ADMINISTRATIVE APPEAL DECISION
UNIVERSAL WELDING AND FABRICATION, INCORPORATED
PROFFERED PERMIT
ALASKA DISTRICT
FILE NO. POA-2008-0550

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

Appellant/Applicant: Universal Welding and Fabrication, Incorporated

Regulatory Authority: Section 404, Clean Water Act

Date Request for Appeal Received: 6 July 2012

Proffered Permit Appeal Conference: 11 September 2012

Summary of Appeal Decision: Universal Welding and Fabrication, Inc. (appellant) is appealing jurisdiction issues related to an USACE Alaska District (District) proffered permit for their property in North Pole, Alaska. The appellant submitted six reasons for appeal in which they contend that the District omitted material facts, was arbitrary and capricious and incorrectly applied laws, regulations or officially promulgated policy. For reasons detailed in this document, the first reason for appeal does not have merit while the remaining reasons have merit. The proffered permit is remanded to the District for reconsideration.

Background Information: The appellant's property is comprised of 2710 Hurst Road lot, 2720 Hurst Road lot, and Lot 3 Quinnell First Addition subdivision and is located within Section 4, T.2 S., R. 2 E., in North Pole, Alaska. The District issued an approved jurisdictional determination (AJD) dated 22 March 2010, which concluded that, "…the on-site water is part of a large wetland area directly abutting U.S. Army Corps of Engineers Drainage Channel C, a relatively permanent waterway (RPW) and is thereby subject to regulation via Section 404 of the Clean Water Act."[1] In response, the appellant requested, via two letters both dated 25 March 2010, that the District reconsider its AJD. [2] The District stated in an e-mail to the appellant dated 29 April 2010, that upon reconsideration, they had determined, "The [on-site] wetlands will be considered adjacent to, but not directly abutting Channel C…because we do not have enough documentation at this time to determine whether Peridot Road comprises a

[1] 2010 Administrative Record (AR) page 404. For clarity, the District provided the AR to the appellant and the Review Officer in two parts. The first part, the portion of the AR associated with the 2010 appeal of the AJD associated with this proffered permit, is referred to as the 2010 AR. The second part, associated with the current appeal of the proffered permit, is referred to as the 2012 AR.
[2] 2010 AR pages 399-403.

barrier to a continuous surface connection."[3] This was reflected in the District's reconsidered AJD issued on 23 July 2010, in which they stated, "…the [on-site] wetland…is adjacent to Channel C, a relatively permanent water, and sustains a significant nexus with Chena Slough, a traditional navigable water."[4] The appellant appealed the reconsidered AJD via letter dated 28 July 2010.[5] The appeal was found to have partial merit and the AJD was remanded to the District on 31 January 2011 for further evaluation, documentation, and reconsideration.[6] The District responded to the remand via letter to the appellant dated 14 February 2011 in which the District reaffirmed that Chena Slough was a traditionally navigable water and "the subject wetland" was jurisdictional as described in their reconsidered AJD.[7]

The appellant then submitted a permit application, dated 28 June 2011, which the District received on 1 July 2011.[8] Upon completion of their permit evaluation, the District sent an initial proffered permit to the appellant via letter dated 10 April 2012.[9] The appellant responded via letter dated 17 April 2012, with an objection to special condition 5 of the initial proffered permit.[10] In response, the District modified the special condition and sent the proffered permit to the applicant for reconsideration via letter dated 1 June 2012.[11]

The appellant appealed the proffered permit by submitting two Requests for Appeal (RFA) to the Pacific Ocean Division (the Division) via e-mails dated 5 and 6 July 2012. These RFAs were received by the Division on the same dates.[12] The appellant was informed, by letter dated 23 July 2012, that the RFA was accepted. The timeline for the preceding is as follows:

- 22 March 2010: District issues first AJD
- 25 March 2010: Appellant requests the District reconsider their AJD
- 23 July 2010: District issues reconsidered AJD
- 28 July 2010: Appellant appeals AJD
- 31 January 2011: AJD appeal is finalized (partial merit) and remanded to District
- 14 February 2011: District finalizes AJD appeal remand response
- 28 June 2011: Appellant submits permit application to District
- 10 April 2012: District issues initial proffered permit

[3] 2010 AR page 344.
[4] 2010 AR page 109.
[5] 2010 AR page 84.
[6] 2012 AR page 189.
[7] 2012 AR page 184.
[8] 2012 AR page 168.
[9] 2012 AR page 46.
[10] 2012 AR page 41.
[11] 2012 AR page 25. In an e-mail dated 23 May 2013, the District indicated that the appeal form associated with this permit transmittal letter was dated 11 May 2012 due to an error. The appeal form, found on 2012 AR page 28h should have the same date as the transmittal letter, or 1 June 2012.
[12] The appellant's second RFA dated 6 July 2012 was provided to correct the cover letter address at the request of the Division regulatory program manager. While this second RFA contained some additional discussion not found in the original RFA dated 5 July 2012, it was received by the Division within 60 days of the date of the appeal form and the proffered permit. Therefore, it was considered as part of the appellant's RFA in accordance with 33 CFR §§ 331.2, 331.5(a)(1), 331.6(a), and 331.6(b).

- 17 April 2012: Appellant objects to initial proffered permit
- 1 June 2012: District issues proffered permit
- 5/6 July 2012: Appellant appeals proffered permit
- 23 July 2012: Proffered permit appeal accepted

Information Received and its Disposal During the Appeal

33 Code of Federal Regulations (CFR) § 331.3(a)(2) sets the authority of the Division Engineer to hear the appeal of this proffered permit. However, the Division Engineer does not have authority under the appeal process to make a final decision regarding permits, as that authority remains with the District Engineer. Upon appeal of the District Engineer's decision, the Division Engineer or his Review Officer (RO) conducts an independent review of the District's administrative record (AR) to address the reasons for appeal cited by the appellant. The District's AR is limited to information contained in the record as of the date of the Notification of Administrative Appeal Options and Process (NAO/NAP) form. Pursuant to 33 CFR § 331.2, no new information may be submitted on appeal. Neither the appellant nor the District may present new information to the Division. To assist the Division Engineer in making a decision on the appeal, the RO may allow the parties to interpret, clarify, or explain issues and information already contained in the District's AR. Such interpretation, clarification, or explanation does not become part of the District's AR, because the District Engineer did not consider it in making the decision on the permit. However, in accordance with 33 CFR § 331.7(f), the Division Engineer may use such interpretation, clarification, or explanation in determining whether the District's AR provides an adequate and reasonable basis to support the District Engineer's decision. The information received during this appeal process and its disposal is as follows:

1. The District provided a copy of their AR to the RO and the appellant. The AR is limited to information contained in the record by the date of the NAO/NAP form. That date for the AJD is 23 July 2010 which includes 2010 AR pages 104 - 459. For the proffered permit associated with this appeal, that date is 1 June 2012 which includes 2012 AR pages 25 - 200. It should be noted that the District's AR includes numerous documents that were placed in the AR after the District completed their 2010 AJD, and before they responded to either the AJD appeal remand or the applicant's permit request. These documents, which are found on 2010 AR pages 4 through 82, include a District response to the appellant's AJD RFA, conversation records, memorandums for record, and various scientific articles. This information was prepared by the District after they completed their decision on jurisdiction (after the AR was closed) and, as previously mentioned, not in response to either the AJD appeal remand or the applicant's permit request. Therefore, this information was not considered as part of either the District's jurisdiction or permit decisions and consequently should not be considered part of the District's AR. For that reason, this information was not considered as part of the evaluation of this RFA.

2. An appeal conference was held on 11 September 2012 at the Noel Wien Library in Fairbanks, Alaska. The conference followed the agenda provided to the District and

the appellant by the RO via e-mail on 6 September 2012. During the appeal conference, the District clarified that several documents in their AR were inadvertently omitted from the copies provided to the RO and the appellant. Additionally, the appellant provided several documents to the RO and the District. These documents are as follows:

a. The District indicated they inadvertently omitted from the copies of the AR provided to the RO and the appellant evidence of the June site visit referenced on 2010 AR page 110. The District indicated they had digital photographs that were time and date stamped on 16 June 2010 which documented this field visit. The RO requested that the District provide these digital photographs to both the RO and the appellant. The District provided two digital photographs to the RO and the appellant via e-mail dated 25 September 2012. In the e-mail, the District indicated that the photographs should have been inserted in the 2010 AR between pages 305 and 306. These photographs were labeled as 2010 AR pages 305a and 305b. These photos were considered as part of the evaluation of this RFA as they were present in the District's AR prior to the District's decision, but inadvertently omitted from the copies of the District's AR provided to the RO and the appellant due to an error.
b. The District indicated copies of the 2012 permit signature page and the first page of the appeal form were inadvertently omitted from the copies of the AR provided to the RO and the appellant due to a scanning error. The District provided the two pages to the RO and the appellant via e-mail dated 25 September 2012. The permit signature page and page one of the appeal form were labeled as 2012 AR pages 50a and 50b respectively. These pages were considered as part of the evaluation of this RFA as they were present in the District's AR prior to the District's decision on 1 June 2012, but inadvertently omitted from the copies of the District's AR provided to the RO and the appellant due to an error.
c. The District indicated they inadvertently omitted from the copies of the AR provided to the RO and the appellant the District response to the appellant's initialed proffered permit objections as well as the proffered permit and associated appeal form. The District provided these documents to the RO and the appellant via e-mail dated 25 September 2012. The District's response to the appellant's initial proffered permit objections were added as 2012 AR pages 39a and 39b and the proffered permit and appeal form pages were added as 2012 AR pages 28a through 28i. These pages were considered as part of the evaluation of this RFA as they were present in the District's AR prior to the District's decision on 1 June 2012, but inadvertently omitted from the copies of the District's AR provided to the RO and the appellant due to an error.
d. The appellant provided a figure that illustrates their assertion that the wetland on the east side of Peridot Street is adjacent to the wetland on the west side of Peridot Street (a wetland adjacent to a wetland). This figure was included in Appendix C of the appeal conference memorandum for record (MFR). The

figure was not considered new information as it was merely an illustration of the appellant's assertion as it was described in their RFA. Therefore, the figure was considered as part of the evaluation of this RFA.

e. The appellant provided a figure that illustrated the results of their flow measurements to all appeal conference participants.[13] This figure was included in Appendix D of the appeal conference MFR. The appellant indicated they did not provide the data represented in this figure to the regulatory office because the appellant believed the regulatory office had previously instructed them that the AR was closed to new information as they had begun the permitting phase. The RO notified the appellant via letter dated 14 November 2012 that this flow data information, which was not considered as part of the District's decision, was considered new information and not part of the information eligible for consideration in conjunction with the appeal process. The appellant responded via letter dated 19 November 2012 that they wished to proceed with the appeal based on the existing AR.[14] Therefore, the flow data was not considered as part of the evaluation of this RFA.

f. The appellant provided a figure to the appeal conference participants that illustrated the bottom of Channel C relative to the level of the regional aquifer. This figure was included as Appendix E in the appeal conference MFR. The figure was not considered new information as it was merely an illustration of information already found in the AR. Therefore, the figure was considered as part of the evaluation of this RFA.

3. On 11 April 2013, the appellant forwarded to the District and the RO a copy of a letter dated 2 April 1986 from Stuzmann Engineering Associates, Inc. to the Alaska Department of Environmental Conservation that discusses drainage on the then proposed Quinnell Subdivision. In this e-mail, the appellant requested that this information be added to the District's AR. The RO notified the appellant via e-mail dated 15 April 2013 that this letter, which was not considered as part of the District's decision, was considered new information and not part of the information eligible for consideration in conjunction with the appeal process. The appellant responded via e-mail dated 15 April 2013 that they wished to proceed with the appeal based on the existing AR. Therefore, the letter was not considered as part of the evaluation of this RFA.

4. On 15 April 2013, the RO forwarded via e-mail a draft MFR summarizing the appeal conference topics to the appellant and the District with a request that they review and provide comments by close of business on 19 April 2013. In an e-mail dated 16 April 2013, the appellant provided comments regarding sections 4.b., 4.k., 4.m., 5.a., and 5.b. of the draft MFR. In an e-mail dated 19 April 2013, the District provided comments regarding sections 4.m., 4.u., and 4.x. of the draft MFR.

[13] These flow measurements were referenced in Section II, #5 of appellant's revised RFA.

[14] Regulations governing the administrative appeal process (33 C.F.R. § 331 *et seq.*) state that new information may not be considered in an appeal. The appellant may choose to either proceed with the appeal based on the AR 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.

5. The RO supplied the final MFR to the appellant and the District via e-mail on 2 May 2013. The District and appellant's comments were included in section 6 of the final MFR.

Appellant's Reasons for Appeal

Reason 1: The District was arbitrary and capricious. More specifically, the appellant believes the District did not support their determination that water from the subject wetland is capable of traveling, "…over 1.1 miles laterally without falling to either permafrost or the groundwater table."

In their RFA, the appellant states that, "Once a drop of water reaches the groundwater table, it ceases to be a Federal issue since groundwater is a state issue under the Clean Water Act." The appellant clarified during the appeal conference that they believe that the state, not the federal government, has authority over groundwater.

The District states in the AR that, "…the evidence available indicates that the subject wetland sustains an unbroken, shallow sub-surface connection with Channel C…via the highly transmissive, shallow aquifer that extends from Tanana River to the Chena River."[15] Here, the District is not asserting jurisdiction on the groundwater itself, but is attempting to use it as a mechanism to establish adjacency between the on-site wetland and Channel C.[16] Therefore, regulatory authority over the groundwater is not at issue here.

Administrative Appeals Process Regulations at 33 CFR § 328.3(c) state that, "…adjacent means bordering, contiguous, or neighboring." It further states that, "Wetlands separated from other waters of the U.S. by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands.'" Revised *Rapanos*[17] guidance issued by USACE in 2008 further clarifies the regulatory definition of adjacency, stating that wetlands are adjacent if one of three criteria are satisfied: (1) there is an unbroken surface or shallow subsurface connection to jurisdictional waters; (2) they are physically separated from jurisdictional waters by man-made dikes or barriers, natural river berms, beach dunes, and the like; or (3) their proximity to a jurisdictional water is reasonably close, supporting the science-based inference that such wetlands have an ecological interconnection with jurisdictional waters.[18]

The barrier the appellant describes related to this reason for appeal (permafrost) relates to *Rapanos* guidance adjacency criteria one, or the presence of an unbroken surface or shallow subsurface connection to jurisdictional waters. Here, the appellant believes a

[15] 2020 AR page 118.
[16] Revised *Rapanos* guidance issued by USACE in 2008 states that wetlands are adjacent if one of three criteria is satisfied including an unbroken surface or shallow subsurface connection to jurisdictional waters.
[17] Combined cases of *Rapanos v. United States* and *Carabell v. United States.* 126 S. Ct. 2208 (2006).
[18] Grumbles, Benjamin H. and John Paul Woodley, Jr. 2008. Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* and *Carabell v. United States,* p. 5-6.

connection is not possible because the discontinuous permafrost would preclude the connection (the water would not reach Channel C because it would freeze).

The District notes that the predominant soil within the project area is the, "North Pole-Noonku complex, which has seasonal frost that typically thaws by July 1, contains no permafrost, and retains near-surface saturation throughout the growing season"[19] The appellant also recognized that any permafrost present was discontinuous when they stated, "A groundwater connection to the underlying aquifer is speculative based upon depth to groundwater and the presence of discontinuous permafrost."[20] Therefore, while some water may be lost to permafrost present, it does not function as a potential barrier as it is not continuous within the area. As a result, this reason for appeal does not have merit.

ACTION: No action necessary.

Reason 2: The District omitted material fact. More specifically, the appellant stated the District, "…cherry picks hydrologic information from publications describing the regional hydrology, but ignores selected information detrimental to their hypothesis of hydrology" when it determined there was adequate subsurface water to sustain a connection between the subject wetlands and Channel C.

Reason 3: The District omitted material fact. More specifically, the appellant stated the District did not support their assertion that the subject wetland is connected with Channel C and, "…summarily rejected all information that did not support their hypothesis of a biological connection."

Reason 4: The District was arbitrary and capricious. More specifically, the appellant stated, "the district must quantify the magnitude of the biological connection without inferring biological functionality in the absence of a physical or chemical connection."

The root of these three reasons for appeal involves the appellant's belief that the on-site wetlands are not connected, or adjacent, to Channel C with each reason for appeal focusing on specific barriers that the appellant believes prevent this connection. Specific barriers cited in the RFA include inadequate subsurface water to sustain a connection and the lack of a biological/ecological connection between the on-site wetlands and Channel C. The appellant also clarified during the appeal conference that they believe Peridot Road also serves as a barrier to this connection. This issue was not unique to the appeal conference as the appellant had previously expressed this concern as documented in the District's AR.[21] Because of the underlying similarity of these three reasons for appeal, they are being combined and are discussed below.

FINDING: This reason for appeal has merit.

[19] 2010 AR page 118.
[20] 2010 AR page 312.
[21] 2010 AR pages 315-317.

The barriers the appellant describes related to the second reason for appeal (inadequate subsurface water to sustain a connection and Peridot Road) relate to *Rapanos* guidance adjacency criteria one, or the presence of an unbroken surface or shallow subsurface connection to jurisdictional waters. Here, the appellant believes a connection is not possible because the wetland is not connected to the groundwater because of the distance between the two, and that Peridot Road prevents shallow sub surface flow within 24 inches of the ground surface due to the compaction associated with the road.

The appellant's assertions included in reasons for appeal three and four are related to *Rapanos* guidance adjacency criteria three, or where a wetland's proximity to a jurisdictional water is reasonably close, supporting the science-based inference that such wetlands have an ecological interconnection with jurisdictional waters. Here, the appellant believes the District must find some other basis of an ecologic connection beyond the subsurface connection, described by the District as the basis of the ecologic connection, as the appellant does not believe the subsurface connection exists.

The District states in the AR that, "The subject wetland is adjacent to, but not directly abutting Channel C, an RPW. …[T]he subject wetland meets all the criteria for adjacency."[22] However, the portions of the AR included in support of this statement include many confusing statements which imply the on-site wetland is also adjacent to Chena Slough. For example:

> "[T]he wetland sustains occasional surface flow that reaches Chena Slough during high water events."[23]
>
> "[T]he evidence available indicates that the subject wetland sustains an unbroken, shallow sub-surface connection with Channel C, the nearby RPW, and Chena Slough."[24]
>
> "The subject wetland also sustains an intermittent surface water connection with Chena Slough, the nearby [traditionally navigable water]."[25]
>
> "The main [man-made] barrier between the subject wetland and both Channel C and Chena slough is Peridot Street."[26]

The District states that, "…the subject wetland sustains an unbroken, shallow sub-surface connection with Channel C, the nearby RPW, and Chena Slough, the nearby traditionally navigable water (TNW), via the highly transmissive, shallow aquifer that extends from Tanana River to the Chena River."[27] The appellant believes that the vertical connection between the wetland and the aquifer does not exist and provided

[22] 2010 AR page 118.
[23] 2010 AR page 118.
[24] 2010 AR page 118.
[25] 2010 AR page 119.
[26] 2010 AR page 121.
[27] 2010 AR page 118.

data from several U.S. Geological Survey (USGS) groundwater gauging wells to show that, "The average groundwater depth in the area of interest is outside the rooting zone."[28] While the District provides discussion in support of a vertical connection, they do not address the USGS data and assertion provided by the appellant.

Additionally, the District was inconsistent when it discussed the potential for roads to act as a barrier to subsurface flow as the District did not distinguish how one road could impede subsurface flow, while another (or even the exact same road) does not when it made the following statements:

> "[Quinnell Lane/Sigel Street] appears to be impeding surface flow and some near-surface seepage from leaving the lot."[29]
>
> "…most of the runoff from the subject wetland seeps under the on-site berms created when the site was 'windrowed' and under Quinnell Lane/Sigel Street and Peridot Street."[30]
>
> "Lateral sub-surface seepage is likely occurring below the road beds since it is likely that only the shallow organic layer was removed before fill was placed for their construction (no over-excavation). Mr. Lewis reported that the section of Peridot Street where the slough crossings are located was not designed by professional engineers and was constructed circa 1990 using mainly soil that was obtained locally and compacted. Quinnell Lane/Sigel Street appears to have been constructed by similar methods but may have a higher proportion of coarse material mixed in with the native soil."[31]

The District's assertion of an ecological connection between the on-site wetland and Channel C lacks support and is complicated by several confusing statements. The District attempts to support this connection in three ways: 1) by continuous lateral groundwater flow from the subject wetland to Channel C, 2) an occasional surface flow from the subject wetland to Chena Slough, and 3) the relatively continuous expanse of intact habitat connecting the subject wetland to Channel C.[32] An occasional surface connection between the subject wetland and Chena Slough[33] may support adjacency between the wetland and Chena Slough; however, it provides no basis for a connection (or adjacency) between the on-site wetland and Channel C. The "intact habitat" referenced in their third reason is described by the District as a large wetland area that is supported, along with "the myriad of wetlands and waters throughout the alluvial plain," by groundwater from the Tanana River. Therefore, the District appears to base their ecological connection between the on-site wetlands and Channel C on the lateral groundwater flow.

[28] 2010 AR pages 316-317.
[29] 2010 AR page 110.
[30] 2010 AR page 119.
[31] 2010 AR page 121.
[32] 2010 AR page 121.
[33] 2010 AR page 122.

The District does discuss the large wetland area in the context of their significant nexus evaluation when it stated that, "This very broad, contiguous connection with the channel allows for a strong ecological interconnection between the wetland, Channel C, and Chena Slough. This area is one of the few very large, undeveloped wetlands within the alluvial plain and therefore has exceptional value as wildlife habitat."[34] Again, this discussion was in the context of the District's significant nexus evaluation and not adjacency and the wildlife usage referenced was either specific to Channel C and Chena Slough, or was general in nature and lacked specific data to support a connection between the on-site wetland and Channel C.

Finally, the District incorrectly attempted to use a connection between Channel C and Chena Slough to support a connection between the on-site wetland and Channel C when it stated, "…the ecological interconnection…is mainly established through the connection between Channel C and Chena Slough."[35] A connection between two separate aquatic features is not one of the adjacency criteria described in the *Rapanos* guidance and is not sufficient to establish a connection between the on-site wetland and Channel C. Therefore, the District does not establish or clearly support in the AR how lateral groundwater flow creates an ecological connection (or adjacency) between the on-site wetland and Channel C.

The District included a number of confusing, contradictory, and unsupported statements associated with the barriers described in reasons for appeal two through four. Therefore, the District did not support their assertion that the on-site wetland is connected, and thus adjacent, to Channel C.

ACTION: The District shall re-evaluate their permit decision, specifically the AJD upon which it is based, to determine if the on-site wetland is adjacent to Channel C. As part of this re-evaluation, the District must clearly document the connection between the on-site wetlands and Channel C. The District shall revise the AR accordingly to document and reflect the factual data considered in this analysis and provide the appellant a new permit decision, including a re-evaluated AJD upon which the permit decision is based, that reflects this analysis. Should the re-evaluation result in a modification of the AJD (i.e., changes in the extent of waters of the U.S. on the property), the District shall revise their permit decision accordingly (i.e., modify permit conditions, the amount or type of compensatory mitigation required, etc.).

Reason 5: The District incorrectly applied law, regulation, and officially promulgated policy. More specifically, the appellant believes that the subject wetlands are adjacent to other wetlands and should not be considered waters of the U.S.

FINDING: This reason for appeal has merit.

[34] 2010 AR page 126.
[35] 2010 AR page 121.

DISCUSSION: In their original AJD dated 22 March 2010, the District asserted that the wetlands on either side of Peridot Road were a single wetland when they stated that the on-site wetland was, "…part of a large wetland area directly abutting U.S. Army Corps of Engineers' Drainage Channel C…" subject to regulation via Section 404 of the Clean Water Act.[36] The appellant objected to this AJD and requested the District reconsider it on the basis that, "The wetlands on the subject property are separated from C-Channel by a man-made barrier (Peridot Road)..."[37] In response, the District stated in an e-mail to the appellant dated 29 April 2010, that upon reconsideration, they had determined that, "The [on-site] wetlands will be considered adjacent to, but not directly a butting Channel C…because we do not have enough documentation at this time to determine whether Peridot Road comprises a barrier to a continuous surface connection."[38] This was reflected in the District's reconsidered AJD issued on 23 July 2010, in which they stated, "…the [on-site] wetland…is adjacent to Channel C, a relatively permanent water, and sustains a significant nexus with Chena Slough, a traditional navigable water."[39] By this statement, the District created a dynamic involving the on-site wetlands which the appellant, in their RFA, asserts, "…would be wetlands adjacent to adjacent wetlands and fall under case law in the *Great Northwest* case."

The *Great Northwest* case[40] involved the issue of wetlands separated by a man-made barrier from other wetlands that are adjacent to waters of the U.S., a similar scenario as that found on the Universal Welding site. Summary judgment was granted in favor of *Great Northwest* on 8 June 2010 and the Government's motion for reconsideration was denied on 20 July 2010, three days before the District issued their AJD to the appellant here. The summary judgment ruling was not further appealed so it was, and is, arguably, precedential caselaw. Even if not binding in a legal sense, *Great Northwest* is at least legally relevant in the same or similar circumstances.[41]

During the 11 September 2012 appeal conference, the District expressed their belief that the judge's order in the *Great Northwest* case was not applicable to the Universal Welding decision because the District did not believe the circumstances between the *Great Northwest* case and Universal Welding were the same. In saying this, the District acknowledged that they were aware of the *Great Northwest* case and even that they considered it as part of the Universal Welding decision; however, the AR is absent of any discussion or rationale that supports this distinction.

Regulatory Guidance Letter 05-02 states that AJDs, "…remain valid for a period of five years, unless new information warrants revision of the determination…"[42] Additionally, the 2 December 2008 Rapanos Guidance states that, "Any decisions regarding a

[36] 2010 AR page 404.
[37] 2010 AR pages 399-403.
[38] 2010 AR page 344.
[39] 2010 AR page 109.
[40] Great Northwest v U.S. Army Corps of Engineers, Case No. 4:09-cv-00029-RRB.
[41] 2012 AR page 190.
[42] Regulatory Guidance Letter 05-02, Section 1.a.

particular water will be based on the applicable statutes, regulations, and case law."[43] While the *Great Northwest* case involved a railroad berm and not a public street, there appears to be no legal difference between the railroad berm and Peridot Street here. Furthermore, there is geographical, factual, and legal/procedural similarity between *Great Northwest* and the appellant. Because of these similarities, and the fact that the *Great Northwest* decision was case law at the time the District made their AJD decision, the District had the ability to, and should have included a detailed factual and legal discussion of *Great Northwest* that, if appropriate, distinguished the District's AJD in the appellant's case from the holding in *Great Northwest.* Instead, the District's AR is absent of any discussion or rationale that supports the distinction made during the appeal conference. Therefore, it does not support the District's conclusion that the subject wetlands are waters of the U.S., and not, as the appellant states in their RFA, wetlands adjacent to other wetlands that should not be considered waters of the U.S.

ACTION: The District shall re-evaluate their permit decision, specifically the AJD upon which it is based, documenting its consideration of the *Great Northwest* court decision. As part of this re-evaluation, the District must clearly document whether the on-site wetlands are adjacent to Channel C and therefore potential waters of the U.S. or adjacent to other wetlands, and therefore not waters of the U.S. The District shall revise the AR accordingly to document and reflect the factual data considered in this analysis and provide the appellant a new permit decision, including a re-evaluated AJD upon which the permit decision is based, that reflects this analysis. Should the re-evaluation result in a modification of the AJD (i.e., changes in the extent of waters of the U.S. on the property), the District shall revise their permit decision accordingly (i.e., modify permit conditions, the amount or type of compensatory mitigation required, etc.).

Reason 6: The District was arbitrary and capricious. More specifically, the appellant stated that the District provided, "…no scientific evidence to support their hypothesis," that jurisdiction was based on an assertion of pollutant trapping characteristics.

FINDING: This reason for appeal has merit.

DISCUSSION: In their RFA, the appellant states that, "Although the Alaska District claims jurisdiction based on an assertion of pollutant trapping characteristics, they provide no scientific evidence to support their hypothesis. The Alaska District must demonstrate (not speculate) the pollutant is present in the subject wetlands AND the pollutant trapping characteristics actually are present in the subject wetlands AND have a significant water quality affect on the downstream [traditionally navigable water]." The appellant clarified during the appeal conference that the District's only support for this assertion lies solely in speculative statements and is absent of any statements based on actual data.

[43] See footnote 17 on page 4 of the 2 December 2008 Joint Memorandum between the Environmental Protection Agency (EPA) and Department of the Army entitled "Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v United States & Carabell v United States."

In 2007, as a result of the U.S. Supreme Court *Rapanos* decision,[44] the Environmental Protection Agency (EPA) and the USACE, in coordination with the Office of Management and Budget and the President's Council on Environmental Quality, issued a guidance memorandum (*Rapanos* guidance) to ensure that jurisdictional determinations, permitting actions, and other relevant actions are consistent with the *Rapanos* decision and supported by the AR. The two agencies issued joint revised *Rapanos* guidance on 2 December 2008, in response to public comments received and the agencies' experience in implementing the *Rapanos* decision. [45]

The *Rapanos* guidance requires the application of two new standards to support an agency jurisdictional determination for certain water bodies, the second of which applies in this case. The second standard requires a case-by-case "significant nexus" analysis to determine whether waters and their adjacent wetlands are jurisdictional. A significant nexus may be found where a tributary, including its adjacent wetlands, has more than a speculative or insubstantial effect on the chemical, physical, and biological integrity of a TNW. Consequently, the agencies may assert jurisdiction, as in this case, over wetlands that are adjacent to but that do not directly abut a relatively permanent, non-navigable tributary if the RPW and its adjacent wetlands are determined (on the basis of a fact-specific analysis) to have a significant nexus with a TNW.

The *Rapanos* guidance states that a significant nexus evaluation includes consideration of various hydrologic and ecologic factors. Some of the ecologic factors a district should consider include the potential of tributaries to carry pollutants to TNWs, the potential of wetlands to trap and filter pollutants, and maintenance of water quality in TNWs. It was in this context that the District discussed the pollutant trapping characteristics of the on-site and similarly situated wetlands.

As part of their significant nexus evaluation, the District includes several statements in the AR regarding the wetland's ability to carry, retain, convert, capture, and/or transform pollutants including:

> "The subject wetland and similarly situated wetlands possess a low capacity to carry pollutants.., but sustain a moderate to high capacity [to] retain and convert pollutants into less harmful forms that may otherwise reach downstream waters."[46]
>
> "The low gradient, dense vegetation, moderate soil saturation, moderate organic matter in various states of decay and moderately deep layer of unfrozen soil during the growing season imparts a moderate to high capacity for the wetland to capture, retain and transform particulate and dissolved pollutants."[47]

[44] Combined cases of *Rapanos v. United States* and *Carabell v. United States.* 126 S. Ct. 2208 (2006).
[45] 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.
[46] 2010 AR page 124.
[47] 2010 AR page 124.

> "…the soil underlying most of the subject wetland and other wetlands in the vicinity…[has] a moderate ability to retain pollutants that include or release dissolved cations such as heavy metals. The ability to retain cations reduces the hazard of ground-water pollution."[48]

While the District provided a few statements regarding the wetland's ability to trap and filter pollutants, they provide only speculative language regarding the presence of actual pollutants that the similarly situated wetlands could trap and filter including:

> "Pollution input from developed areas via lateral ground water flow may occur to some degree but is also limited due to the slow rate of lateral flow in the uppermost part of the soil column (within 20 inches bgs). However, the two southern lots containing the Universal Welding industrial site and the large area east of this site that has been recently cleared are directly upgradient of the subject wetland. These sites may occasionally generate surface runoff and its associated pollutants that reach the wetland."[49]

> "A small portion of the plume from the sulfolane contamination discussed earlier may be reaching the soil column of the subject wetland and similarly situated wetlands. However, most of the monitoring has occurred several feet below ground surface in the substrate below the soil profile, so it is unclear if the ground water upwelling necessary for sulfolane to enter these soils is occurring."[50]

> "Particulates received by adjoining wetland areas may eventually be conveyed to Chena Slough through large runoff events."[51]

It should be noted that the wetland's pollutant trapping characteristics was just one of several factors the District considered as part of their significant nexus evaluation. And while the District did not clearly demonstrate that pollutants could reach and be affected by the wetlands, this issue is moot because, as discussed in reasons two thru five of the appeal, the District did not clearly support that the on-site wetlands are adjacent to Channel C. Therefore, conducting a significant nexus evaluation in this case was premature.

ACTION: If the District determines that the on-site wetlands are indeed adjacent to Channel C after following the actions identified for reasons for the appeal two through five, then the District must re-evaluate their permit decision, specifically the AJD upon which it is based. As part of this re-evaluation, the District shall reconsider and clearly describe the pollutant trapping characteristics of the similarly situated wetlands, then discuss the results of that re-evaluation relative to the entirety of their significant nexus analysis to determine whether 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

[48] 2010 AR page 124.
[49] 2010 AR page 125.
[50] 2010 AR page 125.
[51] 2012 AR page 61.

why it is or is not more than speculative or insubstantial. The District shall revise the AR accordingly to document and reflect the factual data considered in this analysis and provide the appellant a new permit decision, including a re-evaluated AJD upon which the permit decision is based, that reflects this analysis. Should the re-evaluation result in a modification of the AJD (i.e., changes in the extent of waters of the U.S. on the property), the District shall revise their permit decision accordingly (i.e., modify permit conditions, the amount or type of compensatory mitigation required, etc.).

Conclusion: For the reasons stated above, I have determined the first reason for appeal does not have merit while reasons for appeal two through six have merit. The proffered permit is remanded to the Alaska District for reconsideration consistent with comments detailed above. The final USACE decision in this case will be the Alaska District Engineer's decision made pursuant to my remand.

August 22, 2013
Date

RICHARD L. STEVENS
Brigadier General, USA
Commanding