

## **ADMINISTRATIVE APPEAL DECISION**

**ELIZABETH TURNER**

**FILE NO. SAW-2013-572**

**WILMINGTON DISTRICT**

**22 October 2014**

**Review Officer:** Jason Steele, U.S. Army Corps of Engineers, South Atlantic Division, Atlanta, Georgia

**Receipt of Request for Appeal:** 26 June 2013

**Acceptance of Request for Appeal:** 26 July 2013

**Appeal Meeting:** 7 October 2013

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

### **SUMMARY OF DECISION**

Ms. Elizabeth Turner (Appellant) is appealing a U.S. Army Corps of Engineers (Corps), Wilmington District (District) approved jurisdictional determination (AJD), concluding there to be jurisdictional wetlands within her property located in Laurinburg, Scotland County, North Carolina. The Appellant believes the District incorrectly applied current regulatory criteria and associated guidance when it identified and delineated wetlands as well as incorrectly applied law, regulation, guidance, and policy when it concluded that the features on her property are jurisdictional based on the determination that some wetlands are adjacent to an unnamed tributary (UT) to Bridge Creek and others are adjacent (abut) Bridge Creek and have a significant nexus with the nearest downstream traditionally navigable water (TNW).

For reasons detailed in this document, it is found that the District's administrative record (AR) supports its determination that the subject property contains wetlands and that some of these wetlands are adjacent to a UT and others are adjacent (abut) Bridge Creek. The District's AR, however, does not support its determination that the wetlands have a significant nexus with the nearest downstream TNW. Therefore, the Appellant's request for appeal (RFA) has merit and the AJD is remanded to the District for reconsideration.

## **BACKGROUND**

On 10 December 2012, ECS Carolinas, LLP (authorized agent) requested an AJD on behalf of Strata Solar (an electric provider) for an approximately 165 acre parcel owned by the Appellant<sup>1</sup> that is located on the west side of Johns Road (US 501) and is approximately 0.75 miles north of its intersection with Barnes Bridge Road, Laurinburg, Scotland County, North Carolina. In response, the District conducted a site visit on 7 February 2013, and on 12 April 2013, issued an AJD to ECS Carolinas, LLP (as applicant) and the Appellant (as property owner). The AJD consisted of two forms, with a separate form for each of two wetland areas on the property.<sup>2</sup> The District determined there to be wetlands on the property that are subject to the permit requirements of Section 404 of the Clean Water Act.

The 12 April 2013 AJD included a "Notification of Administrative Appeal Options and Process and Request for Appeal" (NAO/NAP) form as well as the two AJD Forms. The first AJD Form identified a wetland (WC1-14 / WCA1-18) as being "... adjacent to but not directly abutting RPWs that flow directly or indirectly into TNWs." The second AJD Form documented five additional wetlands, of which three (WB12-25 / WBA29-53, WBA10-28, and WD1-26) were classified by the District as being "... adjacent to but not directly abutting RPWs that flows directly or indirectly into TNWs," and the remaining two wetlands (WA1-7 / WAA1-17 and WB1-11 / WBA1-9) were classified by the District as "... directly abutting RPWs that flow directly or indirectly into TNWs."

Subsequent to the 12 April 2013 AJD, ECS Carolinas, LLP submitted a survey to the District for verification of approximately 65.718 acres of the 165 acre property. This portion of the property included wetlands WC1-14 / WCA1-18 and WD1-26. In its AJD letter dated 10 June 2013, the District verified the wetlands in the survey to be correctly delineated and jurisdictional.<sup>3</sup> A NAO/NAP form was attached to this AJD.

On 10 June 2013, the District received an RFA from the Appellant appealing the District's 12 April 2013 AJD. The District forwarded the RFA and clarifying information to the Division RO via email dated 26 June 2013. In her RFA, which was accepted by letter to the Appellant dated 26 July 2013,<sup>4</sup> the Appellant disagreed with the District's decision because she had never heard about a water issue with her property nor was there ever information about wetlands being on the property. Also, as explained

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<sup>1</sup> The Appellant provided approval to ECS Carolinas, LLP, via a signed "Agent Authorization Form" dated 31 October 2012, to access Appellant's property for a JD to be conducted.

<sup>2</sup> The District completed two AJD Forms because the site contains two wetland areas -- one that drains into one tributary, and the other that drains into a different tributary. In order to document the significant nexus between these separate wetland areas and their respective water body and eventually a TNW, the District completed two forms.

<sup>3</sup> In an email sent to the South Atlantic Division (Division) Review Officer (RO) on 7 February 2014, the District clarified it had relied on the two AJD forms dated 12 April 2013 as the continued basis for jurisdiction.

<sup>4</sup> The provision at 33 C.F.R. § 331.5(a)(1) states, "The RFA must be received by the division engineer within 60 days of the date of the NAP [Notification of Appeal Process]." Regulatory Guidance Letter (RGL) 06-01, section 3.a. clarifies Day 1 to be the date of the NAP form. This RGL states, that "...an RFA *received* on or after 'Day 61' is not an appealable action, regardless of the Corps office it was submitted to or the date on which it was *submitted* to the Corps." Although the Division did not receive Appellant's RFA before Day 60, it was received by a Corps office (that is, the District) prior to Day 60. Therefore, based on the regulation and clarifying guidance in RGL 06-01, the RFA was determined to be timely.

immediately below, the Appellant later clarified her RFA bases.

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

The RFA was evaluated based on the District's AR; the Appellant's RFA (and Appellant's RFA clarifications); and discussions during and following an appeal meeting on 7 October 2013 with the Appellant and District representatives. The RO noted in the appeal meeting Memorandum for Record that "[t]he Appellant did not dispute the District's findings, but was more interested in what they could and could not do with the areas delineated as wetlands." The RO requested, via email on 15 January 2014, that the Appellant clarify the comment made at the appeal conference.

The Appellant responded via email on 30 January 2014. In the email, the Appellant questioned the determination that the aquatic features on her property exhibit the criteria for wetlands and described the effect of the District's determination "to be an arbitrary taking of over 13 acres of our land."<sup>5</sup> She asserted that the WD 1-26 area was "...nothing more than a vine covered gully (WD 1-26) that at some time in the past may have carried rain runoff from the adjacent cultivated field." The Appellant also addressed two other areas (WC1-14 and WCA1-18<sup>6</sup>), asserting that "...one area supports water flow and the other prohibits water flow, [but] they are both identified as somehow violating some criteria." The Appellant further stated, "...[O]ur principal objection is that the areas are not wet now and, to our knowledge, rarely are."

In her clarification, the Appellant also questioned the conclusion that the features were adjacent to Bridge Creek and had a significant nexus with the nearest downstream TNW. She described the District's conclusion (i.e., that the areas classified as wetlands "abut and are adjacent to Bridge Creek (RPW)"<sup>7</sup>) to be "quite a stretch since the closest flowing water is a half mile away, more or less."

Based on the Appellant's RFA and clarifying information, the Appellant disagreed with the District's decision and put forth three reasons for appeal: (1) the District incorrectly applied regulatory criteria and associated guidance for identifying and delineating wetlands when it determined that the features on the subject property were wetlands; (2) the District incorrectly applied law, regulation and/or policy when it determined that the wetlands were adjacent to Bridge Creek; and (3) the District incorrectly applied law, regulation and/or policy when it determined that the wetlands have a significant nexus to the nearest downstream TNW.

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<sup>5</sup> Among other items, an RFA must include the Appellant's reason(s) for the appeal, 33 C.F.R. § 331.2, and the reason(s) for the appeal must meet the criteria identified in 33 C.F.R. § 331.5. The District is required to follow the Clean Water Act (CWA), its implementing regulations, relevant judicial decisions, and applicable policy in reaching a determination of whether a property is within the regulatory jurisdiction of the CWA. An allegation that a regulatory decision or action is a taking is outside the purview of the regulatory appeal process and will not be addressed further in this decision document.

<sup>6</sup> The Appellant's clarifying email referenced this feature as "WC1-18;" however, the correct reference and the one used in this decision document is "WCA1-18."

<sup>7</sup> Appellant's description of the District's conclusion does not reflect all of the District's relevant conclusions because the District determined one wetland area to be adjacent to a UT to Bridge Creek, three wetland areas to be adjacent to a different UT to Bridge Creek, and two wetland areas to abut Bridge Creek.

## **EVALUATION OF THE REASONS FOR APPEAL, FINDINGS, DISCUSSION, AND ACTIONS FOR THE WILMINGTON DISTRICT COMMANDER**

**Appeal Reason 1:** The District incorrectly applied regulatory criteria and associated guidance for identifying and delineating wetlands when it determined that the features on the subject property were wetlands.

**Finding:** This reason for appeal does not have merit. The AR sufficiently supports the District's determination that the Appellant's property contains wetlands.

**Discussion:** In her RFA, the Appellant asserts that the areas identified as wetlands are never or rarely wet and, therefore, cannot be wetlands.

Wetlands are defined in 33 C.F.R. § 328.3(b) to mean "...those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." The Corps Wetland Delineation Manual (1987 Manual) is used to identify and delineate potentially jurisdictional wetlands.<sup>8</sup> In addition, the Corps developed regional supplements for use with the 1987 Manual to address regional wetland characteristics and improve the accuracy and efficiency of wetland delineation procedures. The applicable region encompassing the Appellant's property is the Atlantic and Gulf Coastal Plain regional supplement (Regional Supplement).<sup>9</sup>

The 1987 Manual, on pages 9-10, states that wetlands have the following general environmental characteristics: (1) hydrophytic vegetation, (2) hydric soils, and (3) wetland hydrology.<sup>10</sup> More specifically, a wetland must have a prevalence of hydrophytic vegetation (that is, vegetation that is typically adapted to life in saturated soil conditions).<sup>11</sup> To meet the criteria, hydrophytic plant species must comprise more than 50 percent of the dominant plant species across all strata at a site.<sup>12</sup>

Additionally, hydric soils are those possessing characteristics that are associated with reducing soil conditions.<sup>13</sup> One or more hydric soil indicators must be present for a soil to be considered hydric.<sup>14</sup>

Furthermore, a site has wetland hydrology if it is inundated either permanently or periodically or the soil is saturated to the surface at some time during the growing

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<sup>8</sup> "Implementation of the 1987 Corps Wetland Delineation Manual," HQ USACE CECW-OR memorandum (27 August 1991).

<sup>9</sup> U.S. Army Corps of Engineers. 2010. *Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Atlantic and Gulf Coastal Plain Region (Version 2.0)*, ed. J. S. Wakeley, R. W. Lichvar, and C. V. Noble. ERDC/EL TR-10-20. Vicksburg, MS: U.S. Army Engineer Research and Development Center.

<sup>10</sup> Environmental Laboratory. (1987). "Corps of Engineers Wetlands Delineation Manual," Technical Report Y-87-1, U.S. Army Engineer Waterways Experiment Station, Vicksburg, Miss. (available at <http://el.erd.c.usace.army.mil/elpubs/pdf/wlman87.pdf>).

<sup>11</sup> 1987 Manual, pp. 9-10.

<sup>12</sup> Regional Supplement, p. 23.

<sup>13</sup> 1987 Manual, p. 10.

<sup>14</sup> Regional Supplement, p. 34.

season.<sup>15</sup> The site must contain at least one primary hydrologic indicator, or a minimum of two secondary hydrologic indicators (in the absence of a primary indicator) to conclude that wetland hydrology is present.<sup>16</sup>

The 1987 Manual and Regional Supplement state that a data form should be used to document the hydrology, vegetation, and soil characteristics for each community type within a site.<sup>17</sup> Consistent with this direction, the District used regional supplement data forms to document the hydrology, vegetation, and soils characteristics at five sample points (DP-1 through DP-5) on the Appellant's property. All three wetland criteria were documented at sampling points DP-2, DP-4, and DP-5, while one or more of the criteria were missing at sampling points DP-1 and DP-3. Therefore, the District concluded that wetlands were present at sampling points DP-2, DP-4, and DP-5 while uplands were present at sampling points DP-1 and DP-3.

To support this conclusion, the District documented that 83%, 60%, and 83% of the dominant plant species at sampling points DP-2, DP-4, and DP-5, respectively, were comprised of hydrophytic vegetation. Therefore, the District sufficiently documented that these three data points had a prevalence (greater than 50%) of hydrophytic vegetation.

The District also documented that the soils at DP-2 and DP-5 satisfied the "S7-Dark Surface" indicator criteria<sup>18</sup> for a hydric soil while the soil located at DP-4 satisfied the "F3-Depleted Matrix"<sup>19</sup> indicator criteria for a hydric soil. Therefore, the District sufficiently documented that these three data points contained hydric soils.

Finally, the District documented the presence of two primary hydrologic indicators (Water-Stained Leaves and Oxidized Rhizospheres along Living Roots) at sample point DP-2, one primary indicator (Water-Stained Leaves) at sample point DP-4, and two secondary hydrologic indicators (Geomorphic Position and FAC-Neutral Test) at sample point DP-5. Because wetland hydrology is present when one primary or two secondary hydrologic indicators are present, the District sufficiently documented that wetland hydrology was present at these three sample points.

Based on the above analysis, it is found that the District sufficiently documented that hydrophytic vegetation, hydric soils, and wetland hydrology were present at sampling points DP-2, DP-4, and DP-5. Accordingly, the District's AR supports that the subject areas are wetlands.

**Action:** None required.

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<sup>15</sup> 1987 Manual, p. 10.

<sup>16</sup> Regional Supplement, pp. 81-2.

<sup>17</sup> 1987 Manual, pp. 41, 46, 48, 49, 53, 54, 57, and 60; Regional Supplement, p. 17. The data form can be found in the Regional Supplement; Appendices C and D.

<sup>18</sup> See Regional Supplement, p. 57, for description.

<sup>19</sup> See Regional Supplement, pp. 61-62, for description.

**Appeal Reason 2:** The District incorrectly applied law, regulation and/or policy when it determined that the wetlands were adjacent to Bridge Creek.

**Finding:** This reason for appeal does not have merit. The AR sufficiently supports that the subject wetlands are adjacent to a UT to Bridge Creek and/or directly abut Bridge Creek.

**Discussion:** The Appellant disagreed that the areas the District classified as wetlands are adjacent to Bridge Creek because she asserts that the closest flowing water is approximately a half mile away.

The term "adjacent" is defined at 33 C.F.R. § 328.3(c) to mean "bordering, contiguous, or neighboring." This section further states, "Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands.'" The regulatory definition of adjacency is further clarified in the guidance that the Corps and Environmental Protection Agency jointly issued in response to the U.S. Supreme Court consolidated cases of *Rapanos v. United States* and *Carabell v. United States* (*Rapanos* Guidance).<sup>20</sup> This guidance document explains that wetlands are adjacent if one of the following three criteria is 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.<sup>21</sup>

The District documented its adjacency determination by completing two AJD Forms, both dated 12 April 2013. One AJD Form documented the District's findings for a wetland identified as WC1-14 / WCA1-18. The other AJD Form documented the District's findings for five wetland areas identified as WB12-25 / WBA29-53, WBA10-28, WD1-26, WA1-7 / WAA1-17, and WB1-11 / WBA1-9.

In Section III.B.2.(i)(c) of one AJD Form, the District documented the wetland identified as WC1-14 / WCA1-18 as being adjacent to, but not directly abutting, the UT to Bridge Creek via a discrete hydrologic connection (that is, a culvert under a farm road on the southern border) as well as being separated by a berm/barrier (a dirt farm road). Accordingly, the District based their adjacency determination on criteria 1 and 2.

The other AJD Form documented findings for three wetlands identified as WB12-25 / WBA29-53, WBA10-28, and WD1-26 as well as for two wetlands identified as WA1-7 / WAA1-17 and WB1-11 / WBA1-9. Specifically, in Section III.B.2.(i)(c), the District

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<sup>20</sup> Guidance Memorandum. "Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* and *Carabell v. United States*." The original guidance was released on 5 June 2007 in response to the U.S. Supreme Court consolidated cases of *Rapanos v. United States* and *Carabell v. United States*, 126 S. Ct. 2208 (2006). Revised guidance was released on 2 December 2008.

<sup>21</sup> *Id.* at pp. 5-6.

documented wetlands WB12-25 / WBA29-53, WBA10-28, and WD1-26 as being adjacent to, but not directly abutting, the UT to Bridge Creek via a discrete hydrologic connection (that is, a topographic drain through a culvert) as well as being separated by a berm/barrier (that is, a culvert under a dirt farm road near its western border). Therefore, the District based its adjacency determination on criteria 1 and 2. Separately in Section III.B.3, the District documented wetlands WA1-7 / WAA1-17 and WB1-11 / WBA1-9 as being "part of a contiguous wetland unit that extends to the banks of Bridge Creek" and therefore directly abut Bridge Creek. Therefore, the District based its adjacency determination on criterion 1.

Accordingly, the District sufficiently documented, consistent with the 33 C.F.R. § 328.3 and *Rapanos* Guidance, that wetlands WC1-14 / WCA1-18, WB12-25 / WBA29-53, WBA10-28, and WD1-26 are adjacent to a UT to Bridge Creek and wetlands WA1-7 / WAA1-17 and WB1-11 / WBA1-9 are adjacent to (abut) Bridge Creek.<sup>22</sup>

**Action:** None required.

**Appeal Reason 3:** The District incorrectly applied law, regulation and/or policy when it determined that the wetlands have a significant nexus with the nearest downstream TNW.

**Finding:** This reason for appeal has merit. The District did not sufficiently document that the subject wetlands have a significant nexus to the nearest downstream TNW.

**Discussion:** The Appellant questioned whether the features have a significant nexus with the nearest downstream TNW when she stated in her 30 January 2014 email that, "...these areas, which the District classified as wetlands that 'abut and are adjacent to bridge creek (RPW),'... seems to us to be quite a stretch since the closest flowing water is a half mile away, more or less...."

The *Rapanos* Guidance sets forth bases that support an agency jurisdictional determination for certain water bodies. Based on the plurality opinion in the *Rapanos* decision, agencies assert jurisdiction over 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. Accordingly, the Corps and EPA assert jurisdiction over the following categories of water bodies: (1) TNWs; (2) 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.

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<sup>22</sup> The criteria set forth in the discussion above link a final determination of adjacency to a jurisdictional water. The discussion above establishes factual adjacency. For the wetlands at issue, a significant nexus analysis is needed to determine whether the relevant tributary is a jurisdictional water establishing jurisdictional adjacency. See appeal reason 3 for the discussion of the significant nexus analysis.

Based on the concurring opinion of Justice Kennedy, tributaries that are not relatively permanent require a case-by-case "significant nexus" analysis to determine whether such 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/or biological integrity of a TNW. Consequently, the agencies may assert jurisdiction over each water body that is not a relatively permanent water 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 the following: (1) non-navigable tributaries that are not relatively permanent (that is, 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 do not directly abut, a relatively permanent tributary (e.g., are separated from the tributary by uplands or a berm, dike, or similar feature).

As discussed below, a significant nexus analysis was required for wetlands WC1-14 / WCA1-18, WB12-25 / WBA29-53, WBA10-28, and WD1-26 because they were determined to be adjacent to, but not directly abutting, an RPW. Although wetlands WA1-7 / WAA1-17 and WB1-11 / WBA1-9 were determined to directly abut Bridge Creek, an RPW, a significant nexus analysis is required based on policy.

#### **4 Wetlands - WC1-14 / WCA1-18, WB12-25 / WBA29-53, WBA10-28, and WD1-26**

As explained in the Background section, the District used one of the two AJD Forms to document its findings concerning the wetland identified as WC1-14 / WCA1-18. This wetland was determined to be adjacent to, but not directly abutting, an RPW that flows directly or indirectly into a TNW. The District documented its findings concerning the wetlands identified as WB12-25 / WBA29-53, WBA10-28, and WD1-26 on the second AJD Form. These three wetlands were determined to be adjacent to, but not directly abutting, an RPW that flows directly or indirectly into a TNW. Because the four wetlands referenced in this paragraph (that is, WC1-14 / WCA1-18, WB12-25 / WBA29-53, WBA10-28, and WD1-26) were determined to be adjacent to, but not directly abutting, an RPW that flows directly or indirectly into a TNW, a significant nexus analysis was required for these wetlands before jurisdiction could be asserted.

#### *Information and Significant Nexus Analysis for Wetland WC1-14 / WCA1-18*

The District identified the flow route for wetland WC1-14/WCA 1-18 in Section III.B.(1)(ii)(a) of the AJD Form as follows: "UT to Bridge Creek (seasonal RPW) to Bridge Creek (RPW) to Leith Creek (RPW) to Little Pee Dee River (TNW)." The wetland flows into the UT to Bridge Creek, and flow for the UT was documented in Section III.B.(1)(ii)(c) as "Intermittent but not seasonal flow." However, for this same UT, Section III.B.1.(ii)(a) includes a parenthetical stating that UT to Bridge Creek is a seasonal RPW. These different classifications make the documentation in the AR insufficient to establish there is a significant nexus between wetland WC1-14/WCA 1-18

and the downstream TNW because the actual frequency of flow from the tributary to the downstream TNW is unclear.

*Information and Significant Nexus Analysis for Wetlands WB12-25 / WBA29-53, WBA10-28, and WD1-26*

As stated above, wetlands WB12-25 / WBA29-53, WBA10-28, and WD1-26 were determined to be adjacent, but not abutting, a UT to Bridge Creek. Information in Section III.C.3 of the AJD Form does not sufficiently support that there is a significant nexus between these three wetlands, in combination with all other wetlands adjacent to the tributary, and the TNW.

Regarding its significant nexus findings, the District documented in Section III.C.3 of the AJD Forms that the wetlands receive "precipitation and runoff water from surrounding lands, thus treating surface and ground water as described above before discharging via a culvert under Hines Road into UT to Bridge Creek which drains into a TNW in just over 10 miles." The District summarized in Section III.B.3 the overall biological, chemical and physical functions being performed by the wetlands, stating, "These wetlands capture runoff from adjacent agricultural land, retain nutrients through anaerobic processes, and capture sediment and pesticides through physical settling." This information does not document, however, sufficient support for the conclusion that 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.

Examples of relevant information that the District did not include are the following: functions/services that affect the TNW; frequency/volume/duration of flow; capacity to transfer nutrients and organic carbon vital to support food webs; habitat services such as providing spawning areas for important aquatic species; 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.

*Information and Significant Nexus Analysis for Wetlands WA1-7 / WAA1-17 and WB1-11 / WBA1-9*

Wetlands WA1-7 / WAA1-17 and WB1-11 / WBA1-9 were determined to be directly abutting an RPW that flows directly or indirectly into a TNW. For wetlands abutting an RPW without perennial flow, the Corps requires the AR to include any available information that documents the existence of a significant nexus, even when a significant nexus analysis is not required as a matter of law.<sup>23</sup>

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<sup>23</sup> U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook, p. 52 (May 30, 2007) (jointly prepared by the Corps and EPA; providing instructions to aid field staff in completing the AJD Form).

For wetlands WA1-7 / WAA1-17 and WB1-11 / WBA1-9, Section III.B.1 describes the flow of the tributary (that is, UT to Bridge Creek<sup>24</sup>) as seasonal but describes the flow regime as intermittent. These different classifications make the actual flow from the tributary to the downstream TNW to be unclear because the data on the form specific to the abutting wetlands was not easily distinguishable from the data related to the non-abutting wetlands.

The District documented information about wetlands WA1-7 / WAA1-17 and WB1-11 / WBA1-9 in the Significant Nexus Determination section (Section III.C.3 of the AJD Form), which supports the conclusion that a significant nexus analysis was conducted as required by policy. The District's documentation is insufficient, however, because the documentation for these two wetlands is combined in Section III.C.3 with the analysis for wetlands WB12-25 / WBA29-53, WBA10-28, and WD1-26. As explained above, this documentation is insufficient to support the conclusion that 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.

**Action:** The District should further analyze and document the frequency of flow between the relevant reach (the stream and all similarly situated wetlands) and the downstream TNW as well as 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 wetlands) and the TNW is or is not significant, as well as why it is or is not more than speculative or insubstantial (see pp. 55-56 of the JD Guidebook). The analysis should focus on how the functions performed by the tributary and its adjacent wetlands (including the onsite wetlands) affect the physical, chemical and/or biological integrity of the TNW. The administrative record should be revised accordingly to reflect this analysis.

## **CONCLUSION**

For the reasons stated above, I have determined the appeal has merit. The AR does not support the District's determination that the subject site contains WOUS that are within CWA jurisdiction because there is insufficient documentation to support a significant nexus between the wetlands and Little Pee Dee River. The District's

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<sup>24</sup> This information in the Significant Nexus section of the AJD Form is inconsistent with adjacency information provided for these same wetlands. (See penultimate paragraph of the discussion for Appeal Reason 2 (p. 7)). In documenting adjacency information, the District described these wetlands as directly abutting Bridge Creek (RPW). However, the information provided in Section III.C of the AJD form describes these wetlands as directly abutting a UT to Bridge Creek.

Subject: Elizabeth Turner - Appeal  
District: Wilmington  
AJD Number: SAW-2013-572  
Page: 11 of 11

determination was not contrary to applicable law, regulation, Executive Order, or policy.  
The administrative appeals process for this action is hereby concluded.

A handwritten signature in black ink, appearing to read 'C. David Turner', with a stylized flourish at the end.

C. David Turner  
Brigadier General, U.S. Army  
Commanding