

ADMINISTRATIVE APPEAL DECISION

46 MILL PLAIN, LLC; FILE NO. NAE-2005-1505

NEW ENGLAND DISTRICT

23 March 2012

Review Officer: Mike Vissichelli, U.S. Army Corps of Engineers, North Atlantic Division

Appellant: Albert J. Salame, 46 Mill Plain, LLC

Date of Receipt of Request for Appeal: 26 August 2011

Date of Acceptance of Request for Appeal: 22 September 2011

Appeal Meeting Date: 13 October 2011

ACCEPTED REASON FOR APPEAL:

The North Atlantic Division office accepted the following reason for appeal as detailed in the Request for Appeal by 46 Mill Plain, LLC dated 26 August 2011:

The appellant alleges that the New England District (the district) did not correctly apply the current regulatory criteria and associated guidance in determining that there are “waters of the United States” on the site.

SUMMARY OF DECISION:

The appellant’s request for appeal (RFA) has partial merit. This finding does not affect the district’s jurisdictional determination since the district’s decision is supported by the Administrative Record (AR) on other grounds. However, the jurisdictional determination (JD) is being remanded to the district to address non-prejudicial errors contained in the AR. The district incorrectly characterized the relevant reach that it used throughout the AR in accordance with the 2 December 2008 joint agency guidance memo¹ (Rapanos memo).

BACKGROUND INFORMATION:

The appellant, Mr. Albert J. Salame represents 46 Mill Plain, LLC, which is located on Mill Plain Road identified as lots E13/39, E13/44 and E13/45 in Danbury, Connecticut. The subject property consists of approximately 26 acres of mixed forested and mowed areas.

In May 2005, the district held a pre-application meeting with the appellant’s representatives for a proposed construction project on the above referenced site. Following the pre-application meeting, an informal request for a JD was received by the district in 2007. In response to this request, the district issued a preliminary JD in 2008. In spring/summer 2010 the appellant

¹ 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”.

requested the district provide them with an approved JD (AJD). The submittal from the appellant was incomplete and the district requested additional information. Information to consider the application federally complete for processing was received by the district on 18 January 2011.

In response to the appellant's request, the district issued two AJD's.

The first AJD was issued on 6 July 2011 and states that a 3 acre area identified as Wetlands² T-1E, T1-W, T-2, W1-W, W2-W, W3-E, W4-E, W5-E on the project plan are considered to be waters of the United States. T1-E, T1-W and T-2 are all identified as Relatively Permanent Waters (RPW's). Wetlands W1-W, W2-W, W3-E, W4-E, W5-E are considered to be jurisdictional because they abut T1-E and T1-W. The AJD also concludes that T-1E, T1-W, T-2 and their abutting wetlands have a significant nexus to traditionally navigable waters (TNW's) because they have more than a speculative or insubstantial affect on the biological, physical or chemical integrity of the TNW.

The second AJD was issued on 12 August 2011 and states that a 0.10 acre area identified as Wetland W-6 is a non-navigable, isolated, and intrastate wetland. Wetland W-6 lacks an inlet or outlet and is hydrologically and topographically isolated from the onsite surface tributaries and is, therefore, considered to be an isolated water and not subject to jurisdiction as a water of the U.S.

The 6 July 2011 AJD is the subject of this request for appeal.

INFORMATION RECEIVED DURING THE APPEAL AND ITS DISPOSITION:

- 1) The district provided a copy of the administrative record (AR), which was reviewed and considered in the evaluation of this request for appeal. The administrative record provided was missing the JD form supporting the 6 July 2011 approved JD. The district provided this information on 18 October 2011.
- 2) With the request for appeal, the appellant provided documents containing its comments and analysis of the district's jurisdictional determination. The submittals were accepted as clarifying information in accordance with 33 CFR 331.7 (f). The appellant provided pictures at the appeal meeting that were not accepted because they were not part of the administrative record used to support the district's decision. The appellant was informed they could submit the pictures to the district and request that they reconsider the approved JD based on the new information.

EVALUATION OF THE REASON FOR APPEAL/APPEAL DECISION FINDINGS:

The appellant alleges that the district did not correctly apply the current regulatory criteria and associated guidance in determining that there are "waters of the United States" on the site. Following are several specific reasons for appeal relating to the district's determination.

² There are various different references to wetland identification numbers throughout the AR. For consistency, all references herein are based off the wetlands as they are identified on Reference 24 (see AR page 20).

Appeal Reason 1: The site does not contain a Traditionally Navigable Water (TNW). The appellant alleges that the site does not contain any TNW's and that the closest perennial water course is the Still River located nearly 2000 feet from the site.

Finding: This reason for appeal does not have merit.

Action: No Action Required.

Discussion: The District has identified the Still River as the nearest TNW in the AR and they agree that it is not located on the site (AR, 44). In their 6 July 2011 Approved JD, the District demonstrates that the Still River is the nearest TNW. The District accurately details that the Still River is an interstate water that historically was used for commerce and is therefore subject to jurisdiction as a TNW in accordance with the regulations found at 33 CFR 329 and the Rapanos Memo (AR, 53).

The AR does not disagree with the appellant's allegation that a TNW is not present on the site.

Appeal Reason 2: The wetlands at the site are not adjacent to a TNW.

Finding: This reason for appeal does not have merit.

Action: No Action Required.

Discussion: The AR states that the wetlands (W1-W, W2-W, W3-E, W4-E and W5-E) are jurisdictional because they abut non-navigable tributaries of TNW's (T1-E and T1-W) that are relatively permanent waters where the tributaries typically have continuous flow at least seasonally (e.g., typically three months) (AR, 58).

The AR does not state that the wetlands are adjacent to a TNW, nor does it say that is the reason the district determined that there are jurisdictional waters of the U.S. present on the site.

Appeal Reason 3: The on-site wetlands do not abut a RPW that flows into a TNW. The appellant does not agree that the onsite tributaries (T1-E and T1-W) are RPWs and, therefore, the wetlands on-site are not jurisdictional.

Finding: This reason for appeal has partial merit.

Action: The district shall provide analysis which supports that the flow regime at the downstream limit of T-2 is representative of the entire lengths of tributaries T1-E and T1-W. If it is determined that this section is not representative, then analysis shall be done using the flow regimes that best characterize tributaries T1-E, T1-W, and the onsite portion of T-2 to determine the appropriate relevant reach(es) to be used in determining jurisdiction for each tributary.

The district shall also correct the factual errors identified herein regarding the depth to the seasonal high water in the appropriate soil series in its reissued AJD letter.

Discussion: The appellant raises several points why it feels the wetlands on site do not abut a RPW.

The appellant believes that the District used the incorrect relevant reach to document the flow characteristics of tributaries T1-E and T1-W.

The district identified the relevant reach as a compilation of T1-E, T1-W and T-2 (AR, 52, 53). The district states in its MFR that this approach was used to reflect all waters on the 46 Mill Plain Road parcel as T1-E and T1-W merge into T-2 before leaving the subject property. The district states that the farthest downstream extent of T-2 is where it meets the Still River system, the next equivalent or higher order tributary, which the district identified as T-3. The downstream extent of T-2 is what the district used to characterize the flow regime of the upstream waters consisting of T1-E, T1-W, and T-2.

The Rapanos Memo states the following:

A tributary includes natural, man-altered, or man-made water bodies that carry flow directly or indirectly into a TNW. Furthermore, a tributary, for the purposes of this guidance, is the entire reach of the stream that is of the same order (i.e., from the point of confluence, where two lower order streams meet to form the tributary, downstream to the point such tributary enters a higher order stream). The flow characteristics of a particular tributary generally will be evaluated at the farthest downstream limit of such tributary (i.e., the point the tributary enters a higher order stream). However, for purposes of determining whether the tributary is relatively permanent, where data indicates the flow regime at the downstream limit is not representative of the entire tributary (as described above) (e.g., where data indicates the tributary is relatively permanent at its downstream limit but not for the majority of its length, or vice versa), the flow regime that best characterizes the entire tributary should be used. A primary factor in making this determination is the relative lengths of segments with differing flow regimes. It is reasonable for the agencies to treat the entire tributary in light of the Supreme Court's observation that the phrase "navigable waters" generally refers to "rivers, streams, and other hydrographic features ." 126 S. Ct. at 2222 (Justice Scalia, quoting *Riverside Bayview*, 474 U.S. at 131) . The entire reach of a stream is a reasonably identifiable hydrographic feature. The agencies will also use this characterization of tributary when applying the significant nexus standard under Section 3 of this guidance.

While the district's use of tributary T-2 at its downstream reach is generally in accordance with the guidance, there is no rationale to support that this relevant reach is representative and best characterizes the flow regimes in tributaries T1-E, T1-W, and the portion of T-2 that are located on site. Based on the Rapanos Memo, where data indicates the flow regime at the downstream limit is not representative of the entire tributary, the flow regime that best characterizes the entire tributary should be used. Information provided by the district in the AJD and the AR states that T1-E, T1-W, and the portion of T-2 located at the site are seasonal RPW's (JD Form at III.D.2, AR at 46). The AR acknowledges that wetlands T1-E

and T1-W are located on slopes ranging from 10-40 percent (AR, 57). The AR also acknowledges that the lower reaches of T-2 at the confluence of T-3 (Still River) is a perennial RPW based on visual observation and by Corps and FEMA flood analyses (AR, 57). The AR details that T1-E and T1-W for most of their length are located on fairly steep slopes and are hydrologically influenced by a seasonal high water table (AR, 34, 292 – 313). The downstream portion of T-2 serves as a flood storage area for the Still River and contains a large floodplain area identified as Mill Plain Swamp with pit and mound topography. The AR indicates that the flow regime of the downstream limit of T-2, which the relevant reach determination was based upon, is not representative of tributaries T1-E and T1-W or the portion of T-2 on the site (AR, 46, 47, 52, 53, 433). The lower portions of T-2 have less change in elevation and the hydrologic influence appears to be different than what is identified in the AR for T1-E and T1-W.

Consequently, the district incorrectly characterized the relevant reach of each of the tributaries. The district did, however, provide information and analysis that supports that each tributary is its own independent reach (T1-E, T1-W, and T2) and is a RPW. T1-E and T1-W are headwater streams and each need to be looked at independently. The district's incorrect documentation was not a prejudicial error since the record supports the district's conclusions in the AJD that each tributary; T1-E, T1-W, and T-2 are RPW's.

In addition to the determination of the relevant reach, the appellant also brings into question the flow characteristics of T1-E, T1-W and the onsite portion of T-2. The appellant states that the AR does not support the District's determination that the on-site intermittent watercourses at the site flow for 90 consecutive days.

Three specific criteria the district uses to support its determination that the appellant brings into question include snow pack, the depth to the seasonal high water table associated with the identified onsite soil complex and the frequency and duration of flow. The district concludes in the AR at page 56 that: "The source of hydrology for these tributaries is best described as a combination of seasonally high groundwater and snow pack contributing flow as snow melt in poorly drained glacial till with moderate slopes."

While snow pack is variable from year to year, the seasonal high water table associated with the soils is a more consistent source of hydrology. The AR supports the position that the tributaries' hydrology is driven by the seasonal high water table (AJD Form III.D.2). The AR contains information (i.e, site characteristics, soils types and scientific literature) that supports the district's determination that the tributary is a seasonal RPW based on duration and frequency of flow. The information provided by the district on flow characteristics in tributaries T1-E, T1-W, and the onsite portion of T-2 provide more than a speculative or insubstantial basis for its findings that they are RPW's.

As detailed in the AR, a majority of the site is dominated by Charlton-Chatfield and Hinckley gravelly sandy loam soils on fairly steep slopes. These soils are both characterized as well drained soils and have a depth to the water table of greater than 5 feet. Based on these characterizations, the appellant believes that the soils do not support the district's findings that seasonally high groundwater contributes to the flow in T1-E and T1-W.

The districts findings (AR, 56) state that the soils in the upper wetlands have a high seasonal water table and are supported with several references. Its analysis concludes that the area that is supporting the hydrology of T1-W is not made up of the soils referred to by the appellant. The district concludes that tributary T1-W is supported by an upslope wetland area dominated by Woodbridge unit soils. These soils have a shallow depth to groundwater, are typically located over dense till or bedrock substratum and due to infiltration limitations and steep slopes, these inundated or saturated wetlands flow freely from late-winter or early spring through late May, thus providing the hydrology to support each of the tributaries as seasonal RPW's. These soils are described in the AR as follows:

Review of the map unit and series description for soils at the site identifies Woodbridge Fine Sandy Loam, 2-8% slopes, very stony (46B) as the dominant soil at the site of the upper wetland origination points. Although moderately well-drained, this soil has a high seasonal water table of -1.5 feet below the surface from November through May, which is routinely perched over a dense till or bedrock substratum.

The appellant correctly states that the AR identifies a majority of the site consists of Charlton-Chatfield soils. This soil series has several inclusions of other soil types including Sutton and Leicester, as documented in the AJD (See III.D.2). These inclusions are associated with depressions and drainage ways on hill tops and side slopes. Tributaries T1-E and T1-W are clearly drainage ways. T1-E is underlain by soils with a high seasonal water table as detailed by the soil characteristics and the physical evidence of hydrology at the site (AR, 46 – 47). The description of the soils present within T1-E are consistent with the soils types included in the Charlton-Chatfield complex that have a seasonally high water table.

The district provides scientific literature (AR, 314 - 354), and soil survey information (AR, 292 – 313), to support its findings that hydrology is present seasonally in tributaries T1-E and T1-W.

The AJD letter (Page 3) makes an inaccurate statement that the Charlton-Chatfield soil complex (the soils that make up a majority of the site) has a high seasonal water table of -1.5 feet below the surface from November through May. It appears that this is a typographical error. The district inadvertently stated Charlton-Chatfield soils series has a depth to the water table of -1.5 feet rather than the inclusions within that soil complex that have a high seasonal water table of -1.5 feet below the surface.

Appeal Reason 4: The Still River, to which the site drains, has not been determined by the Corps to be navigable.

Finding: This reason for appeal does not have merit.

Action: No Action Required.

Discussion: The appellant alleges that the district maintains a list of navigable waters within its area of responsibility and that the Connecticut River is the only one in the state of Connecticut that has had a navigability determination completed for it in accordance with the Corps' regulations.

Although not specifically addressed in the AR, regulations at 33 CFR Part 329 entitled "Definition of Navigable Waters of the United States" detail the requirements for making determinations on what waters are considered to be navigable. The regulation³, in referring to the list identified by the appellant, states: "It should be noted that the list represents only those waterbodies for which determinations have been made; absence from that list should not be taken as an indication that the waterbody is not navigable."

Guidance provided in Appendix D to the *U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook* (6/1/2007) (JD Guidebook) provides further clarification on the legal definition of Traditional Navigable Waters. In its closing paragraph, it states:

In summary, when determining whether a water body qualifies as a "traditional navigable water" (i.e., an (a)(1) water), relevant considerations include whether a Corps District has determined that the water body is a navigable water of the United States pursuant to 33 C.F.R § 329.14, or the water body qualifies as a navigable water of the United States under any of the tests set forth in 33 C.F.R. § 329, or a federal court has determined that the water body is navigable-in-fact under federal law for any purpose, or the water body is "navigable-in-fact" under the standards that have been used by the federal courts.

Based on the regulations, the Rapanos memo and the JD Guidebook, a formal determination of navigability is not the only way for a water to be considered a TNW. The water can also meet the standards required for a formal navigability determination as detailed in the regulations or under standards used by the federal courts. Using these approaches, the district provided a detailed analysis in the AR (See pages 11 & 12) to determine that the Still River is a TNW.

Appeal Reason 5: Portions of T1-E, T1-W and T-2 do not contain a definable ordinary high water mark (OHWM).

Finding: This reason for appeal does not have merit.

Action: No Action Required.

Discussion: The appellant alleges that the district's findings that T1-E, T1-W and T-2 contain a definable OHWM are inaccurate. The rationale for the districts findings that T1-E, T1-W and T-2 contain a definable OHWM in accordance with Regulatory Guidance letter (RGL) 05-05⁴ is supported in the AR (54). Further clarification of the OHWM is provided in the AJD at Section III.B.1.c. In accordance with RGL 05-05: "...if physical evidence alone will be used for the

³ 33 CFR 329.16(b)

⁴ Regulatory Guidance Letter No. 05-05, Subject: Ordinary High Water Mark, 7 December 2005

determination, districts should generally try to identify two or more characteristics, unless there is particularly strong evidence of one.”

The AJD form details several characteristics of the OHWM that are shown along the onsite tributaries. This information is supported by pictures provided in the AR showing the OHWM (AR, 254 to 258). The AJD does state that in some cases the OHWM is discontinuous when it enters into pipes or culverts (AJD Form at III.B.1.c). The Corps JD form for documenting jurisdictional determinations provides information on discontinuous OHWM as follows:

...a natural or man-made discontinuity in the OHWM does not necessarily sever jurisdiction (e.g., where the stream temporarily flows underground or where the OHWM has been removed by development or agricultural practices). Where there is a break in the OHWM that is unrelated to the waterbody’s flow regime (e.g., flow over a rock outcrop or through a culvert), the agencies will look for indicators of flow above and below the break.

The AR indicates that for the purposes of its assessment the district sought and found factual documentation of an OHWM at T1-E, T1-W and T-2 which included, but was not limited to, the presence of a defined channel both above and below a break in the OHWM.

The AR supports the district’s findings that an OHWM is present at T1-E, T1-W and T-2 in accordance with relevant regulations and guidance.

Appeal Reason 6: The wetlands and watercourses at the site do not have a significant nexus to a TNW. The appellant identifies several reasons why it disagrees with the district’s determination that a significant nexus exists between T1-E, T1-W, T-2, their abutting wetlands, and the Still River.

Finding: This reason for appeal does not have merit.

Action: No Action Required.

Discussion: The AR provides analysis and conclusions supported by factual information on the sites hydrologic and soils characteristics, as well as scientific literature to support the District’s findings that a significant nexus exists between the onsite tributaries, their associated wetlands, and the Still River. Although the relevant reach used to classify the flow regime of the onsite tributaries appears to be incorrect based on the Rapanos Memo, it does not have a bearing on the district’s final determination. The district states in the AR (see page 60) that removal of the onsite resources either individually or of similarly situated waters or wetlands will impact the numerous functions these resources provide. Although similarly situated wetlands were considered in association with a much larger area, the district still provided sufficient information to support its determination that a significant nexus exists between T1-E, T1-W, the portion of T-2 on the site, their abutting wetlands and the Still River. The Rapanos Memo (Page 7) states that Clean Water Act jurisdiction over seasonal RPW’s will be evaluated under the significant nexus standards and that “agencies will assert jurisdiction over relatively permanent non-navigable tributaries of TNW’s without a legal obligation to make a significant nexus

finding.” Even though the district is not legally obligated to make a significant nexus finding, it did a complete significant nexus evaluation.

The appellant disagrees with the district’s determination that the functions provided by the onsite tributaries and wetlands have a significant nexus to the TNW. The appellant alleges that although they agree that the wetlands provide some functions such as flood storage, runoff and desynchronization, and other functions beneficial to water quality; it does not feel the impact of those functions on the TNW is significant due to the small drainage area of the onsite wetlands and tributaries.

Although the drainage area is small in size relative to the overall watershed of the Still River, the district supplies numerous references and related rationale supporting the functions that the tributaries and wetlands provide. The district demonstrates in the AR (pages 58-61), that impacts to T1-E, T1-W, T-2 and their abutting wetlands would have an adverse affect on the Still River, regardless of its small watershed due to the urbanized nature of the area, its close proximity to the Still River, and documented past impacts associated with flooding in the Still River system. The AR shows, regardless of the relevant reach determination that there is more than a speculative or insubstantial biological, physical, and chemical nexus between T1-E, T1-W, T-2, their abutting wetlands and the nearest TNW, the Still River.

The appellant contends that tributary T1-W is a man made conveyance that was created by excavation of a drainage ditch in formerly dry land. The appellant states that the function of T1-W is to convey storm flows and groundwater discharge from one point to another and they do not believe the peak flows, volume and duration of flow are significant when compared to the Still River, the nearest TNW.

The AR documents that when considered individually or in combination there is sufficient flow from the onsite tributaries to the TNW to show a significant nexus (AR, 58-61). The AR shows that there have been repeated diversions and changes in configuration at the site. Although T1-W is a man made conveyance created in formerly dry land, it is documented in the AR that it contains an OHWM. The district adequately documents in the AJD form (see III.B.1.ii.c) and the AR (see page 54) that tributary T1-W has an OHWM in accordance with applicable regulations, policy, and guidance. Therefore, it is jurisdictional.

The appellant believes that the district’s statement that the wetlands and waters associated with the 46 Mill Plain, LLC parcel are performing several functions that are of value to society is insufficient to support a determination that a significant nexus exists between the onsite tributaries, their associated wetlands and the Still River. The appellant challenges the District’s determination of the extent of the functions provided by the onsite wetlands and tributaries. The appellant specifically questions the functions of detention and attenuation of runoff and floodwaters, filtering of sediment and other pollutants from the surrounding areas, support for the aquatic food chain and maintenance of water quality before discharging into the Still River. The appellant states that the AJD does not provide documentation that the wetlands and tributaries providing these functions have more than a speculative or insubstantial nexus to the Still River.

The district provides numerous documents that support the effects of these functions. Several documents support not only the ability of the wetlands and waters to perform these functions, but address the effects and importance of the functions provided by headwater tributaries (i.e., T1-E and T1-W) and their associated wetlands on downstream waters. The district provides analysis in the AR (see pages 58 – 61) and the JD form (see Section III) supporting its findings. The district's analysis is based on relevant scientific literature, the existing dense urban development in the area, and the close proximity of the site to the TNW. The district's analysis and supporting information contained in the AR support the district's determination a significant nexus exists between the onsite wetlands and waters and the Still River.

The appellant states several times in its RFA that the hydrologic contribution of the onsite tributaries and their associated wetlands are insignificant when compared to the other urban areas within the watershed contributing hydrology to the Still River. The appellant provides information on peak flow rates and timing of flows for the site as well as the bigger watershed contributing to the Still River.

The AR recognizes that other areas contribute higher flow rates and have bigger watersheds than the onsite tributaries and their associated wetlands. Regardless of the size of the other watersheds, the AR demonstrates (See page 60) that the onsite tributaries and their associated wetlands provide numerous beneficial functions that are important due to the urbanized nature of the area. The AR demonstrates that the onsite resources contribute more than a speculative or insubstantial biological, physical and chemical nexus to the Still River.

The appellant contends that the slope from the site eastward is insufficient to maintain flows and that under most conditions water is moved off by infiltration and evapotranspiration. Consequently, the site has little if any influence on navigable waters or their abutting, adjacent or neighboring wetlands.

As demonstrated under Appeal Reason 3, the waters at the site have been identified as seasonal RPW's. The AR provides information to support the District's findings that the volume, frequency, and duration of flow of the onsite tributaries is sufficient to support that there is more than a speculative or insubstantial biological, physical, and chemical nexus between T1-E, T1-W, T-2 and their abutting wetlands and the nearest TNW, the Still River

The appellant states that there is no ecological nexus between the site and the Still River because the site is ecologically isolated from other wetlands by development along Mill Plain Road, the railroad right of way, and the I-84 highway right of way. It states that the development has eliminated any ecological interaction between the site and any downstream wetlands abutting the Still River. The appellant feels that the determination that Wetland 6 is isolated should apply to all of the onsite wetlands and waters.

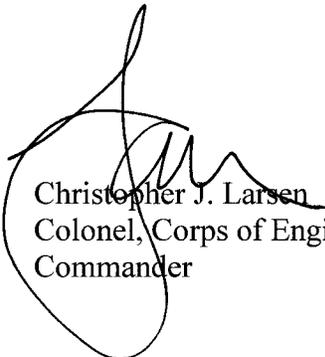
The AR provides sufficient documentation to support that an ecological nexus exists between the Still River, the onsite tributaries and their abutting wetlands. Although the area is densely developed, the ecological nature of the connection still exists. As detailed in the Rapanos memo² (see page 9): "The flow parameters and ecological functions that Justice Kennedy describes as

most relevant to an evaluation of significant nexus result from the ecological inter-relationship between the tributaries and their adjacent wetlands.”

The district provides several examples in the AR (see pages 58-61) and the JD form (See Section III) to support the ecological inter-relationships of the onsite tributaries and their abutting wetlands. Some examples include support for the aquatic food chain, modification of nitrogen, and other in-stream organic material as well as transformation and removal of nutrients. The AR supports that these ecological inter-relationships have an effect on the Still River, as there is a continuous surface water connection, regardless of the urbanized nature of the area. The determination that Wetland 6 is isolated is not relevant to T1-E, T1-W, and T-2 and their abutting wetlands because Wetland 6 is hydrologically and topographically isolated from a surface tributary system (AR, 58) whereas the other wetlands and waters have a continuous surface water connection.

OVERALL CONCLUSION:

For the reasons stated above, I find that the appellant’s RFA has partial merit. This finding does not affect the district’s jurisdictional determination since the district’s decision is supported by the AR on other grounds. However, the RFA is being remanded to the district to address non-prejudicial errors contained in the AR. I am remanding the approved Jurisdictional Determination back to the district for reconsideration in light of this decision. The district shall complete these tasks within 60 days from the date of this decision and upon completion, provide the division office and appellant with its decision document and final JD.



Christopher J. Larsen
Colonel, Corps of Engineers
Commander