineers Wetlands Delineation Manual*¹¹ (1987 Manual) was, "...the only congressionally authorized document the Alaska District [was] permitted to use to identify wetlands in the field."

¹⁰ U.S. Army Corps of Engineers. 2007. *Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Alaska Region (Version 2.0)*, ed. J. S. Wakeley, R. W. Lichvar, and C. V. Noble. ERDC/EL TR-07-24. Vicksburg, MS: U.S. Army Engineer Research and Development Center.

¹¹ Environmental Laboratory. (1987). "Corps of Engineers Wetlands Delineation Manual," Technical Report Y-87-1, U.S. Army Engineer Waterways Experiment Station, Vicksburg, MS.

Therefore, the Appellant believes, as stated in their RFA, that the District, "...exceeded its authority under Section 404 by adopting and using wetland delineation procedures [associated with the Regional Supplement] that supersede those of the congressionally authorized 1987 Manual,"¹² and that, "...all delineations performed using the Alaska Supplement are invalid."¹³

This reason for appeal, as noted by the Appellant during the appeal conference, was partially raised in the 2010 appeal of the AJD associated with this declined proffered permit (the subject of this appeal).¹⁴ In their 2010 RFA, the Appellant stated in their fourth reason for appeal that the District should be forced to follow the growing season definition in the 1987 Manual (and not in the Regional Supplement) and that it was, "...pure speculation by the Corps that the ground temperature rises above 5°C at 20 inches below the ground surface in a permafrost area for a significant portion of the growing season."¹⁵ Regarding this reason for appeal, the 2010 appeal decision document stated that the Regional Supplement, which was applicable to the region, recognized the need to rely, "...upon locally or regionally developed methods to determine the growing season dates..." rather than using the soil temperature criteria in the 1987 Manual.¹⁶ Consequently, the decision document stated that the soil temperature near 20 inches below the ground surface was irrelevant to determining growing season in Alaska and concluded that this reason for appeal did not have merit.

The Appellant's assertion that the District erred when it used the Regional Supplement instead of the 1987 Manual exclusively, is unique to the current appeal. The issue presented by the Appellant's RFA is the District's adoption, for all the District's delineations and not just the action being appealed, of the portions of the Regional Supplement that supersede the 1987 Manual.¹⁷ This assertion is addressed in the following discussion.

The Corps began requiring that districts use the 1987 Manual to identify and delineate wetlands potentially subject to regulation under Section 404 on 27 August 1991.¹⁸ In September 2007, the Corps finalized the Regional Supplement as part of a, "...nationwide effort to address regional wetland characteristics and improve the accuracy and efficiency of wetland-delineation practices."¹⁹ The Regional Supplement was designed to be used with the 1987 Manual (or a subsequent version), but takes

¹² Appellant's 7 January 2014 RFA, pages 13-14.

¹³ Appellant's 7 January 2014 RFA, page 16.

¹⁴ 2011 AR page 10.

¹⁵ 2011 AR page 10.

¹⁶ 2014 AR page 509.

¹⁷ Appellant's 7 January 2014 RFA, page 16.

¹⁸ "Implementation of the 1987 Corps Wetland Delineation Manual," memorandum from John P. Elmore dated 27 August 1991.

¹⁹ U.S. Army Corps of Engineers. 2007. *Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Alaska Region (Version 2.0)*, ed. J. S. Wakeley, R. W. Lichvar, and C. V. Noble. ERDC/EL TR-07-24. Vicksburg, MS: U.S. Army Engineer Research and Development Center. Page 1.

precedence over the 1987 Manual where differences occur²⁰ such as with the definition of the growing season in this case.

The Appellant's assertion that the District erred when it used the Regional Supplement instead of the 1987 Manual exclusively for all the District's delineations is invalid because an appeal must be 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. Because the Regional Supplement was a valid nationally promulgated supplement to the Manual, the District's responsibility in this case was to follow existing regulation, guidance, and policy (including the Regional Supplement in its appropriate context) as it evaluated the Appellant's action. The District's use of Regional Supplement data forms in their AR provided evidence that the District utilized the Regional Supplement as part of its evaluation of this action as required by regulation, guidance, and policy in existence at the time of their evaluation.²¹ Therefore, this reason for appeal does not have merit.

5.1.3 Action: No action necessary.

5.2 Appeal Reason 2: The subject wetlands are independent of, and separated from wetlands found in Channel B. Therefore, the District omitted material fact when it determined that the subject wetlands were continuous with those found in Channel B.²²

5.2.1 Finding: This reason for appeal does not have merit.

5.2.2 Discussion: In their RFA, the Appellant stated that the subject wetlands were separated from those within Channel B by a man-made berm.²³ Additionally, the Appellant asserted that the District's wording in their AR established that the wetlands within Channel B differed from those north of the Channel by topographic position as well as wetland type.²⁴ Therefore, the Appellant believes the District's AR lacks proof that the subject wetlands are continuous with those found within Channel B.²⁵

²⁰ U.S. Army Corps of Engineers. 2007. *Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Alaska Region (Version 2.0)*, ed. J. S. Wakeley, R. W. Lichvar, and C. V. Noble. ERDC/EL TR-07-24. Vicksburg, MS: U.S. Army Engineer Research and Development Center. Pages 1-2.

²¹ 2014 AR pages 72-81.

²² This reason for appeal previously read, "The subject wetlands are independent of, separated from, and do not have a surface hydrologic connection with wetlands found in channel B. Therefore, the District incorrectly applied law, regulation, or officially promulgated policy when it determined that the subject wetlands were continuous with those found in Channel B." At issue in this reason for appeal is whether the wetlands on the Appellant's property are continuous with those found in Channel B (are they all the same wetland). The "law, regulation, or policy" as well as the surface hydrologic connection previously referenced in this reason for appeal relates to whether the wetlands on the Appellant's property are adjacent to channel B, a concept discussed in reason for appeal three in this decision document. Therefore, the reason for appeal was changed to reference "omission of material fact" to more accurately reflect the items the appellant asserted act to fragment the wetland in question and the surface hydrologic connection was removed from this reason for appeal and will be discussed as part of reason for appeal three below.

²³ Appellant's 7 January 2014 RFA, pages 11-12.

²⁴ Appellant's 7 January 2014 RFA, pages 12-13.

²⁵ Appellant's 7 January 2014 RFA, page 11.

In their AR, the District stated that the wetland on the Appellant's property was part of a larger, 3,200 acre, un-fragmented wetland that includes most of the Appellant's property and a large portion of the area between Badger Road and the Richardson Highway near North Pole, Alaska.²⁶ The District clarified during the 15 July 2014 appeal conference that approximately 2,500 acres of this wetland lays within the Channel B watershed.²⁷ The wetland was described in the District's AR as including a mosaic of stunted black spruce forest, deciduous tall and low shrub communities, as well as emergent herbaceous and dwarf shrub-dominated communities.²⁸ Furthermore, the District stated that field investigations conducted in May and June 2013, revealed that a small arm of the southeast portion of the large wetland extended across a narrow, low lying portion of the berm connecting the large wetland with the wetland swale within the upper portion of Channel B.²⁹ Therefore, the District concluded, as part of the revised AJD that accompanied the 14 November 2013 proffered permit, that the large wetland area north of the berm, which includes a portion of the Appellant's property, was continuous with the wetland within Channel B.³⁰

While the District concluded that the wetland was continuous, the District used language in their AR that seemed to imply that the different geographic portions of this continuous wetland were actually independent wetlands. For example, the District stated, "Thus, the hydraulic gradient [...] is causing subsurface flow to lead south from the wetland north of the berm to the wetland swale in Channel B during spring and early summer," and, "...without the berm [...], the wetland area north of the berm and the wetland swale would be more broadly contiguous." However, following these references in the AR, the District clarified the word choice when they indicated that while they previously thought that, "...these two wetland areas were completely separated on the ground surface by the berm," the additional investigations conducted in May and June of 2013 revealed that the wetlands were connected and therefore, "...no longer considered separate."³¹

Finally, to be truly continuous (the same), the area between the subject wetland and those within Channel B must be absent from any barriers. The District identified multiple barriers in the area which included the previously mentioned berm as well as roads, residential developments, and upland areas.³² However, with the exception of the berm, the District's AR demonstrated that all the barriers were located between the wetland itself and the downstream portion of Channel B and did not fragment the wetland (i.e. they were not located between the portion of the wetland on the subject property and the portion within the upstream portion of Channel B).³³ As previously stated, the District's AR indicated the berm was previously thought to completely

²⁶ 2014 AR pages 56 and 58.

²⁷ This is illustrated in the District's AR on 2014 AR page 345.

²⁸ 2014 AR page 58.

²⁹ This is illustrated in the District's AR on 2014 AR page 46.

³⁰ 2014 AR pages 58 and 63-66.

³¹ 2014 AR page 55.

³² 2014 AR page 326.

³³ 2014 AR page 326.

separate the wetland into two portions. However, field work revealed that the berm did not completely separate the wetland.³⁴ Therefore, based on the discussion above, the District's AR supports that the subject wetland is continuous with those within Channel B. Consequently, this reason for appeal does not have merit.

5.2.3 Action: No action necessary.

5.3 Appeal Reason 3: Flow measurements within Channel B, regional topography, and the presence of permafrost demonstrate there is no surface or subsurface connection between the subject wetlands and Channel B. Therefore, the District incorrectly applied law, regulation, or officially promulgated policy when it determined that the subject wetlands were connected (adjacent) to Channel B.

5.3.1 Finding: This reason for appeal does not have merit.

5.3.2 Discussion: In their RFA, the Appellant asserted that because the regional topography slopes to the northwest away from the site, it was impossible for surface flow to travel southeast (upgradient) towards the headwaters of Channel B.³⁵ Additionally, the Appellant asserted that data obtained from flow measurements at various locations along Channel B demonstrated that the area wetlands lacked a subsurface connection to Channel B.³⁶ Furthermore, the Appellant asserted that rainfall data showed that evaporation is greater than precipitation for the region and that any water that infiltrates below the surface would be lost to the permafrost that is found within 80-90% of the region.³⁷ By arguing that the subject wetlands lack a connection (either surface or subsurface) to Channel B, the Appellant is essentially arguing that the subject wetlands are not adjacent to Channel B.

Adjacency is defined in regulation as, "...bordering, contiguous, or neighboring," and that "Wetlands separated from other waters of the U.S. by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands.'"³⁸ 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 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.³⁹

³⁴ 2014 AR page 55.

³⁵ Appellant's 7 January 2014 RFA, page 6.

³⁶ Appellant's 7 January 2014 RFA, pages 7-8.

³⁷ Appellant's 7 January 2014 RFA, page 18.

³⁸ 33 CFR § 328.3(c).

³⁹ 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.

The *U.S. Army Corps of Engineers Jurisdictional Form Instructional Guidebook* (Guidebook)⁴⁰ establishes standard operating procedures for conducting, and documentation practices to support an AJD. Documentation practices required by the Guidebook for wetlands adjacent to, but not directly abutting RPWs that flow directly or indirectly into TNWs specifically require a district to document that the wetland meets at least one of the three *Rapanos* criteria described above. Documentation practices by the Guidebook required for wetlands directly abutting RPWs that flow directly or indirectly into TNWs do not require discussion relative to the three *Rapanos* criteria, but documentation that the wetland directly abuts the RPW with the Guidebook referring to this geographic orientation as a continuous surface connection.

As discussed in reason for appeal two above, the District showed in its AR that the wetland on the Appellant's property was part of a larger wetland that extended into the upper portion of Channel B. The District further stated in a MFR and its revised AJD that accompanied the 14 November 2013 proffered permit that this wetland extends to where the RPW portion Channel B begins and therefore concluded that the wetland is adjacent to, and directly abutting an RPW (Channel B).⁴¹ As a result, the District's AR satisfied the Guidebook requirements to document that the wetland is adjacent to Channel B.

While not necessary in this case, the District also indicated in its AR that the larger wetland satisfied all three *Rapanos* guidance criteria for being adjacent to Channel B.⁴² The District documented that the wetland was separated by a berm/barrier (the 40-foot wide spoil berm) from, as well maintained an ecological connection with Channel B.⁴³ Additionally, the District documented that the wetland maintained an unbroken shallow subsurface connection with Channel B.⁴⁴ This shallow subsurface connection was a main portion of the Appellant's assertions associated with this reason for appeal.

The District's rationale associated with the shallow subsurface hydrologic connection was based on a connection established vertically through infiltration from the wetland into the underlying, shallow aquifer, and then laterally from the fast moving aquifer into Channel B.⁴⁵ In their AR, the District stated that some precipitation remains available for infiltration into the aquifer as only 60 to 70 percent is removed by "actual" evapotranspiration (which the District distinguished from "potential" evapotranspiration which exceeds precipitation).⁴⁶ The District also acknowledged that the majority of the region was mapped as having soils with seasonal frost, but that discontinuous

⁴⁰ *U.S. Army Corps of Engineers Jurisdictional Form Instructional Guidebook*. June 1, 2007. The Guidebook is found at <http://www.usace.army.mil/Missions/CivilWorks/RegulatoryProgramandPermits/RelatedResources/CWAGuidance.aspx>.

⁴¹ 2014 AR pages 43, 48 and 63-66.

⁴² 2014 AR pages 43, 46, and 48.

⁴³ 2014 AR pages 46, 54-56, 305, and 325-326.

⁴⁴ 2014 AR page 46.

⁴⁵ 2014 AR pages 55-56, and 328.

⁴⁶ 2014 AR pages 55, 57, and 323-324.

permafrost and permafrost were also present.⁴⁷ The District believed this did not prevent infiltration into the aquifer as water perched above seasonal frost would reach the aquifer once the frost thawed, or water above permafrost could reach the aquifer by either moving laterally around the permafrost or vertically through thaw zones within the permafrost. Once in the aquifer, the District stated a small portion would move southeast into the upper reaches of Channel B due to the hydraulic gradient produced by the elevation difference (the District stated Channel B was approximately one foot below the ground surface of the wetland area to the north). However, the majority of the infiltration would be carried within the fast moving aquifer along the predominant topographic gradient to the northwest towards the downstream portions of Channel B.⁴⁸ Therefore, while this documentation was unnecessary, the District's AR addresses the Appellant's assertions associated with this reason for appeal and supports their conclusion that the subject wetlands were adjacent to Channel B via a shallow, subsurface connection.

Based on the above discussion, while the District's AR contains unnecessary discussion relative to the three *Rapanos* guidance adjacency criteria, it does satisfy the Guidebook's requirements for documentation that the wetland is adjacent to Channel B. Therefore, this reason for appeal does not have merit.

5.3.3 Action: No action necessary.

5.4 Appeal Reason 4: "The contribution from the entire Channel B watershed is less than one percent of total flow in the [Chena River] and is insignificant." Therefore, the District incorrectly applied law, regulation, or officially promulgated policy when it determined that Channel B, in combination with similarly situated wetlands (including the subject wetland), had a significant nexus with the Chena River, the nearest downstream traditionally navigable water.

5.4.1 Finding: This reason for appeal does not have merit.

5.4.2 Discussion: In their RFA, the Appellant asserted that the volume of discharge from Channel B into the Chena River is insignificant as it is so small relative to the overall volume of flow in the Chena River. Consequently, the Appellant believes Channel B lacks a significant nexus with the Chena River.⁴⁹

In 2007, as a result of the U.S. Supreme Court *Rapanos* decision,⁵⁰ the EPA and the Corps, in coordination with the Office of Management and Budget and the President's Council on Environmental Quality, issued a guidance memorandum (*Rapanos* guidance) to ensure that jurisdictional determinations, permitting actions, and other relevant actions were consistent with the *Rapanos* decision and supported by the AR. The two agencies issued joint revised *Rapanos* guidance on 2 December 2008, in

⁴⁷ 2014 AR pages 314-316, 321-322, and 324-326.

⁴⁸ 2014 AR pages 55, 323-324, and 326.

⁴⁹ Appellant's 7 January 2014 RFA, page 6.

⁵⁰ Combined cases of *Rapanos v. United States* and *Carabell v. United States*. 126 S. Ct. 2208 (2006).

response to public comments received and the agencies' experience in implementing the *Rapanos* decision.⁵¹

The *Rapanos* guidance requires the application of two new standards to support an agency jurisdictional determination for certain water bodies. The first standard, based on the plurality opinion in the *Rapanos* decision, recognizes regulatory jurisdiction over a water body that is not a TNW if that water body is "relatively permanent" (i.e., it flows year-round, or at least "seasonally") and over wetlands adjacent to such water bodies if the wetlands directly abut the water body. In accordance with this standard, the Corps and EPA may assert jurisdiction over the following categories of water bodies: (1) TNWs, (2) all wetlands adjacent to TNWs, (3) relatively permanent non-navigable tributaries (with at least seasonal flow) of TNWs, and (4) wetlands that directly abut relatively permanent, non-navigable tributaries of TNWs.

The second standard requires a case-by-case "significant nexus" analysis to determine whether waters and their adjacent wetlands are jurisdictional. A significant nexus may be found where a tributary, including its adjacent wetlands, has more than a speculative or insubstantial effect on the chemical, physical, and biological integrity of a TNW. Consequently, the agencies may assert jurisdiction over wetlands that are adjacent to but that do not directly abut a relatively permanent, non-navigable tributary if the RPW and its adjacent wetlands are determined (on the basis of a fact-specific analysis) to have a significant nexus with a TNW.

As discussed in reasons for appeal two and three above, the District's AR established that the subject wetland was part of a larger wetland that extended into Channel B, then northwest within the Channel to the point where the Channel became an RPW. Therefore, the District concluded that the wetland was adjacent to (and abutting) an RPW.⁵² As such, this satisfied the first standard of the *Rapanos* guidance described above and regulatory jurisdiction is recognized over the wetland without the legal obligation to make a case-by-case significant nexus analysis.

It should be noted that while not required in this circumstance, the District's AR included a lengthy significant nexus analysis that was part of the District's basis of jurisdiction associated with the 22 October 2012 initial proffered permit. The District recognized during the appeal conference that the analysis was no longer required, but chose not to omit it due to the extensive time and resources invested in it. Nevertheless, the District's significant nexus analysis is immaterial as it was not required. Consequently, the Appellant's assertion that Channel B lacks a significant nexus with the Chena River is also immaterial because, as previously mentioned, jurisdiction is recognized in this circumstance without the legal obligation to make a

⁵¹ Grumbles, Benjamin H. and John Paul Woodley, Jr. 2007, 2008. Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* and *Carabell v. United States*. Original guidance released June 5, 2007; revised guidance released December 2, 2008.

⁵² 2014 AR pages 43, 46, 48, and 58.

case-by-case significant nexus analysis. Therefore, this reason for appeal does not have merit.

5.4.2 Action: No action necessary.

5.5 Appeal Reason 5: The District lacked, "...sufficient guidance, policy, and regulation to conduct and publish significant nexus findings." Therefore, the District was arbitrary and capricious when it concluded Channel B and its adjacent wetlands (including the subject wetlands) had a significant nexus with the Chena River.

5.5.1 Finding: This reason for appeal does not have merit.

5.5.2 Discussion: In their RFA, the Appellant stated that the District lacked sufficient, "...guidance, policy, and regulation to conduct and publish significant nexus findings." The assertion was based on hand written comments on an internal (District) staff action summary dated 24 February 2012, that stated:

"Kevin, give me your analysis."⁵³

"Sir: This version includes [Hydrology and Hydraulic Engineer (H&H)] comments. Greg has done a great job and I agree with his conclusions. Biggest issue is that what constitutes a 'significant nexus' is a judicial creation that is not defined and ultimately can only be decided by the courts. OC has reviewed and found it legally sufficient. Kevin."⁵⁴

During the appeal conference, the District stated that the response was provided by Mr. Kevin Morgan, the former District Regulatory Division Chief. The District stated that because Mr. Morgan is now retired, they are unable to definitively explain the comment. Regardless, 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. Furthermore, as discussed in reason for appeal four above, while included in the District's AR, a significant nexus analysis was not required in this case. Therefore, the sufficiency of regulation, guidance, or policy relative to a significant nexus analysis is immaterial. Consequently, this reason for appeal does not have merit.

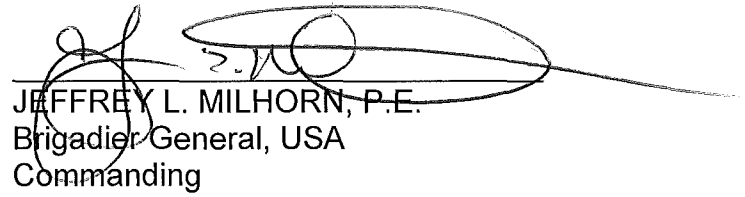
5.5.3 Action: No action necessary.

⁵³ It should be noted that the RFA attributed this comment to LTC James Stone. However, the source of this comment is not entirely clear as it encompassed the spaces allotted for both the district and deputy district commanders and the signature associated with it is not legible. It is clear, however, that the comment originated from either the commander or deputy commander as the response included the word, "Sir." Due to this uncertainty, the quote here differs from that in the RFA as it did not include an originator.

⁵⁴ 2014 AR page 292.

6. **CONCLUSION.** For the reasons stated above, I have determined the reasons for appeal do not have merit. The final Corps decision in this case is the Alaska District Engineer's proffered permit. This concludes the administrative appeal process relative to this action.

2 MAR 15
Date


JEFFREY L. MILHORN, P.E.
Brigadier General, USA
Commanding