

**ADMINISTRATIVE APPEAL DECISION**  
**JURISDICTIONAL DETERMINATION**  
**GREAT NORTHWEST INCORPORATED**

**FILE NUMBER 1994-143-9**

**ALASKA DISTRICT**

**DATE: July 18, 2008**

**Review Officer:** Michael F. Bell, US Army Corps of Engineers, Pacific Ocean Division

**Appellants:** Tony Johansen and Randy Bland

**Request for Appeal (RFA):** December 21, 2007

**Appeal Accepted:** January 21, 2008

**Appeal Conference/Site Visit:** June 10, 2008

**Summary of Decision:** The Appellant's property is clearly adjacent to a traditional navigable waterway, the Tanana River. The man-made items between the river and the property do not defeat adjacency. Accordingly, the District correctly asserted regulatory jurisdiction over the subject property.

Due to anomalies in the District's decision document, it is unclear whether the District also asserted a second, redundant, basis for jurisdiction -- that the project is adjacent to Drainage Channel A which is a relatively permanent water (RPW) that abuts the wetlands on the Appellants' property. To clarify this issue, the District should issue an amended decision document that clearly indicates whether Channel A is a second basis for jurisdiction and, if so, the District should comprehensively describe the information in the record supporting that assertion.

**Background Information:** Great Northwest, Inc. (GNI) has operated a gravel mine on 170.4 acres of wetlands associated with the development of a 108-acre material site. The mining site is the Van Horn Road Facility located within Sections 19 and 20, T.1 South, R.1 West, Fairbanks Meridian, in Fairbanks, Alaska, east of the Fairbanks International Airport.

The GNI mining operation has been operating for 15 years under the authorization of the South Fairbanks General Permit 92-03. The General permit was first authorized in 1992 and expired in 2002.

On April 2, 2004, GNI requested an approved jurisdictional determination (JD) for their entire site and a Department of the Army standard permit to continue mining. The District issued a JD on April 7, 2004, and determined the wetlands and stream channels on the property are adjacent to Drainage Channel A, a tributary of the Tanana River. By correspondence dated April 15 and 29, 2004, the Appellant requested clarification of the District's JD decision in light of the US Supreme Court's ruling in *Solid Waste Agencies of Northern Cook County v. US Army Corps of Engineers (SWANCC)*.

The District responded by letters dated April 23 and May 14, 2004, and stated the SWANCC decision eliminated Corps jurisdiction only over those waters that are isolated, intrastate, and non-navigable, when the basis for asserting jurisdiction was the use of the wetlands by migratory birds. The District determined that the wetlands are adjacent to Drainage Channel A and the channel serves as a hydrologic conveyance to a navigable water (Tanana River). GNI still questioned the JD but did appeal the action.

The District offered a proffered permit to GNI on March 28, 2007, with a special condition stating the District would re-evaluate the JD once guidance was issued on a recent US Supreme Court decision in the *Rapanos/Carabell (Rapanos)* case. Special condition # 1 of the proffered permit stated that the in-lieu fee for compensatory mitigation would be held in escrow until a new approved JD was issued under the guidance.

The *Rapanos* decision was handed down on June 19, 2006. In the decision, the Justices issued five opinions with no single opinion commanding as majority of the court. A plurality of the Court vacated the original Court of Appeals judgment and remanded both cases (*Rapanos v. US* and *Carabell v. US*) to the lower courts for re-evaluation. Justice Kennedy provided the necessary fifth vote to reverse the lower court in *Rapanos* and wrote his own concurring decision. The decision provides two new analytical standards for determining whether bodies that are not traditional navigable waters (TNWs), including wetlands adjacent to those non-TNWs, are subject to Clean Water Act (CWA) jurisdiction. (The Corps and EPA issued a legal memorandum on June 5, 2007, providing guidance to Corps Districts on how to implement the *Rapanos* decision.)

GNI requested a re-evaluation of the JD on July 12, 2006. The District conducted a JD using the *Rapanos* guidance on November 8, 2007, and concluded that the wetlands on the parcel are adjacent to the Tanana River, a navigable water of the US although the wetlands are separated from the Tanana River by a railroad embankment with culverts and a flood control levee. The JD also states that the wetlands directly abut Drainage Channel A, a manmade relatively permanent waterway running westward between the railroad and the levee south of the project site.

GNI disagreed with the determination and appealed the decision to the Pacific Ocean Division Commander on December 21, 2007. The Pacific Ocean Division Administrative Appeal Review Officer (RO) accepted the appeal on January 28, 2008.

Due to weather conditions and the need to see the wetlands in a free flowing state, the site visit was delay until June 2008 and after the spring thaw.

**Site Visit:** On June 10, 2008, the RO, the Appellants, and their consultants, Dr. Eddie Packee, Larry Peterson, and observer Damien Schiff (Pacific Legal Foundation) met District Project Manager Christy Everett and North Branch Chief Steve Meyers at the Fairbanks Regulatory Field Office at 1000 hours to discuss the reasons for appeal before visiting the site. Regulatory Program Manager Thom Lichte and Attorney Brian Smith of the Pacific Ocean Division also attended the appeal conference and the subsequent site visit.

Following the appeal conference, the attendees adjourned to the permitted gravel-mining site. A large wetland complex exists between the Tanana River and the project site. The wetland is separated from the Tanana River by a large levee, an access road, and a railroad berm. Several fill pads are located in the area between the levee and the railroad berm. Wooded riverine wetlands consisting of paper birch, alder and black spruce exist between the levee and the Tanana River. The soil surface is saturated and ponded between the man-made river levee and the railroad berm. A Corps drainage project "Channel A" is excavated between the railroad fill and the levee. Channel A is a shallow, wide, and vegetated drainage ditch that appears to drain surface water between the levee and the railroad berm to the River. The slope of Channel A is difficult to determine as it is extremely flat. The attendees walked Channel A and observed that the ditch contained ponded water and saturated soils at the upstream (eastern) end of the conveyance, however, the channel gradually became dry at the riverward end of the channel. The RO observed no ordinary high water marks (OHWM) in the drainage channel.

The GNI project site is located on the landward side of the railroad berm. The area has been cleared with pockets of fill material deposited throughout the site. The Appellants' gravel mining operation is adjacent to the site. The attendees spot checked the area and inspected the culverts that flow through the railroad berm at the eastern and western end of the site. The culvert at the western end and near the airport did not contain surface water on the day of the site visit but had recently performed the function of draining the site. There was standing water at the outlet of he eastern culvert (culvert closest to the project site, but upstream of the site) and the soil was saturated where the culvert connected with Channel A.

The RO concluded the field investigation at 1400 hours.

#### **Information Received And Its Disposition During The Appeal Review:**

a.) The Alaska District provided a copy of the administrative record (Record) to the RO and the Appellants. The RO reviewed and considered the Record during the appeal process along with the results of the site inspection and appeal conference.

b.) During the conference, the Appellants and the District requested an opportunity to supplement the Record with missing and clarifying information that was not available at the conference. The RO received and accepted the following information:

- Letter dated March 5, 2007, from Mike Lilly of Geo Watersheds Scientific to Larry Peterson describing the ground-water flow direction at the site;
- Electronic mail dated June 17, 2008, to the RO from Larry Peterson with references to the legal justifications in the RFA;
- Electronic mail dated June 19, 2008, from the District that contained the definition of Navigable Waters.

c.) On June 18, 2008, the RO interviewed Forest McDaniel, the District PM who conducted the 2004 JD.

### **APPEAL EVALUATION, FINDINGS and INSTRUCTIONS to the Alaska District Commander**

**The Appellant listed nine reasons for appeal with supporting statements and citations. Appeal reasons 1, 3, 6 and 9, are similar and are combined for simplicity.**

**Appeal Reason 1:** Administrative record is subjective and lacks scientific support.

**Appeal Reason 3:** The Alaska District failed to manage based upon best available science and relied instead upon hypothesis and conjecture that cannot be supported in the face of third-party data.

**Appeal Reason 6:** The conclusions drawn from the administrative record are contradicted by readily available third party data.

**Appeal Reason 9:** Repeats appeal reason 3.

**FINDINGS:** Appeal reasons 1, 3, 6, and 9 have no merit.

**ACTION:** None required.

**Discussion:** According to the Record and the RFA, the Appellant agreed with the District's 2004 findings that the site contains wetlands according to the requirements of the *1987 Wetland Delineation Manual*. They disagreed with the April 7, 2004, JD that determined the wetlands and stream channels on the parcel were adjacent to "Channel A", a tributary of the Tanana River. Channel A is a shallow, wide, and thickly vegetated drainage ditch designed by the District's Civil Works Division to remove the surface water between the levee and the railroad berm to the Chena River and thence to the

Tanana River. The Appellants felt the proposed work site was isolated (see background information).

In defense of the 2004 JD, the District explained during the Appeal Conference that Channel A is designed to drain surface water between the railroad and the levee to the Chena River which established a hydrologic link between the project site and a navigable water of the US. Before the *Rapanos* decision, this hydrologic connection was a requirement to determine if the wetlands on the Appellants' property were waters of the US. In addition, the railroad berm that separated the project site from Channel A has functional culverts.

The 2007 Approved Jurisdictional Determination Form (JD Form) that uses the *Rapanos* guidance and primarily concludes that the wetlands on the Appellants property are adjacent to the Tanana River, a traditional navigable water (TNW). The Appellants disagreement with the District's findings as discussed in the RFA, and states:

The approved jurisdictional determination is being appealed based upon readily available published information that refutes and contradicts the assertions made in the administrative record. Specifically, readily available information demonstrates the following:

1. Surface flows from the subject wetlands do not reach the Tanana River.
2. No significant hydrological nexus can exist between the wetlands on the subject property and any TNW or RPW:
  - a. There is no surface hydrologic communication between the subject wetland and any TNW or RPW;
  - b. Permafrost is a confining layer that limits communication between the groundwater and surface waters to seasonal snowmelt outside of the growing season;
  - c. Evaporative losses during the growing season preclude the migration of rainfall into the subpermafrost aquifer;
  - d. Numerous barriers to surface flow exist between the subject wetlands and the Tanana River; and
  - e. Water within the Tanana River is chemically distinguishable from the waters in the alluvial aquifer underlying Fairbanks.
3. The Alaska District has improperly invoked 'adjacency' to avoid having to perform a hydrological nexus evaluation as required by guidance:
  - a.) COE Channel A is not an RPW; and
  - b.) Aerial photographs do not display flow in COE Channel A except under "artificial irrigation".

The primary reason for the appeal is that the District established adjacency between the Appellants' property and the Tanana River due to a broad continuum of wetlands. The site is separated from the River by man-made features (levee, access road and railroad berm). A secondary reason for appeal is that the District concludes the Appellants' property is adjacent to Drainage Channel A (appeal reasons 4 and 5).

The District's JD Form indicates that waters of the US located on the site consist of wetlands adjacent to TNWs. [JD Form, II.B.1.a]. The JD Form also contends that the wetlands on the Appellants' property are adjacent to RPWs that flow directly or indirectly into TNWs. [JD Form, III.D.2]. The JD Form summarizes the rationale for supporting the determination that wetlands are adjacent to a TNW: [JD Form, III.A.2]:

The wetlands on the parcel are separated from the Tanana River by a railroad berm and a flood control levee. Side channels of the river are shoreward of the levee, thus separated from the wetlands only by a railroad berm, which is culverted at the western end of the wetland complex next to the airport, and at the southeastern end of the parcel, where Drainage Channel A crosses it. Drainage Channel A is a manmade RPW running westward between the railroad and the levee south of the parcel, and flowing into the Tanana River. The wetlands are therefore also abutting a RPW. There is also an unnamed slough originating approximately five miles east and flowing through the property which is a RPW originally tributary to the Chena River. The downstream end of the slough was filled during construction of the Fairbanks International Airport, and the slough now only flows into the surrounding wetland complex.

The JD Form defines the term adjacent as:

[b]ordering, continuous, or neighboring. Wetlands separated from other waters of the US by man-made dikes or barriers, natural river berms, beach dunes, and the like are also adjacent.

This definition is derived from 1986 Corps regulations at 33 CFR 328.3(a)(7)(c) that state, "the term adjacent means bordering, contiguous or neighboring. Wetlands separated from other waters of the United States by man-made ditches or barriers, natural river berms, beach dunes and the like are adjacent wetlands." Although 'railroad berms and levees' are not explicitly mentioned in the definition, they are man-made barriers or obstructions separating portions of a once intact wetland adjacent to and contiguous with the Tanana River.

The subject of adjacency is initially addressed in the Corps of Engineers regulations for the Regulatory Program in 1977. In the preamble to the 1977 regulations under Part 327, it states:

The landward limit of Federal jurisdiction under Section 404 must include any adjacent wetlands that form the border of or are in reasonable proximity to other waters of the United States, as these wetlands are part of the aquatic system.

It further states that "adjacent" means "bordering, contiguous and neighboring" and that these terms include "wetlands directly connected to other waters of the United States, or are in proximity to these waters but physically separated from them by man-made dikes or barriers, natural river berms, beach dunes, and similar obstructions."

By reviewing aerial photography and observing the area during the site visit, the adjacent wetlands appear to be historically part of a contiguous wetland system that is connected to the Tanana River, a traditional navigable water. Corps regulations at Section 329.4, defines navigable waters (including adjacent wetlands) and mentions impediments in the navigable waters:

Navigable waters of the United States are those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce. A determination of navigability, once made, applies laterally over the entire surface of the waterbody, and is not extinguished by later actions or events which impede or destroy navigable capacity. [emphasis added]

It is apparent that the intent of the above regulations is to ensure that man-made structures cannot isolate adjacent wetlands to a TNW. Therefore, because the wetlands on the Appellants' property meet the definition of waters of the US under 33 CFR 328.3(a) (7), they are adjacent wetlands.

Besides the District's use of the adjacency definition to determine that the project site is adjacent to a TNW, the Appellants state that the use of barriers by the District is inconsistent with the ruling by the Ninth Circuit Court of Appeals in *Northern California River Water vs. City of Healdsburg*. The RFA contains quotes from the case that "for dikes and barriers and levees are manifestly intended to prevent a surface-water connection." The Appellants argue that since the court determined that the man-made structures are "manifestly intended" to prevent a surface water connection, and a surface water connection is needed to establish adjacency, the wetlands adjacent to the Appellants' property are not jurisdictional. This argument is not valid due to the discussion below, in which the *Rapanos* Supreme Court guidance specifically states, "a continuous surface connection is not required to establish adjacency under this [adjacency] definition."

During the appeal conference and in the RFA, the Appellants also stated that the wetlands on their property must have a surface connection or a significant hydrologic nexus to navigable waters of the US and referenced recent Supreme Court rulings, specifically the SWANCC decision addressed in the background information and the *Rapanos* decision. The District appropriately determined that the jurisdictional determination was made in accordance with the SWANCC decision (see above). The District contends that, according to the *Rapanos* Supreme court decision, a continuous surface connection between the wetland and a navigable water is not required when making a determination that the wetlands are adjacent to a TNW. In addition, a significant nexus determination is not required when the District determines that the wetlands in question are adjacent to a TNW.

On June 5, 2007, the Corps and EPA developed a Memorandum *Regarding Clean Water Act Jurisdiction following Rapanos v. United States* (Memorandum). This memorandum provides guidance to Corps Districts and EPA regions on how to

implement the Supreme Court's decision in the *Rapanos* case. The guidance specifically states that the EPA and Corps "will assert jurisdiction over traditional navigable waters, which includes all waters described in 33 CFR § 328.3(a)(1), and 40 C.F.R. § 230.3(a)(1)." In addition, the memorandum also states:

The agencies will also continue to assert jurisdiction over wetlands "adjacent" to traditional navigable waters as defined in the agencies' regulations. Under EPA and Corps regulations and as used in this guidance, adjacent means "bordering, contiguous, or neighboring." **Finding a continuous surface connection is not required to establish adjacency under this definition.** The *Rapanos* decision does not affect the scope of jurisdiction over wetlands that are adjacent to traditional navigable waters because at least five justices agreed that such wetlands are "waters of the United States." [emphasis added].

Appendix A of the June 5, 2007, Memorandum states in the *Summary of Key Points* on page 1:

The agencies will assert jurisdiction over the following waters:

- Traditional navigable waters
- Wetlands adjacent to traditional navigable waters
- Non-navigable tributaries of traditional navigable waters that are relatively permanent where the tributaries typically flow year-round or have a continuous flow at least seasonally (e.g., typically three months)
- Wetlands that directly abut such tributaries

The agencies will decide jurisdiction over the following waters based on a fact-specific analysis to determine whether they have a significant nexus with a traditional navigable water:

- Non-navigable tributaries that are not relatively permanent
- Wetlands adjacent to non-navigable tributaries that are not relatively permanent
- Wetlands adjacent to but that do not directly abut a relatively permanent non-navigable tributary

These two circumstances from the *Rapanos* decision are considered when a case-by-case significant nexus determination is required. The designation of "Wetlands adjacent to traditional navigable waters" would not require a significant nexus determination. Because the wetlands on the Appellants' work site meet the definition of waters of the United States under § 328.3 (a)(7), the nexus to navigable waters has been met.

The administrative record, the *Basis of Determination*, the appeal conference, and the observations made during the site visit support the District's determination that the wetlands on the Appellants' property are adjacent to a navigable water of the US. The



District followed the applicable laws and regulations regarding identification of adjacent wetlands.

**Appeal Reason 2:** Administrative record for our review is incomplete-15 emails withheld.

**FINDINGS:** This reason for appeal has no merit.

**ACTION:** None required.

**Discussion:** The appellants stated during the appeal conference that 15 electronic messages (e-mail) were not included in the administrative record. These messages could provide insight into the District's decision-making process. The District stated that they purged the administrative record of personal notes and pre-decisional material. They removed e-mails that were not used in the decision making process. In addition, The Alaska District Office of Counsel reviewed the administrative record and determined it contained all the required information.

The US Department of Justice provided guidance on what materials should be included in an agency's administrative record. The guidance states that all materials used in the decision making process should be in the record. The agency should purge personal notes, copies, and pre-decisional material from the Record. The guidance recommended that the Agency Office of Counsel review the Record to determine that it has the appropriate information. The Justice Department rescinded the guidance but it is still used by government agencies as a guide to prepare the Record.

Considering the above information, the District properly purged pre-decisional and personal material from the Record.

**The Appellant listed nine reasons for appeal with supporting statements and citations. Appeal reasons 4 and 5 are similar and are combined for simplicity.**

**Appeal Reason 4:** Conclusions in the Jurisdictional Determination are erroneous, notably statements regarding:

- a. Year round flow in A channel;
- b. Number of barriers between A channel and the subject wetlands; and
- c. Local surface flow direction.

**Appeal Reason 5:** Conclusions in the Jurisdictional Determination are not supported by the administrative record.

**FINDINGS:** These reasons for appeal may have merit, if relevant.

**ACTION:** If the District intended to rely upon the project site and Channel A as a second reason for regulatory jurisdiction, then the District is required to revisit its jurisdictional determination to document and explain the specific connections between the wetlands on the Appellants' project site and Channel A, the Relatively Permanent Water (RPW) in question, and the Tanana River.

**Discussion:** These reasons for appeal discuss issues surrounding the District's *Rapanos* determination that Drainage Channel A is a Relatively Permanent Water (RPW) that abuts the wetlands on the Appellants' property. These reasons for appeal also include discussions on barriers between A Channel and the subject wetlands; and local surface flow direction which is addressed in appeal reasons one and seven. As discussed in the first appeal reasons, the primary reason for appeal is that the District claimed jurisdiction over the wetlands on the Appellants' property because they are adjacent to a TNW. As a second indicator of adjacency, the District appears to contend that the wetlands on the Appellants' property are adjacent to RPWs that flow directly or indirectly into TNWs.

In 1994, the District determined that the site is not isolated because Drainage Channel A is adjacent to the wetlands on the Appellants' property and the drainage ditch serves as a hydrologic conveyance to a navigable water. The hydrologic connection was not required to be a RPW before the *Rapanos* guidance; therefore, the District properly determined adjacency in 1994.

After the *Rapanos* Supreme Court Decision, the Appellants felt the District's new 2007 determination that Channel A is a RPW is not supported by evidence in the administrative record. The District contends that Channel A is a RPW that typically flows year round and based their decision on aerial photographs and site visits. Although the photographs and site visits do provide evidence of flowing water, the channel also had dry periods as revealed by a heavily vegetated channel and a lack of an ordinary high water mark (OHWM). An OHWM is a typical indicator of perennial flow since year round waters establish a vegetative growth line where the flowing water scoured the shoreline vegetation.

The JD Form has directions for the District to complete the form and justify a RPW determination. The directions in Section III.B state:

The agencies will assert jurisdiction over non-navigable tributaries of TNWs where the tributaries are "relatively permanent waters" (RPWs), i.e. tributaries that typically flow year round or have a continuous flow.... A wetland that directly abuts a RPW is also jurisdictional. If the aquatic resource is not a TNW, but has year-round (perennial) flow, skip to Section III.D.2.

Section III D.2. of the JD Form under the category of **RPWs that flow directly of indirectly into TNWs**, states:

Drainage Channel A has year round flow for most of its length, based on aerial photography and site visits at various times of the year, although the flow appears to be subsurface in some localized areas. The channel was designed to intercept groundwater flow and provide drainage to the Tanana River, as part of the Corps of Engineers Chena River Lakes Flood Control Project.

If relevant, the District is required to justify the JDs wetlands determinations by completing the JD Form. The District must complete the form according to the directions contained in the *U.S. ARMY CORPS OF ENGINEERS JURISDICTIONAL DETERMINATION FORM INSTRUCTIONAL GUIDEBOOK*. The Guidebook instructs the users on how to support determinations of RPWs that flow directly or indirectly into TNWs. The instructions state:

If flow is typically year round, flow determinations should be supported by the characteristics in Section III.B.1 of the form such as flow/gage data, rainfall data, and anecdotal information.

The District did not complete Section III.B.1 and did not conclusively document that Channel A is a RPW with year around flow. In addition, the RO had a conversation with Mr. Forest McDaniel, the District PM who performed the 2004 delineation report. The PM believed that Channel A is probably not a RPW due to the absence of an OHWM. However, the designation of an OHWM was not necessary to determine a hydrologic conveyance in 2004.

In their current form, the JD Form, site visit, and information obtained from the PM does not support the District's determination that the wetlands on the project site are adjacent to RPWs that flow directly or indirectly into TNWs. To clarify this issue, the District should issue an amended decision document that clearly indicates whether Channel A is a second basis for jurisdiction and, if so, the District should comprehensively describe the information in the record supporting that assertion.

**Appeal Reason 7:** Analysis performed fails to take into account the significant influence permafrost has on local/regional hydrology.

**FINDINGS:** This reason for appeal has no merit.

**ACTION:** None required.

**Discussion:** During the Appeal Conference and in the Record, the Appellants' submitted a large amount of scientific data in support their conclusion that the porous frozen media (permafrost) can prevent subsurface flows from the Appellants' property to the Tanana River and that the Tanana River water is chemically distinguishable from the waters in the alluvial aquifer underlying Fairbanks. The Appellants also submitted Information that the impounded waters between the railroad embankment and the project site infiltrates into the groundwater system or is lost due to evaporation. Information concerning the "local/regional hydrology" is also in the administrative record

and was discussed at the appeal conference. The Appellants summarized their groundwater flow information on page 8 of the RFA:

An evaluation of infiltration into the subpermafrost aquifer from the subject wetlands indicates that:

1. Less than one quarter of the surface area of basins VII, IX, and X may potentially communicate with the subpermafrost aquifer;
2. Groundwater flow direction is to the west northwest and away from the COE Channel A and Tanana Rivers; and
3. Significant groundwater impacts between the Chena River and the subject wetlands have had no physical or chemical impacts on the Chena River or Tanana River. [emphasis added]

The Hydrological information provided supports the conclusion that the actual direction of groundwater flow is from the Tanana River across the site to the Chena River. To further support this claim, the Appellants submitted a letter dated March 5, 2007 from Michael Lilly of *Geo-Watersheds Scientific* to Larry Peterson (Appellants' consultant). Mr. Peterson had contacted Mr. Lilly requesting his expertise on the history of the site investigations and the ground-water flow direction. An excerpt from the letter summarizes the majority of the positions taken by the Appellants' concerning permafrost and subsurface direction:

[T]here is a general gradient in the area from the Tanana River to the Chena River in a northwest direction. In any North-South transect between the two rivers from their confluence, the Tanana River is higher. The hydraulic conductivity of the Chena alluvium sediments is very high, so the ground-water levels will rise and fall with changes in the river levels. In the vicinity of the Chena River, this can locally reverse ground-water levels due to its rapid stream changes. The Tanana River does not reverse ground-water gradients, more than a few hundred feet from the bank.

Based on the above statements, information obtained from the administrative record, the appeal conference, and the site visit to the culverts, it appears the District agrees with the Appellants' finding that there is a hydrologic connection between the wetlands located on the property and the Tanana River. The surface and ground water flows are from the Tanana River to the northwest, with local reversals of ground-water levels due to its rapid stream changes. The hydrological information generally contradicts the permafrost conclusions that the ground water does not leave the site but is absorbed in the permafrost or evaporates. In addition, the chemical and biological differences in waters of the US between the project site and the Chena or Tanana River would not be relevant because there are no listed exceptions in § 328.3 (a)(7) for these differences.

Even though the District agreed with the Appellants concerning the hydrologic conductivity between the Tanana River and the wetlands on the work site, they stated during the appeal conference that proof of this connection is not necessary. The District made the correct determination that the wetlands on the Appellants' property meet the definition of waters of the United States under § 328.3 (a)(7), and that man-made

barriers cannot sever adjacency (See Appeal Reasons 1,3,6 and 9). Because the wetlands on the Appellants work site meet the definition of waters of the United States under § 328.3 (a)(7) the “significant” nexus to navigable waters has been met.

**Appeal Reason 8:** The Alaska District failed to account for current case law and wrongly concluded that wetlands that lack a significant hydrologic nexus with a Traditionally Navigable Water body are “adjacent wetlands.”

**FINDINGS:** This reason for appeal has no merit.

**ACTION:** None required.

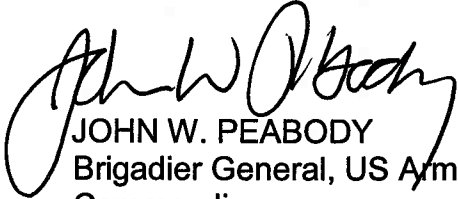
**Discussion:** According to the RFA, the primary reason for the appeal of the 1997 JD is adjacency. The RFA states:

At the core of the Alaska District's decision to assert jurisdiction over the subject property is the proposition that the wetlands are adjacent to the Tanana River, a Traditionally Navigable Water body (TNW). The basis for adjacency has been defined by the Supreme Court as "inseparably bound up with the navigable water body such that it is impossible to determine where the navigable water body ends and the wetland begins". In the most recent rulings, the Supreme Court affirmed that adjacency means inseparably bound up minimally requires a surface connection or significant hydrologic nexus. Based upon the Supreme Court's rulings, adjacency presupposes that a significant hydrologic nexus exists and adjacency cannot be used as a fall back position to assert jurisdiction when a significant hydrologic nexus does not exist.

The Alaska District's interpretation of the *Rapanos* and SWANCC Supreme Court decisions is discussed in the previous reasons for appeal. The District complied with the *Rapanos* guidance in determining that the project site is adjacent to a TNW. Because the wetlands on the Appellants' work site meet the definition of waters of the United States under § 328.3 (a)(7), the nexus to navigable waters has been met. However, the District's determination that the wetlands on the project site are adjacent to RPWs that flow directly or indirectly into TNWs is not supported by evidence in the administrative record.

One of the final adjacency issues is the above statement from the RFA that, “Based upon the Supreme Court's rulings, adjacency presupposes that a significant hydrologic nexus exists and adjacency cannot be used as a fall back position to assert jurisdiction when a significant hydrologic nexus does not exist.” During the appeal conference, the Appellants' were questioned where this Supreme Court ruling is located. The Appellants could not present the case where Court made this decision. In addition, the administrative record contains no information that supports the claim that the District used the definition of adjacency as a “fall back position.”

**CONCLUSION:** As my final decision on the merits of the appeal, I conclude there is substantial evidence in the administrative record to support the Alaska District's jurisdictional determination, with the exception of Appeal Reasons 4 and 5. Other than Appeal Reasons 4 and 5, the administrative record and information obtained at the site visit do not support the Appellants' reasons for appeal that the wetlands on the property are isolated and not regulated. The District's determination was not otherwise arbitrary, capricious or an abuse of discretion, and was not plainly contrary to applicable law or policy. With regard to Appeal Reasons 4 and 5, the District is required to revisit its jurisdictional determination and, if applicable, to document and explain the specific reasons Channel A is a RPW with year round flow to a TNW. This concludes the Administrative Appeal Process.



JOHN W. PEABODY  
Brigadier General, US Army  
Commanding