

**ADMINISTRATIVE APPEAL DECISION**  
**PRECON DEVELOPMENT CORPORATION, INC.**

**FILE NO. NAO-2007-240**

**NORFOLK DISTRICT**

**21 FEBRUARY 2013**

**Review Officer:** Jason Steele, U.S. Army Corps of Engineers, South Atlantic Division (SAD)

**Appellant:** Precon Development Corporation, Inc.

**Date of Receipt of Request for Appeal:** 10 October 2012

**Acceptance of Request for Appeal:** 5 November 2012

**Appeal Meeting:** 29 November 2012

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

**SUMMARY OF DECISION**

Appellant's request for appeal (RFA) does not have merit. The administrative record (AR) substantiates the District's determination that the subject wetlands have a significant nexus to the nearest downstream Traditional Navigable Water (TNW), as required by the *U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook* (6/1/2007) ("JD Guidebook"), and the EPA/Army Memorandum, *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States* (2 December 2008) ("Rapanos Memorandum").

**BACKGROUND**

Precon Development Corporation, Inc. (Appellant) is appealing the Norfolk District's (District) 9 July 2012 decision to assert jurisdiction over 4.8 acres of wetlands on property located in the northern portion of section CC1b, south of the unpaved portion of Hillcrest Parkway, Chesapeake, Virginia.

The District contends that the onsite wetlands (4.8 acres) are adjacent (but not directly abutting) to a seasonal relatively permanent water (RPW) that directly flows into a perennial RPW (Saint Brides Ditch) that directly flows into a TNW (Northwest River). The District claims jurisdiction over the onsite wetlands via significant nexus to the downstream TNW.

The appellant disputes the District's assertion of jurisdiction based on its submitted RFA received on 10 October 2012 and outlined below.

### **INFORMATION RECEIVED DURING THE APPEAL AND ITS DISPOSITION**

1. The District provided a copy of the administrative record, which was reviewed and considered in the evaluation of this request for appeal.
2. The appellant supplied clarifying documentation at the time of submittal of the RFA.

### **APPELLANT'S REASONS FOR APPEAL**

Appeal Reason 1: "The Corps position is based upon an incorrect interpretation and application of governing law."

Appeal Reason 2: "The administrative record contains no documentation establishing a significant nexus between the subject wetlands and the Northwest River."

Appeal Reason 3: "The Corps position is based on multiple mis-statements of facts."

Appeal Reason 4: "The Corps failed to take into consideration material, undisputed physical evidence that was submitted into the administrative record by Precon."

### **EVALUATION OF THE REASON FOR APPEAL, FINDING, DISCUSSION, AND ACTION FOR THE NORFOLK DISTRICT COMMANDER**

**Appeal Reasons 1 & 2:** Since the District's assertion of jurisdiction, via significant nexus, is part of the administrative record and the District based their jurisdictional determination on the interpretation and application of governing law, these two reasons for appeal are combined for similarity.

**Finding:** These reasons for appeal do not have merit.

**Discussion:** In *Rapanos v. United States*, 547 U.S. 715 (2006), the United States Supreme Court addressed the question of the circumstances under which a wetland or tributary is a "water of the United States" within the meaning of the CWA. The *Rapanos* decision included five opinions, with no single opinion commanding as majority of the court. The U.S. Army Corps of Engineers and Environmental Protection Agency issued guidance in response to the *Rapanos* decision. The *Rapanos* Memorandum provides that "[w]here there is no majority opinion ..., controlling legal principles may be derived from those principles espoused by five or more justices." As a result, "regulatory jurisdiction under the CWA exists over a water body if either the plurality's or Justice Kennedy's standard is satisfied." *Rapanos* Memorandum, p. 3. This is sometimes referred to as the "two test" approach. The plurality's test (Plurality Test) extends the Corps regulatory authority "only to 'relatively permanent, standing or continuously flowing bodies of water' [referred to as perennial "RPWs"] connected to traditional navigable waters [TNWs], and

to 'wetlands with a continuous surface connection to' such relatively permanent waters." Justice Kennedy's test (Kennedy Test) concluded that wetlands are waters of the United States "if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity" of traditional navigable waters [TNWs]." Rapanos Memorandum, pp. 1-3.

The Plurality Test may not be used to establish jurisdiction in this instance because the subject wetlands (4.8-acre site) do not have a continuous surface connection to a perennial RPW (relatively permanent, standing or continuous flow, typically year-round). The Kennedy test was used since the subject wetlands are adjacent to (not directly abutting) a seasonal RPW (tributaries that have continuous flow at least 3 months of the year).

The JD Guidebook, p. 7, states: "A significant nexus exists if the tributary, in combination with all of its adjacent wetlands, has more than a speculative or an insubstantial effect on the chemical, physical, and/or biological integrity of a TNW."

The Rapanos Memorandum, p. 8, outlines key points to consider when conducting a significant nexus determination:

- A significant nexus analysis will assess the flow characteristics and functions of the tributary itself and the functions performed by any wetlands adjacent to the tributary to determine if they significantly affect the chemical, physical and biological integrity of downstream traditional navigable waters.
- "Similarly situated" wetlands include all wetlands adjacent to the same tributary.
- Significant nexus includes consideration of hydrologic factors including the following:
  - volume, duration, and frequency of flow, including consideration of certain physical characteristics of the tributary
  - proximity to the traditional navigable water
  - size of the watershed
  - average annual rainfall
  - average annual winter snow pack
- Significant nexus also includes consideration of ecologic factors including the following :
  - potential of tributaries to carry pollutants and flood waters to traditional navigable waters
  - provision of aquatic habitat that supports a traditional navigable water
  - potential of wetlands to trap and filter pollutants or store flood waters
  - maintenance of water quality in traditional navigable waters

The District provided its significant nexus evaluation as a supplement to the "Approved Jurisdictional Determination Form" (JD Form), dated 9 July 2012. This supplement is titled, "Addendum to Approved Jurisdictional Determination Form for the Edinburgh PUD" (Addendum to the JD Form) and will be used in the evaluation of this RFA.

**The flow characteristics, within both the perennial RPW (Saint Brides Ditch) and seasonal RPW (described in the Addendum to the JD Form, pp. 10-12), establish a significant nexus determination using hydrologic factors, as per the Rapanos memorandum. The 4.8 acre wetlands are adjacent to the seasonal RPW which flows into the perennial RPW, which directly flows into the TNW. The flow characteristics and documentation of the existence of a seasonal RPW and perennial RPW, are described as follows:**

The flow for the 2,500 linear foot seasonal RPW is seasonal while the 4,900 feet of Saint Brides Ditch (2,967 linear feet of which runs along the western Edinburgh PUD boundary) is perennial as is the entire portion of the Saint Brides Ditch downstream to the Northwest River.

The seasonal RPW has flow at least through the late winter to early spring when rainfall and the water table are highest....

The District documented evidence of flow. Water was observed and photographed in the seasonal RPW on 2/8/02, 3/3/02, 3/18/02, 3/28/02 and 4/1/02. Standing water was also observed in the seasonal RPW on 1/24/08 to the south of the outfall at the west end of Hillcrest Parkway while the region was under drought conditions (Figure O, photographs 1 and 2). Water staining was also observed on the vegetation along the banks corresponding with the OHWM. This is evidence of the presence of water in this channel for an extended period of time. Photographs taken show water in the RPW during each site visit. In addition, Exhibit 32 shows clear visual evidence of flow, a sediment plume, from the RPW to Saint Brides Ditch, supporting the conclusion of at least seasonal flow. Further evidence of flow is the lack of terrestrial vegetation within the RPW channel bottom, the presence of a clear line or water mark on the bank of the RPW and the changes in soil type and characteristics from the bank to the bottom of the RPW. Water staining, litter, debris, sediment dams and leaf packs also provide evidence of regular flow from this RPW to the Saint Brides Ditch.

Saint Brides Ditch is a perennial system with flow present for the majority of the year. Photographs of the portion of Saint Brides Ditch adjacent to the Edinburgh PUD were taken and water is present in all of the photos. Water was also observed in this channel both upstream and downstream of the Edinburgh PUD. Water staining on vegetation along the ditch banks as well as the presence of blackened leaves in areas below the observed OHWM further support that the area is inundated for extended periods.

There are no stream flow gauges in Saint Brides Ditch nor in the Northwest River.... On numerous occasions under differing weather conditions, Corps personnel have visited the site and observed flow in Saint Brides Ditch.

As outlined above, the District substantially supported its significant nexus

determination, as it relates to the flow characteristics of the tributaries (establishing hydrology and supporting the perennial/seasonal status of the tributaries), as per current policy and guidance.

**The significant nexus evaluation is described in the Addendum to the JD Form, pp. 15-28. The first part of the District's significant nexus evaluation examined the importance and struggles of maintaining the chemical, physical and biological integrity of the Northwest River (TNW), pp. 15-17:**

The District observed that Rare plant and animal studies conducted in the watersheds revealed that these systems support the greatest diversity and abundance of rare species in Virginia east of the Blue Ridge. The Northwest River is also an important wildlife corridor as well as a public drinking water supply.

Since 1998, the Northwest River has been listed as impaired due to the fact that it exceeds Virginia's minimum dissolved oxygen (DO) water quality standard. The portion of St. Brides Ditch from Saint Brides Road to the confluence with the Northwest River as well as portions of the Northwest River proper are listed as being impaired due to low DO concentrations.

The Integrated Report indicates that the low DO condition is likely a result of excessive plant growth (eutrophication) which is typically triggered by excessive nutrient (nitrogen and/or phosphorus) inputs. The Integrated Report identifies point sources such as storm water outfalls as well as non-point sources such as agricultural and urban runoff as contributors to the nutrient loads. Areas of the Northwest River downstream of the Saint Brides Ditch outlet have been specifically identified as having excessively high loads of agricultural nitrogen and phosphorous. The Integrated Report also identifies the lower portion of the Northwest River as in need of a high level of public water supply protection due to potentially high non-point source pollution loads.

On January 13, 2011, the DEQ released a draft report titled "Total Maximum Daily Load Development for the Northwest River Watershed, A Total Phosphorus TMDL Due to Low Dissolved Oxygen Impairment." According to this report, DO measurements collected between 1997 and 2010 near the outlet of Saint Brides Ditch were found to be in violation of the State water quality standard for DO 56% of the time.

DEQ determined that to address this problem, a Total Maximum Daily Load (TMDL) for phosphorus was needed. A TMDL is a pollution budget that determines a maximum limit of pollutant the water body can receive in a given period of time and still meet the intended water quality standard. Based on a relatively unimpacted reference stream, a TMDL for phosphorous in the Northwest River was proposed at 9,627 kg/yr. Currently the Northwest River system experiences a total phosphorus load of approximately 15,917 kg/yr. This

means the phosphorus load of the Northwest River system would need to be reduced by at least +/- 40% in order to achieve compliance with the water quality standard.

According to the 2011 draft report, phosphorus is delivered to the Northwest River system from both point and non-point sources and is transported either attached to sediments or dissolved in water runoff. Therefore, control and reduction of runoff and sedimentation is key in achieving the required reductions necessary to bring the system into compliance with the state water quality standards.

As outlined above, the District substantially examined the importance of maintaining the chemical, physical and biological integrity of this TNW. The Rapanos Memorandum, p. 10, footnote 35, states:

In discussing the significant nexus standard, Justice Kennedy stated: "The required nexus must be assessed in terms of the statute's goals and purposes. Congress enacted the [CWA] to 'restore and maintain the chemical, physical, and biological integrity of the Nation's waters' . . ." 126 S. Ct. at 2248. Consistent with Justice Kennedy's instruction, EPA and the Corps will apply the significant nexus standard in a manner that restores and maintains any of these three attributes of traditional navigable waters.

**The second part of the District's significant nexus evaluation examined the tributaries, their relevant reach, their similarly situated wetlands, and the functions they provide to the downstream TNW, pp. 17-28:**

#### **Tributary - Relevant Reach and Similarly Situated Waters**

For purposes of determining a significant nexus the Rapanos Guidance describes the "relevant reach" of a tributary as the entire reach of stream that is of the same order (i.e., from the point of confluence, where two lower order streams meet to form the tributary, downstream to the point such tributary enters a higher order stream). As described above, the Relevant Reach used here is the portion of Saint Brides Ditch from its origin to its confluence with the first-order tributary just north of Benefit Road. The similarly situated waters includes the 166 acre onsite wetlands adjacent to Saint Brides Ditch and the onsite seasonal RPW flowing into Saint Brides Ditch. Based on data from the City of Chesapeake, the drainage area for the Relevant Reach is approximately 1,342 acres. Therefore, similarly situated waters also include the estimated 282 acres of remaining wetlands within this drainage area.

The subject 4.8 acres of wetlands are adjacent to the seasonal RPW. The 4.8 acres of wetlands function as one with the remainder of the 166 acres of on-site wetlands in the Saint Brides Ditch drainage area because historically they are part of the same wetland system and they provide the same or similar functions.

Similarly, this seasonal RPW is one portion of the larger RPW adjacent to the 166 acre wetland system. While it also functions integrally with the remaining adjacent RPW, specific details concerning this portion of the Relevant Reach are discussed to provide a more complete overview of the functioning of the entire on-site Saint Brides Ditch drainage system. As outlined above, the 166 acres of wetlands within the Edinburgh PUD are part of a much larger system and despite recent fragmentations, continue to function as part of the entire 447.76 acres of similarly situated wetlands within the Relevant Reach.

Berms have partially severed the direct surface water connection between the 166 acres of wetlands and Saint Brides Ditch, including the connection between the 4.8 acres of wetlands and the seasonal RPW. A berm with a variable width and height is present along the eastern edge of Saint Brides Ditch where it runs along the western property boundary of the Edinburgh PUD. The Corps has documented at least three breaks in the berm north of the intersection of the 2,500 foot seasonal RPW and the Saint Brides Ditch, separating most of the 166 acres of wetlands from the Saint Brides Ditch. These breaks allow exchange of surface water between the 166 acres of wetlands and Saint Brides Ditch. The berm present between the 4.8 acre wetland and the seasonal RPW is continuous; however, there is no evidence that the berms have diminished the overall ecological functions that the entire similarly situated wetlands perform and may even enhance certain wetland functions such as pollutant removal and flood flow retention.

#### **Functions and Indicators of Functions establishing a Significant Nexus**

Based on the observed indicators, the tributaries within the Relevant Reach are performing the following functions: flood flow attenuation, sediment storage, water quality functions, nutrient cycling, pollutant removal and food chain support.

The wetland functions of the area in question, along with all similarly situated wetlands adjacent to the Relevant Reach, as determined from the indicators include water storage, flow attenuation, flood desynchronization, carbon sequestration, nutrient cycling, pollutant/particulate removal, and wildlife habitat support.

#### **Flood Flow Functions (Water Storage, Flood Attenuation/Desynchronization)**

The wetlands on this property along with the similarly situated wetlands store the precipitation that falls on the site. Approximately 45 inches of rainfall occurs in an average year. Precipitation falling on the 166 acres of wetlands within the Edinburgh PUD would total 203 million gallons per year and total precipitation falling on the entire 448 acres of similarly situated wetlands would equal 548 million gallons each year. In addition to the direct precipitation input, these

wetlands, since they are situated relatively low in the landscape, receive and store runoff from the surrounding upland areas.

Overall, these mineral flat wetlands are capable of storing large quantities of water due to the slow drainage associated with a landscape of low relief. This water storage prevents flood flows from large precipitation events from moving quickly downstream to the Northwest River.

The City of Chesapeake drainage study documents complaints about flooding in the Caroon Farm subdivision located on the west side of Saint Brides Ditch, opposite the Edinburgh property. This study identifies the locations of the current flooding and predicts that loss of storage capacity caused by additional development in the wetland areas will exacerbate the flooding. Information from this study indicates that additional drainage modifications will be necessary to deal with the increased flooding. These modifications will result in faster and more flashy release of stormwater leading to increased downstream velocities and flooding in Saint Brides Ditch and the Northwest River. Currently the existing wetlands store rainfall and slowly release water thereby mediating downstream flows to the Northwest River.

Partial berms separating the 166 acres of onsite wetlands from the main portion of Saint Brides Ditch slow the exchange of water between the wetlands and Saint Brides Ditch. The continuous berm present between the 4.8 acre wetland and the seasonal RPW allows floodwaters to be retained longer within the wetlands prior to being discharged downstream thus moderating and mitigating flood flows. According to Dr. Whittecar, the water from these wetlands is gradually released into Saint Brides Ditch. This slow release of water maintains base flows to the Northwest River and also moderates downstream flooding during extreme precipitation events.

This tributary and wetland complex protects downstream waters including the Northwest River from damages due to high volume, high energy flood flows. Without this system, the downstream waters would receive a greater volume of stormwater at a greater velocity. This would lead to greater frequency of overbank events in which water would spill out of the channel onto adjacent properties. Increased water velocities would also cause accelerated rates of bank erosion leading to loss of land and an increase in sedimentation and pollution of downstream waters including the Northwest River.

Therefore, the 4.8 acre wetland under review along with all other similarly situated wetlands and the Relevant Reach of Saint Brides Ditch contribute substantially and directly to the physical, chemical and biological integrity of the Northwest River. As discussed above, these wetlands can and do store a significant amount of water delivered by precipitation both directly and via runoff from adjacent uplands. The water storage functions performed by this tributary and wetland complex contribute substantially to moderating flows delivered to



and within the Northwest River. Storage of water within the wetlands and the tributary prevent flash, high velocity and high volume flood flows which would lead to increased flooding, increased damage from erosion and increased sedimentation within the Northwest River. Water stored within this system is delivered more gradually downstream providing stable base flow to the Northwest River.

### **Sediment Storage and Nutrient/Pollutant Removal**

Sediment is a pollutant that directly adversely affects downstream species by covering natural substrate, fouling or interrupting biological processes and clouding the water column. Decreases in water clarity hamper both survival and photosynthetic ability of aquatic vegetation. Plant photosynthesis is a main source of Dissolved Oxygen (DO) and decreases in DO lead to decreases in many fish and benthic invertebrate populations. Decreases in water clarity also impair the ability of aquatic species to locate food. Increases in suspended sediments interfere with aquatic species' respiration by clogging gills and with spawning and reproduction by covering nests and/or eggs. Bottom dwelling species are also negatively impacted by being smothered with sediments. Sediment also indirectly adversely affect downstream water quality by carrying adhered pollutants/nutrients such as phosphorus and the ammonium form of nitrogen to downstream waters.

Tributary systems such as Saint Brides Ditch and its adjacent wetlands act as sinks for sediment and other pollutants and buffer downstream waters from negative effects. Low water velocities and extended retention time associated with the Saint Brides Ditch system and the wetlands in the Relevant Reach allow suspended sediments and other pollutants time to settle out of the water column. As a result, sediments are stored and pollutants and nutrients are removed prior to reaching the Northwest River.

Adjacent wetlands also remove nutrients, sediment and pollutants from the aquatic system. These wetlands slow and retain runoff allowing sediment particles and dissolved pollutants to be assimilated and preventing them from reaching downstream waters including the Northwest River. Physical, biological and chemical processes remove much of this material once it enters the wetland.

The Northwest River has been listed as impaired for many years due to low dissolved oxygen conditions. Low dissolved oxygen levels are attributable in part to eutrophication caused by excess nutrient (nitrogen and phosphorus) inputs. The 4.8 acres of wetlands in combination with all similarly situated wetlands act as a sink for a substantial amount of atmospheric nitrogen per year. Loss of these areas would have a substantial and direct effect on the chemical integrity of the Northwest River by releasing additional nitrogen and phosphorus to the system.

This in turn would lead to increased occurrence of eutrophic events and further depletions in dissolved oxygen in the Northwest River.

The 4.8 acre wetland under review along with all other similarly situated wetlands and the Relevant Reach of the Saint Brides Ditch contribute substantially and directly to the chemical and biological integrity of the Northwest River. As discussed above, work within and adjacent to these wetland areas directly and immediately increases sediment input to the system. Additionally, loss of these areas to residential or agricultural development contributes additional long-term sediment inputs. These long-term inputs will likely include additional pollutants such as nitrogen and phosphorus. Loss of wetland areas will reduce the system's ability to act as a sink for these inputs and result in more sediment, nitrogen and phosphorus being delivered to the Northwest River. This would hinder the Northwest River from being able to attain the reduction in TMDL necessary to ensure the future health of that system.

#### **Wildlife and Food-chain Support**

Despite ditch construction and the fill associated with Hillcrest Parkway, the ecological functions of these specific 4.8 acres of wetlands along with the other wetlands onsite (a total of 166 acres) and within the Relevant Reach (a total of 447.76 acres) remains relatively unimpaired. These wetland areas provide habitat for a number of species. The Department of Conservation and Recreation (DCR) submitted comments to a Public Notice for impacts to the 4.8 acres of wetlands for a permit application. DCR indicated that the canebrake rattlesnake, a State endangered species, has been documented in the area. The Norfolk District has observed evidence; i.e. shed skins of canebrake rattlesnakes on the Edinburgh PUD on two occasions. DCR also indicated that the eastern big-eared bat, a federal species of concern and a State endangered species, has been documented nearby. On site, based on observed evidence (such as deer tracks), wildlife currently crosses the road fill and uses the wetlands on either side of the fill and ditches. This road fill is beginning to revegetate which will aid animals in crossing this area as it provides some measure of protection from predators.

Other functions related to food chain support, such as the decomposition of woody debris and leaf matter and bioavailability of organic carbon are being performed by these wetlands. The Saint Brides Ditch, especially the Pleasant Grove Swamp portion, acts as a funnel for wildlife to utilize this system as a corridor for movement between the Northwest River and points to the north and west.

The 4.8 acre wetland under review along with all other similarly situated wetlands and the Relevant Reach of Saint Brides Ditch contribute substantially and directly to the chemical, physical and biological integrity of the Northwest River. Carbon is stored and cycled within this system and released downstream to provide food

chain support. Microorganisms and macroinvertebrates found within the wetland and upper tributaries are also found within the Northwest River and provide an important food source for larger organisms within the Northwest River system. Finally, many of the larger fish and wildlife species, including several threatened or endangered species, that inhabit the Northwest River system, use the wetland and tributary system a travel corridor and/or feeding, breeding or nursery areas.

#### **Applicant's functional assessment of the Edinburgh PUD wetlands**

Precon Development Corporation submitted a functional assessment completed by Kerr Environmental Services (Kerr) in June 2004 in response to a request from the Department of Environmental Quality associated with a permit application. Bay Environmental, acting as agent for Precon, submitted this same assessment as part of permit application NAO-2007-240. This functional assessment is based on the Technique for the Functional Assessment of Nontidal Wetlands in the Coastal Plain of Virginia. The assessment looked at seven functions including flood storage, nutrient retention, sediment retention, sediment stabilization, wildlife habitat, aquatic habitat and public use. Their assessment specifies it is for the wetlands on the entire Edinburgh PUD.

The determinations made by Kerr and confirmed by the Norfolk District demonstrate that even the onsite wetlands alone (without the aggregation of the similarly situated wetlands in the Relevant Reach) have a significant nexus to downstream traditionally navigable waters (it should be noted that the Kerr analysis considered all wetlands on the Edinburgh PUD, both the 166 acres in the Saint Brides Ditch watershed and the remaining wetlands that are in the Coopers Ditch watershed). However, this determination is magnified greatly in the Saint Brides Ditch watershed when considered along with the functions provided by all similarly situated wetlands located within the Relevant Reach.

As outlined above, the District substantially examined the functions of the tributaries and the functions performed by any wetlands adjacent to the tributaries on maintaining the "chemical, physical and/or biological integrity" of the downstream TNW.

**The last part of the District's significant nexus evaluation concluded whether or not the tributaries along with their similarly situated wetlands (including the subject 4.8-acre site) have more than a speculative or insubstantial role in maintaining the "chemical, physical and/or biological integrity" of the downstream TNW, pp. 28-30:**

The Relevant Reach and its 448 acres of adjacent wetlands play a significant and crucial role in maintaining the integrity of the downstream traditionally navigable waters of the Northwest River. This role is amplified by the substantial loss of wetlands that has already occurred in the watershed. These forested wetlands shade the tributary RPW's which helps regulate and moderate the water

temperature. The RPW channels and the wetlands retain and store floodwaters that would otherwise contribute to downstream flooding and erosion. These wetlands act as kidneys, filtering and retaining pollutants that would otherwise flow and pollute downstream waters, including the Northwest River in this case. The wetlands and RPW's in the Relevant Reach retain a large amount of sediment, preventing its release to downstream waters which could impact the navigability of these waters as well as impact fish and other aquatic organisms and plants. As demonstrated by the evidence, it is indisputable that the 166 acres of wetlands, including the 4.8 acre wetland area in question, in the Northwest River watershed on the Edinburgh PUD, and the 448 acres in the Relevant Reach, as well as the tributary ditches, contribute substantially to the chemical, physical and biological integrity of the Northwest River. Therefore, consistent with the criteria set out in the *Rapanos* Opinion, and consistent with the *Rapanos* Guidance, there is a significant nexus between the subject wetlands and the traditionally navigable Northwest River. Accordingly, the subject wetlands are clearly jurisdictional under the Clean Water Act.

As shown above, the District correctly concluded, from the AR, that the functions of the tributaries and the functions performed by any wetlands adjacent to the tributaries (including the 4.8 acre subject site) significantly affect the chemical, physical and biological integrity of downstream TNW.

Based on the Corps current policy and guidance, for documenting CWA jurisdiction (JD Guidebook and *Rapanos* Memorandum) concerning wetlands that are not directly abutting RPWs that flow directly or indirectly into TNWs, it is found that the District substantially documented a significant nexus that was more than speculative or insubstantial.

**Action:** None required.

**Appeal Reasons 3 & 4:** Since the appellant believes the District's determination is based on multiple mis-statements of facts that are contrary to the appellant's submitted information, which the appellant believes the District failed to take into consideration (i.e. material, undisputed physical evidence that was submitted into the administrative record by Precon), these two reasons for appeal are combined for similarity.

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

**Discussion:** The appellant submitted new information to the District on 19 July 2012, post the District's 9 July 2012 approved jurisdictional determination (AJD). This new information was a report by Stroud Water Research Center that sought to rebut the District's 9 July 2012 AJD. The District responded to the appellant's 19 July 2012 report on 17 September 2012 via a document titled "Memorandum Regarding Precon Approved Jurisdictional Determination".

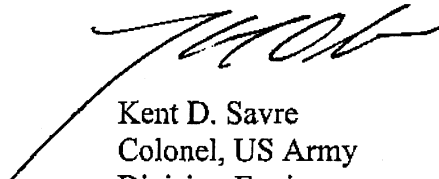
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Although the District's final conclusion in their Memorandum Regarding Precon Approved Jurisdictional Determination did not agree with the Stroud Water Research Center report, it is found that the District did consider and fully evaluate the information contained in the report.

**Action:** None required.

### CONCLUSION

For the reasons stated above, I find Appellant's RFA does not have merit. The AR substantiates the District's determination that the subject wetlands have a significant nexus to the nearest downstream TNW, as required by the JD Guidebook and Rapanos Memorandum. The administrative appeals process for this action is hereby concluded.



Kent D. Savre  
Colonel, US Army  
Division Engineer