

## ADMINISTRATIVE APPEAL DECISION

MR. DEAN VAN DRESS; FILE NO. 2010-01402

BUFFALO DISTRICT

DECEMBER 7, 2012

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

**Appellant:** Mr. Dean Van Dress

**Permit Authority:** Section 404, Clean Water Act (33 U.S.C. 1344)

**Receipt of Request for Appeal:** December 5, 2011

**Appeal Meeting:** March 6, 2012

**Summary of Appeal Decision:** Mr. Dean Van Dress (appellant) is appealing a Buffalo District (district) approved jurisdictional determination (AJD) for a wetland within his property located in the City of Berea, Cuyahoga County, Ohio. The appellant submitted three reasons for appeal: 1) the district did not address in the administrative record (AR) several expert reports that the appellant submitted; 2) the district did not clearly establish the ordinary high water mark (OHWM); and 3) the district did not adequately support its significant nexus determination including its assertions that the wetlands, "...contribute organic carbon and nutrients to Baldwin Creek" as well as provide, "...recreational and educational opportunities for residents of the area." Accordingly, the appellant believes the district omitted material facts and incorrectly applied law, regulation, guidance and/or policy to determine jurisdiction. **For reasons detailed in this document, the first and second reasons for appeal do not have merit but the third reason has merit. The AJD is remanded to the district for reconsideration.**

**Background Information:** The property in question is located at 150 Adams Street in the City of Berea, Cuyahoga County, Ohio. The district conducted a site visit on August 12, 2011,<sup>1</sup> and issued an AJD, by letter dated October 26, 2011, which stated that, "...the wetland on the subject parcel is part of a surface water tributary system to a navigable water of the United States..." and is "...regulated under Section 404 of the Clean Water Act."<sup>2</sup>

---

<sup>1</sup> The district conducted the site visit in response to a jurisdictional determination request by the appellant. The district clarified during the March 6, 2012, appeal meeting that the appellant originally requested a preliminary jurisdictional determination (PJD) and later verbally changed the request to an AJD. The AR did not contain a copy of the appellant's original PJD request and the district indicated during the appeal meeting that they failed to document the appellant's verbal AJD request in a telephone log in the AR.

<sup>2</sup> AR page 81.

The appellant submitted a complete Request for Appeal (RFA), dated December 11, 2011, which was received by the Great Lakes and Ohio River Division office on December 5, 2011. The appellant was informed, by letter dated January 3, 2012, that his RFA was accepted.

### **Information Received and its Disposal During the Appeal**

The 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. . To assist the Division Engineer in making a decision on the appeal, the RO may allow the parties to interpret, clarify, or explain issues and information already contained in the AR. Such interpretation, clarification, or explanation does not become part of the AR, because the District Engineer did not consider it in making the decision on the AJD. However, in accordance with 33 CFR § 331.7(f), the Division Engineer may use such interpretation, clarification, or explanation in determining whether the AR provides an adequate and reasonable basis to support the District Engineer's decision. The information received during this appeal review and its disposal is as follows:

1. The district provided a copy of the AR to the RO and the appellant which the RO received on January 13, 2012. The AR is limited to information contained in the record by October 26, 2011.
2. An appeal meeting was held via teleconference on March 6, 2012. The appeal meeting followed the agenda provided to the district and the appellant by the RO via email on February 24, 2012. During the appeal meeting, numerous documents were determined to be missing from the AR. They are as follows:
  - a. The district indicated it inadvertently omitted from the AR its letter to the appellant dated February 28, 2011.<sup>3</sup> The appellant forwarded a copy of the letter via email to the RO and the district on March 6, 2012. Because this letter was completed prior to October 26, 2011, it was considered as part of the evaluation of this RFA.
  - b. The district indicated it inadvertently omitted from the AR the attachments to an email it received from the appellant dated September 16, 2011.<sup>4</sup> The appellant forwarded a copy of the attachments via email to the RO and the district on March 6, 2012. Because the attachments were part of an email sent prior to October 26, 2011, they were considered as part of the evaluation of this RFA.
  - c. The appellant noted several of his emails were missing from the AR. The RO requested that both the district and the appellant forward to all parties copies of all their email correspondence that occurred prior to October 26, 2011, the date the district made its AJD decision. The district sent, via email dated March 6, 2012, a PDF document that contained 26 email messages between the district and the appellant that were dated on or before October 26, 2011. The appellant forwarded, via email dated March 6, 2012, 31 emails messages he previously sent to the district

---

<sup>3</sup> This letter is referenced on AR page 1. The district prepared the letter in response to an alleged violation that was reported by the appellant's neighbor. The district's letter indicated that a violation had not occurred on the appellant's property.

<sup>4</sup> The email is found on AR page 67.

that were dated on or before October 26, 2011.<sup>5</sup> In addition, the appellant forwarded, via email dated March 6, 2012, 31 emails that he previously received from the district that were dated on or before October 26, 2011. The RO reviewed the messages forwarded by the appellant and confirmed, that with the exception of two email messages,<sup>6</sup> they were within either the original AR forwarded by the district, or within the email sent by the district that contained the emails they indicated that they inadvertently omitted from the original copy of the AR. The emails that were sent prior to October 26, 2011 were considered as part of the evaluation of this RFA.

- d. The appellant indicated several photos he supplied to the district were missing from the AR. The appellant forwarded, via email on March 6, 2012, six photographs to the RO and the district. The district confirmed the photos the appellant forwarded were the same as those that were inadvertently omitted from the AR. Because these photos were sent to the district prior to October 26, 2011, they were considered as part of the evaluation of this RFA.
  - e. The appellant indicated that the soils report he submitted to the district was missing from the AR. The appellant forwarded, via email on May 4, 2012, a copy of a soils report which matched the date of that which the district had inadvertently omitted from the AR. Because this soils report was submitted to the district prior to October 26, 2011, it will be considered as part of the evaluation of this RFA.
3. On May 18, 2012, the RO forwarded via email a draft Memorandum for Record (MFR) summarizing the appeal meeting topics to the appellant and the district with a request that they review and provide comment by May 25, 2012. In an email response dated May 24, 2012, the district provided one comment regarding section 6.i. of the draft MFR. Additionally, the appellant provided comments, via email dated May 25, 2012, regarding sections 2.b., 5.a., 5.f., 5.r., 6.e., and 6.i. of the draft MFR. Finally, the district provided, via email dated May 30, 2012, one additional comment regarding section 6.i. of the draft MFR.
  4. The RO supplied the final MFR to the appellant and the district via email on June 1, 2012. The clarifying remarks received prior to May 25, 2012, were included in section 8 of the final MFR. The district's comment received on May 30, 2012, is included in this decision document via footnote below as it was received after the MFR was finalized.<sup>7</sup> A copy of the final MFR is included as Attachment A to this decision document.

#### **Appeal Evaluation, Findings and Instructions to the Buffalo District Engineer:**

**Appellant's First Reason for Appeal: The district omitted material fact. More specifically, the district did not address in the AR several expert reports which the appellant submitted.**

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

---

<sup>5</sup> The appellant did forward two emails that were dated after October 26, 2011: one dated October 28, 2011 from the appellant to the district inquiring as to the status of his AJD request and the other, the district's email response, dated October 30, 2011. These emails were not considered as part of this RFA because they occurred after October 26, 2011.

<sup>6</sup> Id.

<sup>7</sup> In an email dated May 30, 2012, the district provided an additional comment regarding section 6.i. of the draft MFR, which stated that the district project manager, "...may have stated that he himself is not an ichthyologist or entomologist; however, I am certain it was not a generalized statement applying to all of [the district] or the Corps."

**Action:** No action required.

**Discussion:** In his RFA, the appellant stated that he "...submitted several expert reports..." that he believed the district did not include in the AR. During the March 6, 2012, appeal meeting, the appellant clarified that the expert reports to which he referred in his RFA were those dated June 8, 2010, and April 18, 2011, prepared by his consultant, Mr. Robert Judge. The appellant further stated that he was unaware the reports were included in the AR until he received his copy from the district as part of this appeal process; however, he did not believe that the district adequately considered them as part of its decision on jurisdiction.

The *Standard Operating Procedures for the U.S. Army Corps of Engineers Regulatory Program* recommends that districts, "...include all documents and materials directly or indirectly considered by the decision-maker" within the AR.<sup>8</sup> The appellant's report dated June 8, 2010, is located on pages 16 through 33 in the AR. Additionally, the appellant's report dated April 18, 2011, is located on pages 2 through 15 in the AR. Inclusion of these reports in the AR indicates they were considered by the district. Therefore, the appellant's first reason for appeal has no merit. The degree to which the district considered these reports will be apparent based on the discussions of the appellant's other reasons for appeal.

**Appellant's Second Reason for Appeal: The district incorrectly applied law, regulation, or officially promulgated policy. More specifically, the appellant believes the district did not clearly establish the Ordinary High Water Mark (OHWM).**

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

**Action:** No action required.

**Discussion:** In his RFA, the appellant states, "The lateral limits of jurisdiction extend to the limits of the OHWM (33 CFR 328.4). The DE fails to establish the OHWM. The subject property is beyond the limits of the OHWM." The appellant clarified during the March 6, 2012, appeal meeting that he believed the OHWM was an important component of delineating wetlands.

Regulations at 33 CFR § 328.4(c)(1) state that, "[i]n the absence of adjacent wetlands, the [limits of] jurisdiction [in non-tidal waters] extends to the [OHWM]." The term "OHWM" is defined in 33 CFR § 328.3(e) as, "...that line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas." 33 CFR § 328.4(c)(2) states that, "[w]hen adjacent wetlands are present, the [limits of] jurisdiction [in non-tidal waters] extends beyond the [OHWM] to the limit of the adjacent wetlands."

---

<sup>8</sup>July 1, 2009. *Standard Operating Procedures for the U.S. Army Corps of Engineers Regulatory Program*: Section 2: File Maintenance. The *Standard Operating Procedures for the U.S. Army Corps of Engineers Regulatory Program* provides a summary of current policies and procedures and should be used as day-to-day informal guidance by regulatory project managers as they implement the program.

Finally, wetland boundaries (the limits of the wetland) are delineated by the presence or absence of hydrophytic vegetation, hydric soils, and wetland hydrology.<sup>9</sup>

The district indicated in the AR that there are “wetlands adjacent to but not directly abutting [relatively permanent waters] (RPWs) that flow directly or indirectly into [traditionally navigable waters] TNWs.”<sup>10</sup> The district further indicated that the on-site wetland is adjacent to Coe Lake as well as Baldwin Creek.<sup>11</sup> Because the wetland is adjacent to, but not abutting Coe Lake and Baldwin Creek, these aquatic features are therefore separated by uplands. Consequently, jurisdiction would not only extend to the OHWM of Baldwin Creek and Coe Lake, but would also extend beyond the OHWM to include the area within the wetland’s limits. Jurisdiction would not, however, include the upland area between these features. Therefore, the wetland’s proximity to the OHWM (beyond the limits of the OHWM) does not prevent the wetland from being a water of the U.S.

Because a wetland is delineated by the presence or absence of hydrophytic vegetation, hydric soils, and wetland hydrology and not the OHWM, and a wetland’s proximity to the OHWM (beyond the limits of the OHWM) does not prevent it from being a water of the U.S., the appellant’s second reason for appeal has no merit.

**Appellant’s Third Reason for Appeal: The district incorrectly applied law, regulation, or officially promulgated policy. More specifically, the district did not adequately support their significant nexus determination including their assertion that the wetlands, “...contribute organic carbon and nutrients to Baldwin Creek” and provide, “...recreational and educational opportunities for residents of the area.”**

**Finding:** This reason for appeal has merit.

**Action:** The district should further analyze and document for the record whether there exists a significant nexus that has more than a speculative or insubstantial effect on the chemical, physical, and/or biological integrity of the TNW. The significant nexus determination should contain a fact specific analysis of the functions that the tributary and its adjacent wetlands within the relevant reach provide and should elaborate on why the nexus between the tributary and its adjacent wetlands (including the on-site wetland) and the TNW is or is not significant, as well as why it is or is not more than speculative or insubstantial. The analysis should focus on how the functions performed by the tributary and its adjacent wetlands (including the onsite wetland) effects the physical, chemical and/or biological integrity of the TNW. The administrative record should be revised accordingly to reflect this analysis.

**Discussion:** In 2007, as a result of the U.S. Supreme Court *Rapanos* decision,<sup>12</sup> the Environmental Protection Agency (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,

<sup>9</sup> Environmental Laboratory. (1987). "Corps of Engineers Wetlands Delineation Manual," Technical Report Y-87-1, U.S. Army Engineer Waterways Experiment Station, Vicksburg, MS.

<sup>10</sup> AR page 85, Section II.B.1.a.

<sup>11</sup> AR page 88, Section III.B.2.(i)(b).

<sup>12</sup> Combined cases of *Rapanos v. United States* and *Carabell v. United States*. 126 S. Ct. 2208 (2006).

permitting actions, and other relevant actions are consistent with the *Rapanos* decision and supported by the AR. The two agencies issued joint revised *Rapanos* guidance on December 2, 2008, in response to public comments received and the agencies' experience in implementing the *Rapanos* decision.<sup>13</sup>

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 traditionally navigable waters (TNWs) and their adjacent wetlands, as well as 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, for tributaries that are not relatively permanent, is based on the concurring opinion of Justice Kennedy and 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 every water body that is not an RPW if that water body is determined (on the basis of a fact-specific analysis) to have a significant nexus with a TNW. The classes of water bodies that are subject to CWA jurisdiction, if such a significant nexus is demonstrated, are: (1) non-navigable tributaries that do not typically flow year-round or have continuous flow at least seasonally, (2) wetlands adjacent to such tributaries, and (3) wetlands that are adjacent to but that do not directly abut a relatively permanent, non-navigable tributary.

Implementation of the *Rapanos* decision requires the Corps to strive for more thoroughness and consistency in the documentation of jurisdictional determinations. To meet this requirement, the Corps now uses a standardized AJD form. Instructions for completing the form are found in the *U.S. Army Corps of Engineers Jurisdictional Form Instructional Guidebook* (Guidebook).<sup>14</sup> The Guidebook clarifies terms commonly used in the form, presents an overview on jurisdictional practices, and supplements the form instructions.

The district indicated on the AJD form that the wetland on the appellant's property is adjacent to, but not abutting Coe Lake as well as Baldwin Creek.<sup>15</sup> Because the wetland in question was documented as adjacent to, but not directly abutting an RPW, the district was required to conduct a "significant nexus" analysis to determine whether the tributary and its adjacent wetlands are jurisdictional.

---

<sup>13</sup> 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.

<sup>14</sup> The Guidebook was issued on June 1, 2007, as Regulatory National Standard Operating Procedures for conducting an approved jurisdictional determination and documenting practices to support an approved JD. Information on *Rapanos* may be found at [http://usace.army.mil/CECW/Pages/cecwo\\_reg.aspx](http://usace.army.mil/CECW/Pages/cecwo_reg.aspx).

<sup>15</sup> AR pages 85 and 88.

The Guidebook states the following regarding the significant nexus determination:

The field staff will assert jurisdiction over wetlands that do not directly abut an RPW where there is a demonstrated significant nexus with a TNW. As a result, the explanation in Section III.C.4 will include a discussion documenting the characteristics and underlying rationale for the conclusions regarding the presence or absence of a significant nexus with a TNW. The significant nexus determination can be based on the wetland under review, in combination with all other wetlands adjacent to that tributary.<sup>16</sup>

The Guidebook further states that:

[F]ield staff will explain the specific connections between the characteristics documented and the functions/services that affect a TNW. Specifically, an evaluation will be made of the frequency, volume, and duration of flow; proximity to a TNW; capacity to transfer nutrients and organic carbon vital to support food webs; habitat services such as providing spawning areas for important aquatic species; functions related to the maintenance of water quality such as sediment trapping; and other relevant factors.<sup>17</sup>

[T]he evaluation will also consider the functions performed cumulatively by any and all wetlands that are adjacent to the tributary, such as storage of flood water and runoff; pollutant trapping and filtration; improvement of water quality; support of habitat for aquatic species; and other functions that contribute to the maintenance of water quality, aquatic life, commerce, navigation, recreation, and public health in the TNW. This is particularly important where the presence or absence of a significant nexus is less apparent, such as for a tributary at the upper reaches of a watershed. Because such a tributary may not have a large volume, frequency, and duration of flow, it is important to consider how the functions supported by the wetlands, cumulatively, have more than a speculative or insubstantial effect on the chemical, physical, or biological integrity of a TNW.<sup>18</sup>

Specific factors considered by the district for the significant nexus determination in this case are found in Sections III.B. and III.C of its AJD Form. The district then made the following statements regarding the wetland's effect on the chemical, physical, or biological integrity of the downstream TNW:

The project wetland provides habitat for several plant and animal species adapted to living in inundated and/or saturated conditions for at least part of their lifecycle. The project wetland mitigates the effects of flooding by absorbing and storing floodwaters from Baldwin Creek. The wetland also filters sediments and other pollutants from floodwaters before they return to Baldwin Creek and/or Coe Lake and before they reach

---

<sup>16</sup> Guidebook page 56.

<sup>17</sup> Guidebook pages 55-56.

<sup>18</sup> Guidebook page 56.

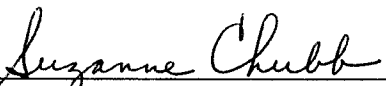
the Rocky River and Lake Erie. The wetland also supports the aquatic food web of Baldwin Creek and the Rocky River by contributing organic carbon and nutrients. It also provides recreation and educational opportunities for residents of the area.<sup>19</sup> The project wetland is at the “bottom” of the Baldwin Creek watershed and helps protect the quality of downstream waters including the Rocky River and Lake Erie.<sup>20</sup>

The district also states:

The wetlands mitigate the effects of flooding by absorbing and storing floodwaters, and filtering sediment and other pollutants. The wetlands also contribute organic carbon and nutrients to Baldwin Creek when floodwaters recede following flood events.<sup>21</sup> The organic carbon and nutrients then get transferred to the Rocky River, a TNW, and eventually to Lake Erie. The wetlands adjacent to Baldwin Creek also provide important habitat for flora and fauna that are adapted to living at least part of their lifecycle in inundated or saturated conditions.<sup>22</sup>

Although the district describes a number of general characteristics of the wetland on the appellant’s property, the AR does not contain a fact-specific analysis of how these factors constitute more than a speculative or insubstantial effect on the chemical, physical, and/or biological integrity of the downstream TNW (the Rocky River).

**Conclusion:** For the reasons stated above, I have determined the appellant’s first and second reasons for appeal do not have merit but the appellant’s third reason for appeal has merit. The approved jurisdictional determination is remanded to the Buffalo District for reconsideration consistent with the discussions above. The final Corps decision on jurisdiction in this case will be the Buffalo District Engineer’s decision made pursuant to my remand.

  
\_\_\_\_\_  
Ms. Suzanne Chubb  
Regulatory Program Manager  
Great Lakes and Ohio River Division

---

<sup>19</sup> The district clarified during the March 6, 2012, appeal meeting that this statement is based on the assumption that area residents can walk along the berms by the appellant’s property and view wildlife on his property and adjacent to it as the wetland extends beyond the appellant’s property line.

<sup>20</sup> AR page 89.

<sup>21</sup> The district clarified during the March 6, 2012, appeal meeting that this assertion is based on a fundamental knowledge of wetlands and that flooding washes the material into the streams.

<sup>22</sup> AR page 90.



**ATTACHMENT A**  
**Appeal Meeting**  
**Final Memorandum for Record**  
**June 2012**



Reply to  
Attention of:

**DEPARTMENT OF THE ARMY**  
**SOUTHWESTERN DIVISION, CORPS OF ENGINEERS**  
**1100 COMMERCE STREET, SUITE 831**  
**DALLAS, TEXAS 75242-1317**

CESWD-PD-O

1 June 2012

**MEMORANDUM FOR RECORD**

**SUBJECT:** Notes of 6 March 2012 appeal meeting for approved jurisdictional determination (file number LRB-2010-01402) by Mr. Dean Van Dress.

1. An appeal meeting was held via teleconference on 6 March 2012 at 0930 (Eastern Standard Time) regarding an approved jurisdictional determination (AJD) completed by the Buffalo District (LRB) for property owned by Mr. Dean Van Dress (appellant) located at 150 Adams Street in Berea, Cuyahoga County, Ohio. The meeting followed the agenda provided to LRB and the appellant by the Southwestern Division review officer (RO) via email on 24 February 2012. A copy of the agenda can be found in Appendix A. The following is a list of participants:

*Mr. Elliott Carman* – Regulatory Appeals Review Officer, Southwestern Division, U.S. Army Corps of Engineers

*Mr. Dean Van Dress* – the appellant

*Mr. John Reinier* – Project Manager, Evaluation Section, Buffalo District, Stow Field Office, U.S. Army Corps of Engineers

*Mr. Mark Scalabrino* – Evaluation Section Chief, Buffalo District, U.S. Army Corps of Engineers

2. Introductions and Opening Remarks

a. The RO read an opening statement that explained the appeal meeting's purpose was to assist the RO in summarizing and clarifying both the appellant's request for appeal and LRB's rationale for their decision.

b. The appellant indicated that he believes his property does not contain a wetland and if it did, he did not believe that the wetland abuts a traditionally navigable water (TNW). The appellant described the flow path from his property to the nearest TNW, which he stated was 30

CESWD-PD-O

SUBJECT: Notes of 06 March 2012 appeal meeting for approved jurisdictional determination (file number LRB-2010-01402) by Mr. Dean Van Dress

river miles away, and indicated he believes his property is so far removed from the TNW that the wetland does not affect it.<sup>23</sup>

c. LRB indicated they believe the on-site wetland should be considered a water of the U.S.

### 3. Reasons for Appeal

a. The appellant confirmed that the reasons for appeal listed below were accurate.

(1) LRB incorrectly applied law, regulation, or officially promulgated policy. More specifically, the appellant believes LRB did not adequately support their significant nexus determination including their assertion that the wetlands, "...contribute organic carbon and nutrients to Baldwin Creek" and provide, "...recreational and educational opportunities for residents of the area."

(2) LRB incorrectly applied law, regulation, or officially promulgated policy. More specifically, the appellant believes LRB did not clearly establish the OHWM.

(3) LRB omitted material fact. More specifically, the appellant believes LRB did not address in the AR several expert reports which the appellant submitted.

### 4. Administrative Record

a. LRB provided a summary of the contents of the AR.

(1) LRB indicated the appellant originally requested a preliminary jurisdictional determination and that the AR did not contain an AJD request because the appellant later requested an AJD verbally.

(2) LRB indicated they inadvertently omitted from the AR their letter to the appellant dated 28 February 2011. This letter is referenced on page 1 of the AR. LRB indicated they would provide a copy of this letter via email to the RO and the appellant. The appellant forwarded a copy of the letter via email to the RO and LRB on 6 March 2012.<sup>24</sup>

(3) LRB indicated they inadvertently omitted from the AR the attachments to an email from the appellant to LRB dated 16 September 2011 (AR page 67). The appellant forwarded a copy of the attachments via email to the RO and LRB on 6 March 2012.

---

<sup>23</sup> The appellant commented in an email dated 25 May 2012, that the, "Appellant AND the District's Administrative Record report finding stated that the nearest TNW is 30 miles away."

<sup>24</sup> This letter, which LRB prepared in response to an alleged violation that was reported by the appellant's neighbor, indicated that a violation had not occurred on the appellant's property.

CESWD-PD-O

SUBJECT: Notes of 06 March 2012 appeal meeting for approved jurisdictional determination (file number LRB-2010-01402) by Mr. Dean Van Dress

b. The appellant noted several of his emails were missing from the AR. The RO requested that both LRB and the appellant forward to all parties copies of all their email correspondence that occurred prior to 26 October 2011, the date LRB made their AJD decision. LRB sent, via email dated 6 March 2012, a PDF document that contained 26 email messages between LRB and the appellant that were dated on or before 26 October 2011. The appellant forwarded, via email dated 6 March 2012, 31 email messages he sent to LRB that were dated on or before 26 October 2011. In addition, the appellant forwarded, via email dated 6 March 2012, 31 emails that he received from LRB that were dated on or before 26 October 2011. The RO reviewed the messages forwarded by the appellant and confirmed they were within either the original AR forwarded by LRB, or within the email sent by LRB that contained the emails they indicated that they inadvertently omitted from the original copy of the AR.

#### 5. Points for Clarification

a. The appellant indicated LRB enforcement personnel initially visited his property to investigate an alleged violation that was reported by his neighbor.<sup>25</sup> LRB indicated the first report they received dated 8 June 2010 was in response to this investigation. The appellant clarified this report was primarily prepared for the City of Barea. LRB indicated they reviewed this report, but it did not contain sufficient information to make a decision; therefore, they requested additional information. The appellant indicated the second report he submitted, dated 18 April 2011, was in response to LRB's questions regarding hydrology. Furthermore, the appellant indicated he did not realize both reports were included in the AR and did not believe the Corps gave much weight to them. LRB indicated they considered and understood both reports, but neither contained sufficient information to make a decision. Finally, the appellant indicated these two reports were the expert reports referenced in his RFA.

b. The RO asked the appellant to clarify his statement from the "omissions section" of his RFA which states, "The subject property is beyond the limits of the OHWM." The appellant indicated he believed the OHWM was an important part of delineating wetlands. The RO clarified that the OHWM is used to determine the limits of jurisdiction for streams/rivers and that the wetland boundaries are determined by the presence of hydrophytic vegetation, hydric soils, and wetland hydrology.

c. The appellant indicated his property was part of a former quarry that was eventually filled with unstable foundry sand. He stated that the previous property owners attempted to build a home on the property, but lost the property after only completing the foundation. The appellant stated he discovered that the sand was unstable after his home was built. The appellant indicated

---

<sup>25</sup> The appellant stated in an email dated 25 May 2012, that, "The District concluded in writing to [the] Appellant that no violation had occurred. The District supplied a copy of the no-violation letter to [the RO]." This letter, referenced in section 4.a.2. above, was received by the RO on 6 March 2012.

CESWD-PD-O

SUBJECT: Notes of 06 March 2012 appeal meeting for approved jurisdictional determination (file number LRB-2010-01402) by Mr. Dean Van Dress

that the soils report he submitted to LRB was missing from the AR. The RO requested that he resend the report to LRB and copy the RO. The appellant forwarded, via email dated 3 May 2012, a copy of a soils report which LRB indicated, via email on 4 May 2012, was not the soils report they inadvertently omitted from the AR. Therefore, this soils report should be considered new information. The RO contacted the appellant on 10 May 2012 via telephone to discuss the appellant's options regarding this new information.<sup>26</sup> The appellant elected to proceed with his appeal based on the administrative record without consideration of the new information. The appellant forwarded, via email on 4 May 2012, a copy of a soils report which matched the date of that which LRB had inadvertently omitted from the AR. This soils report will be considered for the purposes of this appeal.

d. LRB indicated that they considered the current conditions of the appellant's property when they conducted their AJD. In addition, LRB also stated that they considered the history of the appellant's property (it was formerly a quarry) in that it contributed to a depressional area on the appellant's property and documented this in Section 2.i.a. of the AJD form found on AR page 88.

e. The appellant asserted that that the foundry sand cannot support plant life which he believes is supported by the absence of vegetation in the areas shown in the photos at the top of AR page 36 and the bottom of AR page 72. The appellant also indicated that the photos he supplied to LRB were missing from the AR. The RO requested that the appellant resend these photos to LRB and copy the RO. The appellant forwarded, via email on 6 March 2012, six photographs to the RO and LRB. LRB confirmed the photos the appellant forwarded were the same as those that were inadvertently omitted from the AR.

f. The appellant indicated his consultant did not provide an assessment of his entire property, but rather only the area he proposed to fill in order to support his home. This review area did not include the back of his property which the appellant stated is the area that occasionally floods.<sup>27</sup> The appellant indicated that the area between contour lines 793 and 789 shown on AR page 5 is the area proposed for support.

g. LRB indicated the photo found on AR page 59, which was supplied by the appellant's neighbor, demonstrates that the area does flood. The appellant stated that flooding into the back of his property is intermittent; however, the area has experienced high amounts of flooding due to unusually high snow and rainfall amounts. Finally, the appellant indicated he does not believe his property is connected to Coe Lake through the 18-inch culvert.

---

<sup>26</sup> The administrative appeal process (33 C.F.R. § 331 *et seq*), states that new information may not be considered in an appeal. The appellant may choose to either proceed with the appeal based on the administrative record without consideration of the new information, or revise the record to include the new information and have the case returned to the District for action.

<sup>27</sup> The appellant commented via email dated 25 May 2012, that, "The review area in the Appellant's expert report to determine whether a wetland existed was for the fill area. To determine whether a significant nexus exists between Appellant's land and a TNW, the entire area was used as a review area."

CESWD-PD-O

SUBJECT: Notes of 06 March 2012 appeal meeting for approved jurisdictional determination (file number LRB-2010-01402) by Mr. Dean Van Dress

h. In response to a question from the RO, LRB indicated they had not received any wetland data forms with either of the appellant's reports. In addition, the appellant indicated he was unfamiliar with wetland data forms. The RO provided a brief discussion of the purpose of the wetland data forms.

i. LRB indicated they looked at the upland condition while on the appellant's property, but only completed one data form for the wetland as they believed the wetland boundary was obvious. LRB was not able to recall what was used to establish the wetland boundary, but did indicate there was a distinct change in vegetation associated with an abrupt slope on the appellant's property.

j. LRB clarified that the data found on AR page 58 were the initial set of points that represent the wetland boundary and that the data found on AR page 79 were the revised points that reflected the appellant's correct property boundaries.

k. LRB clarified the "aquatic fauna" noted on AR page 55 were gastropod shells that they observed around the wetland perimeter.

l. When asked about the third to the last paragraph of AR page 19 which provides a discussion of the pH of the property, the appellant stated that the Ohio Administrative Code establishes a relationship between pH and quarries. In addition, the appellant stated that the Ohio Administrative Code also indicates that quarries are not wetlands. Therefore, the appellant stated he was trying to demonstrate in his first report that the pH of his property proved his site was formerly a quarry which, in accordance with the Ohio Administrative Code, would not be considered a wetland.

m. The appellant stated he no longer intends on creating a pond in the rear of his property as his 8 June 2010 report initially suggested.

n. LRB clarified that information pertaining to the 8 July 2011 field work referenced on their AJD form (AR page 85) can be found on AR pages 34-42. LRB indicated photos from their August 2011 field work are found in AR pages 50-54.

o. When asked by the RO to define the review area, LRB indicated the review area was limited to the property and the relevant reach included the wetlands adjacent to Baldwin Creek as well as Coe Lake.

p. LRB indicated the wetland is adjacent to Coe Lake through a culvert. LRB also indicated the wetland is adjacent to Baldwin Creek via surface hydrology (intermittent flooding). Finally, LRB indicated both Coe Lake and Baldwin Creek are perennial, relatively permanent waters (RPW's).

CESWD-PD-O

SUBJECT: Notes of 06 March 2012 appeal meeting for approved jurisdictional determination (file number LRB-2010-01402) by Mr. Dean Van Dress

q. Sections III.2.i.b. and III.2.i.c. found on AR page 88 indicates, “photographic evidence and data collected during field work suggest that floodwaters from Baldwin Creek inundate the project wetlands during periods of high flooding.” LRB clarified during the meeting that the data being referenced in these sections is the photograph found on AR page 59 that was provided to LRB via the appellant’s neighbor. LRB stated they used this photo as part of the basis for their adjacency determination (the wetland is adjacent to Baldwin Creek). LRB also indicated the neighbor asserted during a telephone conversation that the appellant’s property floods annually; however, this conversation is not reflected in the AR as LRB did not document it with a phone log.

r. Section III.2.i.d. on AR page 88 indicates wetlands are in the 500 year or greater floodplain. LRB indicated the floodplain referenced here is the TNW (Rocky River) and that they based this determination on the distance between the wetland and the TNW.<sup>28</sup>

s. Section III.B.3 on AR page 89 indicates the subject wetlands provide recreational and educational opportunities for residents of the area. LRB stated this is based on the assumption that area residents can walk along the berms by the appellant’s property and view wildlife on his property and adjacent to it as the wetland extends beyond the appellant’s property line.

t. Section III.B.3 on AR page 89 indicates the subject wetlands contribute to the food web by contributing organic carbon and nutrients. LRB indicated this assertion is based on a fundamental knowledge of wetlands and that flooding washes the material into the streams.

## 6. Other Questions/Comments

a. The appellant asked LRB if the wetland actually abuts a TNW. LRB indicated it does not.

b. The appellant asked LRB if it was appropriate for them to indicate on section II.B.1.a. of the AJD form (AR page 85) that “wetlands adjacent to but not directly abutting RPWs that flow directly or indirectly into TNWs.” LRB indicated it was as water flows from the site through multiple RPWs and then into the TNW.

c. The appellant asked LRB what the length of the growing season was. LRB indicated they did not know.

d. The appellant asked LRB how long it would take for water to travel from the wetland on his property to Baldwin Creek. LRB indicated they did not know.

---

<sup>28</sup> The appellant commented via email dated 25 May 2012, that, “The fill area is outside of the 500 year floodplain as shown in the survey supplied by Appellant and as stated by Appellant’s expert.”

CESWD-PD-O

SUBJECT: Notes of 06 March 2012 appeal meeting for approved jurisdictional determination (file number LRB-2010-01402) by Mr. Dean Van Dress

e. The appellant asked LRB if they conducted any specific tests to determine if his property contributed organic compounds to the Rocky River, and if so, how much of the material actually reached it. LRB indicated they relied on their knowledge of wetlands as the basis of their determination and were uncertain how much material reached Rocky River.<sup>29</sup>

f. The appellant asked LRB how the wetland on his property impacted water quality. LRB indicated the wetlands accumulate pollutants as well as contribute organic carbon to the system.

g. The appellant asked LRB if they actually visited the TNW. LRB indicated they did not.

h. The appellant asked LRB what percent of the watershed was comprised of his property. LRB did not know, but indicated the appellant should be able to calculate this.

i. The appellant asked LRB if they knew which specific fish species or plants existed because of the wetland on his property. The LRB project manager indicated he did not have a specific list and that he is not a fish biologist or entomologist, but that fish species in the TNW are impacted by organic carbon that originated from the wetland on his property.<sup>30</sup>

j. The appellant asked LRB if they have a set procedure they follow to designate a TNW. LRB indicated they did not.

## 7. Conclusion

a. The RO discussed the next steps in the appeal process including the memorandum for record as well as possible outcomes of the appeal process.

b. The appeal meeting concluded at approximately 1200 (Eastern Standard Time). The appeal meeting was conducted via teleconference; therefore, a site visit was not conducted.

8. Review - On 18 May 2012, the RO forwarded via email a draft Memorandum for Record (MFR) summarizing the appeal meeting topics to the appellant and LRB for review and comment. The RO requested that all parties provide comments by close of business on 25 May 2012.

a. In an email dated 24 May 2012, LRB provided one comment regarding section 6.i of the draft MFR. LRB commented that they, "...do not recall a statement by [the] corps stating 'they

---

<sup>29</sup> The appellant commented via email dated 25 May 2012, that, "LRB said that they performed no tests, procedures or experiments to support their conclusions. LRB said that all conclusions were based on 'a general knowledge of wetlands.'"

<sup>30</sup> In an email dated 24 May 2012, LRB commented that they, "...do not recall a statement by [the] corps stating 'they are not fish biologists or entomologists.'" The appellant commented via email dated 25 May 2012, that the statement was consistent with his notes of the appeal meeting.



CESWD-PD-O

SUBJECT: Notes of 06 March 2012 appeal meeting for approved jurisdictional determination (file number LRB-2010-01402) by Mr. Dean Van Dress

are not fish biologists or entomologists.” LRB also indicated in the same email that, “The remainder of the document appears to be an accurate representation of the meeting as I recall it.”

b. In an email dated 25 May 2012, the appellant provided comments for sections 2.b., 5.a., 5.f., 5.r., 6.e., and 6.i. above. These comments, which are also included as footnotes in the respective sections, are as follows:

(1) Regarding section 2.b., the appellant commented that the, “Appellant AND the District's Administrative Record report finding stated that the nearest TNW is 30 miles away.”

(2) Regarding section 5.a, the appellant commented that, “The District concluded in writing to [the] Appellant that no violation had occurred. The District supplied a copy of the no-violation letter to [the RO].”

(3) Regarding section 5.f, the appellant commented that, “The review area in the Appellant's expert report to determine whether a wetland existed was for the fill area. To determine whether a significant nexus exists between Appellant's land and a TNW, the entire area was used as a review area.”

(4) Regarding section 5.r., the appellant commented that, “The fill area is outside of the 500 year floodplain as shown in the survey supplied by Appellant and as stated by Appellant's expert.”

(5) Regarding section 6.e., the appellant commented that, “LRB said that they performed no tests, procedures or experiments to support their conclusions. LRB said that all conclusions were based on 'a general knowledge of wetlands.’”

(6) Regarding section 6.i., the appellant commented that, “...LRB did say that they are not fish biologists or entomologists.”

Elliott Carman  
Administrative Appeals Review Officer

## APPENDIX A – VAN DRESS APPEAL MEETING AGENDA

---

**File No:** LRB-2010-01402  
**Informal Meeting Date:** 6 March 2012 @ 0930 (eastern)  
**Location:** Via Teleconference  
Call in number: 888-675-2535  
Access Code: 6246679  
Security Code: 1234

**Representing the Appellant:** Mr. Dean Van Dress (appellant) and Mr. Robert Judge (appellant's consultant)  
**Representing the District:** Mr. John Reinier (LRB project manager) and Mr. Mark Scalabrino (LRB Evaluation Section Chief).  
**Representing the Division and facilitating the meeting:** Mr. Elliott Carman, Administrative Appeal Review Officer (Southwestern Division)

### AGENDA ITEMS

#### I. Introductions and Opening Remarks

- a. Introductions (ALL)
- b. RO opening statement
  - i. Goal of meeting is to:
    1. Summarize/clarify the Appellant's request for appeal (RFA) and
    2. Summarize/clarify the District's rationale for decision
- c. Appellant opening statement
- d. District opening statement

#### II. Reasons for Appeal

- a. The District incorrectly applied law, regulation, or officially promulgated policy. More specifically, the appellant believes the district did not adequately support their significant nexus determination including the district's assertions that the wetlands, "...contribute organic carbon and nutrients to Baldwin Creek" and provide, "...recreational and educational opportunities for residents of the area."
- b. The District incorrectly applied law, regulation, or officially promulgated policy. More specifically, the appellant believes the district did not clearly establish the OHWM.
- c. The District omitted material fact. More specifically, the appellant believes the district did not address in the AR several expert reports which the appellant submitted.

#### III. Administrative Record (AR)

- a. Summary of AR contents (DISTRICT)
- b. Is AR complete? (Anything that should be in AR but isn't?)
  - i. RO
    1. Where is the appellant's original AJD request located in the AR?
    2. Where in the AR is the letter dated 28 February 2011 referenced on AR 1?
    3. Where are the attachments to Mr. Van Dress' 16 September 2011 email (11:26am) found on AR 67?
  - ii. Appellant
  - iii. District
- c. Other questions about the AR (ALL)

## APPENDIX A – CONTINUED

---

### IV. Points for Clarification

#### a. Appellant

- i. RFA “no significant or unspeculative nexus exists” section - the last sentence is a fragment. Were important details omitted?
- ii. RFA “omissions” section – references several expert reports. Are these the two Judge reports dated 18 April 2011 and 8 June 2010 (with Davey Group report attached)? What information do you feel the district omitted from their decision?
- iii. Please clarify this statement from the “omissions section” of the RFA - “The subject property is beyond the limits of the OHWM.”
- iv. AR 2 and 16 - why were two reports submitted to the district (8 June 2010 and 18 April 2011)?
- v. AR 4 “fieldwork observation” section - states that foundry sand “does not support macrophytes.” Please clarify what is meant here.
- vi. AR 4 indicates the property is an abandoned sandstone quarry. AR 19 indicates the quarry was filled with unstable foundry sand. Please clarify when the quarry was abandoned and the limits of the quarry relative to the property. Please be sure to note the limits of where the foundry sand was placed.
- vii. AR 4 “fieldwork observation section” - states, “the area was subject to extensive drainage and watershed over the winter and spring.” Please clarify. Was it drained in the spring? “Watershed?” It is not clear what is meant by the comment.
- viii. AR 4 “fieldwork observation” section states - “ no evidence of disturbance was found” and that the Corps determined, “...that no clean water act violation had occurred.” Please clarify.
- ix. AR 4 “fieldwork observation” section - states no hydric activity, but also states the very rear of the property is subject to occasional flooding. Please clarify.
- x. AR 4 “fieldwork observation” section indicates field samples were taken. AR 1, 2nd paragraph indicates the work for the supplemental report was done during the growing season. Were any data forms filled out associated with this report? If so, where are they?
- xi. AR 16 1st paragraph - indicates that Mr. Judge provided a bank support plan. Please clarify what bank is being supported?
- xii. AR 17, 1st paragraph - says 18” culvert allows “water from Coe Lake to trespass into and flood the southerly portion of the property on an irregular basis.” Do you know frequency of flooding.
- xiii. AR 19, 3rd to last paragraph discusses pH of the property. Please clarify the intent of the paragraph, especially the statement, “The property has access to other surface waters throughout the year, which again does not meet the criteria for a wetland under paragraph (C)(1)(b) and (C)(1)(c), which call for hydrologic isolation.” Finally, what surface waters are referenced here?
- xiv. AR 19 - last paragraph mentions making a pond on the south side of the site. Is this part of the proposed project as it is not clear in the report?

#### b. District

- i. AR 4 indicates the property is an abandoned sandstone quarry. Was this considered this as part of the AJD? Where in the AR this is addressed?

## APPENDIX A – CONTINUED

---

- ii. AR 1 - Who is Tina Stonemetz to which the letter on AR 1 is addressed?
- iii. Did LRB request the supplemental report found on AR 1? Why are there two reports? How did LRB consider the information contained in these reports as part of the AJD?
- iv. AR 55 - Where is the corresponding upland data point? How were the wetland boundaries illustrated on AR 64 established with this one data point?
- v. AR 55 - hydrology section of data form references “aquatic fauna” were observed. Please clarify what fauna were observed.
- vi. AR 58 and 79 - Please clarify what these points represent?
- vii. AR 59 - is this photo related to the statement on AR 4 that no disturbance was found? Please clarify the photograph?
- viii. AR 85 - AJD form references 8 July 2011 field work. Where in the AR is the info from this field work?
- ix. AR 85 - what is the relevant reach (review area) and where is the info on the data form for RPW?
- x. AR 85 - please describe what RPW the wetland is adjacent to.
- xi. AR 88, section III.2.i.b. and III.2.i.c. – indicates “photographic evidence and data collected during field work suggest that floodwaters from Baldwin Creek inundate the project wetlands during periods of high flooding.” What data is being referenced here and where is it in the AR? Also, Section III.2.i.d.. indicates wetlands are in the 500 year or greater floodplain. Is this Baldwin Creek floodplain? If so, is this the frequency that was used to establish adjacency?
- xii. AR 89, section III.B.3 indicates subject wetlands provide recreational and educational opportunities for residents of the area and contribute to the food web by contributing organic carbon and nutrients. Please clarify.
- xiii. AR 92: section IV.A. – indicates NRCS soil survey is supporting info. Please clarify how it was used.

### **V. Other questions/comments**

- a. Appellant
- b. District

### **VI. Concluding Remarks (RO)**