

**ADMINISTRATIVE APPEAL DECISION  
WILLARD SIMMONS  
APPROVED JURISDICTIONAL DETERMINATION  
MOBILE DISTRICT  
SAM-2022-01238-JEB**

**Review Officer:** Krista Sabin, U.S. Army Corps of Engineers, South Atlantic Division

**Appellant:** Willard Simmons

**Regulatory Authority:** Section 404 of the Clean Water Act (33 USC § 1344 et seq)

**Date Acceptable Request for Appeal Received:** March 7, 2024

**Date of Appeal Meeting and Site Visit:** May 17, 2024, Daphne, Alabama.

**Summary of Appeal Decision:** Mr. Willard Simmons (Appellant) is challenging the Mobile District's (District) February 6, 2024, Approved Jurisdictional Determination (AJD), which concluded the U.S. Army Corps of Engineers (Corps) does not have Clean Water Act (CWA) jurisdiction over an approximately 0.01-acre wetland or a 0.06-acre pond, referred to as Malbis Lake.<sup>1</sup> The Appellant disagrees with the District's determination that the wetland and Malbis Lake are not waters of the U.S. subject to CWA jurisdiction. The Appellant submitted three reasons for appeal, asserting that the District committed procedural errors; the District incorrectly applied laws, regulations, or officially promulgated policy; and the District omitted material facts from its review.

Specifically, the Reasons for Appeal are:

1. The AJD dated February 6, 2024, contained a limited Review Area, and should have included the entirety of Malbis Lake.
- 2a. The AJD did not consider Malbis Lake or its wetlands as an (a)(4) water<sup>2</sup> – All impoundments of waters otherwise defined as waters of the United States under

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<sup>1</sup>AR 0008.

<sup>2</sup>As a result of litigation, waters of the U.S. within the state of Alabama are determined consistent with the pre- 2015 regulatory regime and consistent with the Supreme Court's decision in Sackett (pre-2015 Regime). The "pre-2015 Regime" refers to the agencies' pre-2015 definition of "waters of the U.S.," implemented consistent with relevant case law and longstanding practice, as informed by applicable guidance, training, and experience. Additionally, the agencies are interpreting the phrase "waters of the U.S." consistent with the Supreme Court's decision in Sackett v. Environmental Protection Agency, 598 U.S. 651 (2023).

"Because the Supreme Court in Sackett adopted the Rapanos plurality standard, and the agencies' pre-2015 regulatory regime discussed the Rapanos plurality standard, the agencies will implement the pre-2015 regulations generally consistent with the pre-2015 regulatory regime's approach to the plurality standard, including relevant case law and longstanding practice, as informed by applicable guidance, training, and experience." (from the *Joint Coordination Memorandum to the Field between the US*

the definition.<sup>3</sup> Specifically, Malbis Lake is an impoundment of D'Olive Creek and should be treated as such.

2b. The AJD did not consider Malbis Lake or its wetlands as an (a)(5) water – Tributaries of waters identified in paragraphs (a)(1) – (a)(4).<sup>4</sup>

2c. The AJD did not consider Malbis Lake or its wetlands as an (a)(7) water – wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1)-(6) of this section.<sup>5</sup>

3. Malbis Lake and its wetlands are part of a surface tributary system with a continuous surface connection to D'Olive Creek. Discharge from the Malbis Lake dam structure flows to the undisturbed portion of D'Olive Creek on the north side of Woodrow Lane when the lake water surface elevation exceeds the outlet structure invert elevation. Between Malbis Lake and Woodrow Lane the creek has been routed through culverts, ponds, drainage structures and flumes, providing a continuous surface connection to D'Olive Creek, a Relatively Permanent Non-navigable Tributary of Traditional Navigable Water.

Reasons for appeal 2a, 2b, and 3 have merit. Reasons for appeal 1 and 2c do not have merit. This action is remanded to the District for reconsideration consistent with the discussion in this decision document.

**Background Information:** The Appellant, represented by, Wetland Resources Environmental Consulting (Agent), requested an AJD on December 13, 2022, for two contiguous parcels of land totaling approximately 4.73 acres within the Malbis Plantation Historic District that includes an area of Malbis Lake.<sup>6</sup> An AJD is a Corps document stating the presence or absence of waters of the U.S. on a parcel.<sup>7</sup> Malbis Lake is an approximately 8-acre pond bordered on the north side by a concrete headwall and elevated culvert underneath Highway 90.<sup>8</sup> The subject property is located along the south side of US Highway 90 west of State Highway 181, in Section 34, Township 4 South, Range 2 East, in Daphne, Baldwin County, Alabama (approximate center coordinates 30.655382, -87.855178).

The District's review of the request included field visits to the parcel on January 4, 2023, October 25, 2023, and December 13, 2023.<sup>9</sup> On February 6, 2024, the District issued an AJD concluding that the Corps does not have regulatory authority over the

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*Department of the Army, US Army Corps of Engineers (Corps) and the US Environmental Protection Agency (EPA), September 27, 2023, [www.epa.gov/system/files/documents/2023-10/2023-joint-coordination-memo-pre-2015-regulatory-regime\\_508c.pdf](https://www.epa.gov/system/files/documents/2023-10/2023-joint-coordination-memo-pre-2015-regulatory-regime_508c.pdf).*

<sup>3</sup>51 FR 41206 § 328.3(a)(4), herein referred to as (a)(4) water.

<sup>4</sup>51 FR 41206 33 C.F.R. § 328.3(a)(5), herein referred to as (a)(5) water.

<sup>5</sup>51 FR 41206 33 C.F.R. § 328.3(a)(7), herein referred to as (a)(7) water.

<sup>6</sup>AR 0168.

<sup>7</sup>33 C.F.R. §331.2.

<sup>8</sup>See photographs on AR 0173, AR 0206, and AR 0521.

<sup>9</sup>AR 0293 and AR 0519, respectively.

approximately 0.01-acre wetland or a 0.06-acre portion of Malbis Lake within the parcel, pursuant to Section 404 of the CWA.<sup>10</sup> On March 7, 2024, the South Atlantic Division (SAD) received a Notification of Administrative Appeal Options and Process and Request for Appeal (NAO/NAP) form that the Agent had completed on behalf of the Appellant, along with a 9-page letter and attachments documenting the reasons for appeal. On March 20, 2024, SAD notified the Appellant that the request for appeal was complete and contained acceptable reasons for appeal. The notification also requested that the District provide identical copies of the administrative record (AR) to SAD and the Appellant. On May 17, 2024, an informal appeal meeting was held in Daphne, Alabama. The Appellant, Agent, District, and Review Officer (RO) were in attendance. A field visit was also conducted.

**Information Received and its Disposition During the Appeal:** The AR is limited to information contained in the record as of the date of the NAO/NAP form, which is February 6, 2024. No new information may be submitted on appeal;<sup>11</sup> however, to assist the Division Engineer in making a decision on the appeal, the RO may allow the parties to interpret, clarify, or explain issues and information already contained in the AR. Such interpretation, clarification, or explanation does not become part of the AR because the District Engineer did not consider it in making the AJD decision. Consistent with Corps regulations, the Division Engineer may use such interpretation, clarification, or explanation in determining whether the AR provides an adequate and reasonable basis to support the District Engineer's decision.<sup>12</sup> The information received during this appeal review, and its disposition, is as follows:

- 1) Request for Appeal sent by the Appellant's agent, Ms. Genia Todia, received by the Corps, SAD, on March 7, 2024.
- 2) Notice from SAD to the Appellant accepting the request for appeal and stating that the request met the required criteria for an administrative appeal, sent by letter dated March 20, 2024.
- 3) The AR, a copy of which the District provided to SAD and the Appellant on April 4, 2024.
- 4) An informal appeal meeting and site visit, in accordance with 33 C.F.R. § 331.7 on May 17, 2024. The goal of the conference was to summarize and clarify the Appellant's and the District's positions as it relates to the appeal. Topics discussed at the appeal conference are summarized in the document titled "20240610-Appeal Meeting Notes-SAM-2022-01238."
- 5) The District provided two aerials that were included as an attachment to an email to EPA (AR page 0203, File name 2023-01-04.CORR.22-1238.EPA AJD questions) electronically by email on May 16, 2024, and a paper copy during the meeting. The

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<sup>10</sup>AR 0733.

<sup>11</sup>33 C.F.R. §331.2.

<sup>12</sup>33 C.F.R. §331.7(f).

District provided the attachments as separate documents because the RO was unable to open the files in the AR transmitted on April 4, 2024.

6) During the appeal meeting, the Appellant provided 11 pages of drought records that were an attachment an email<sup>13</sup> but not included in the AR provided by the District. The District confirmed the drought records were received prior to the AJD decision and erroneously omitted from the AR.

### **Evaluation of the Appellant's Reasons for Appeal, Findings, and Instructions to the District Engineer**

The three reasons for appeal listed below have been summarized from the request for appeal. Summarized reasons for appeal 1, 2, and 3 were coordinated with the Appellant in the appeal meeting agenda emailed to the Appellant and District on May 10, 2024. As documented in the Appeal Meeting Notes,<sup>14</sup> the Appellant concurred with SAD's summarized reasons for appeal. The request for appeal contained several other points classified as reasons for appeal; however, they were ultimately points that supported their primary reasons for appeal and are addressed in the following reasons for appeal.

**REASON FOR APPEAL 1:** The AJD dated February 6, 2024, contained a limited Review Area, and should have included the entirety of Malbis Lake.

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

**ACTION:** No further action.

**DISCUSSION:** The AJD Memorandum for Record (MFR) identified the review area as two contiguous parcels, totaling 4.73 acres, owned by Mr. Willard Simmons.<sup>15</sup> For purposes of AJDs, the review area is the geographic area the District is evaluating for the presence or absence of waters of the U.S.<sup>16</sup> It typically consists of a parcel, or a portion of a parcel. Defining the review area in each case is at the discretion of the District<sup>17</sup>, and in this case is reflective of the information submitted by the Appellant in the 2022 AJD request. The review area in this case consists of the 4.73 acres owned by Mr. Willard Simmons. Because the review area was reflective of applicant/agent submitted materials, this reason for appeal does not have merit. Furthermore, the review area does not affect the jurisdictional determination for Malbis Lake.

**REASON FOR APPEAL 2:** This reason for appeal is based on three elements, which are being considered together.

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<sup>13</sup>AR 0690

<sup>14</sup>Memorandum for Record of May 17, 2024, appeal meeting for the Willard Simmons appeal of an approved jurisdictional determination file number SAM-2022-01238. Dated June 10, 2024.

<sup>15</sup>AR 0734.

<sup>16</sup>RGL 16-01, Q&A #10.

<sup>17</sup>AR 0168

**REASON FOR APPEAL 2A:** The AJD did not consider Malbis Lake or its wetlands as an (a)(4) water – All impoundments of waters otherwise defined as waters of the United States under the definition.<sup>18</sup> Specifically, Malbis Lake is an impoundment of D'Olive Creek and should be treated as such.

**REASON FOR APPEAL 2B:** The AJD did not consider Malbis Lake or its wetlands as an (a)(5) water – Tributaries of waters identified in paragraphs (a)(1) – (a)(4).

**REASON FOR APPEAL 2C:** The AJD did not consider Malbis Lake or its wetlands as an (a)(7) water – wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1)-(6) of this section.

**FINDING:** Reasons for appeal 2a and 2b have merit. Reason for appeal 2c does not have merit.

**ACTION:** For the reasons discussed below, this AJD is remanded to the District for further evaluation, analysis, and documentation. The District should re-evaluate its observations and conclusions relative to the jurisdictional status of the aquatic feature known as Malbis Lake as an (a)(4) and/or (a)(5) water. In addition, the District should ensure these observations and conclusions are adequately documented in the AR and the AJD, in accordance with current regulation, policy, and guidance in place at the time of the reconsideration.

**DISCUSSION:** Appellant asserts the District was too narrow in its review of the aquatic resources on the subject site, neglecting to determine if the aquatic resources on the subject site met the definition of any other type of water of the U.S. For clarity, the two aquatic resources, Malbis Lake and riparian wetlands bordering Malbis Lake, will be discussed separately in this document. However, before discussing the individual waters, it is important to examine a preliminary matter. The District determined Malbis Lake was not jurisdictional because it did not meet the definition of an (a)(3) water. When determining if an aquatic feature is jurisdictional, the District must first determine if it meets the criteria of generally non-jurisdictional features described in the preamble to the 1986 regulations or in the Rapanos guidance<sup>19</sup>, then the District must determine if the aquatic feature meets the criteria of any other paragraph (a) waters, and if not, the District should evaluate if the aquatic feature meets the criteria for an (a)(3) water.<sup>20</sup> It appears that the District followed this process; however, it did not adequately document its determination that the subject aquatic resources did not meet the criteria of any other

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<sup>18</sup>51 FR 41206 § 328.3(a)(4), herein referred to as (a)(4) water.

<sup>19</sup>Rapanos Guidance includes, but is not limited to, the memorandum *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States*, dated December 2, 2008. (Hereinafter referred to as the 2008 Rapanos Memorandum) and the U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook. June 2007. ([epa.gov/wotus/current-implementation-waters-united-states](http://epa.gov/wotus/current-implementation-waters-united-states))

<sup>20</sup>Preamble waters, 51 FR 41217, November 13, 1986. EPA and Army Webinar Slides at [https://www.epa.gov/system/files/documents/2023-11/wotus-overview\\_tribes-and-states\\_11-15-23\\_508.pdf](https://www.epa.gov/system/files/documents/2023-11/wotus-overview_tribes-and-states_11-15-23_508.pdf)

paragraph (a) waters. Prior to determining whether Malbis Lake met the definition of an (a)(3) water, the District should have documented that Malbis Lake did not meet the criteria under one of the other jurisdictional categories. Based on the AR and as the Appellant noted in the request for appeal, Malbis Lake has the potential to meet the definition of an (a)(4) water and an (a)(5) water. The District briefly addressed Malbis Lake as an (a)(4) water but neglected to discuss its potential as an (a)(5) water.

When determining the jurisdictional status of an aquatic resource, a District must evaluate if the water meets one or more categories of waters of the U.S. contained in 33 C.F.R. § 328.3. The AJD primarily focused on evaluating Malbis Lake as an (a)(3) water. In addition, the District made broad statements regarding Malbis Lake's jurisdictional status such as "...Malbis Lake does not meet the definition of waters of the U.S. as defined by 33 CFR Part 328.3(a) and is not jurisdictional under the Clean Water Act."<sup>21</sup>

***Reason for Appeal 2a: Malbis Lake and wetlands, as an (a)(4) water***

The District stated three times in the AJD MFR that Malbis Lake is not an impoundment of a jurisdictional water.<sup>22</sup> Specifically, the AJD MFR states "[t]his pond is not an impoundment of a jurisdictional water as there is no dam, but was excavated in the early 1900s, according to the landowner's agent."<sup>23</sup>

During the appeal meeting, the District further clarified their position that Malbis Lake is not an (a)(4) water by noting that Highway 90 is not a dam, as it does not include any type of spillway.<sup>24</sup> Also during the appeal meeting, when asked if a dam acting to impound water was the only type of structure or barrier considered, the District stated the culvert underneath Highway 90 is impeding the flow of water, but it is not a dam.<sup>25</sup> The AR also contains field notes from a 2005 NWP verification, which includes information that was relied on in other sections of the AJD.<sup>26</sup> However, the discussion of impoundments did not reference these field notes and the following statements from the field notes appear contrary to the District's conclusion:

(b) Before barriers were emplaced blocking flow, there was a continuous historical hydrological connection along the tributary to Mobile Bay.

(c) Barriers include the dam at the impoundment south of Hwy 90 and the unpermitted, unculverted utility line crossing just south of the culvert under 1-10;  
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<sup>21</sup>AR 0739.

<sup>22</sup>AR 0734, AR 0737, AR 0739.

<sup>23</sup>AR 0737. Of note, the aquatic resource is referred to as a pond and a lake throughout the AR. The District does not make a final determination on what type of aquatic resource Malbis Lake is; however, for the purposes of determining jurisdiction, whether the aquatic resource is a lake or pond is irrelevant.

<sup>24</sup>Appeal Meeting notes.

<sup>25</sup>Appeal meeting notes.

<sup>26</sup>AR0245.

<sup>27</sup>AR0245.

These notes contradict the District's statement referring to Highway 90 as a dam and calling Malbis Lake an impoundment. In addition, the Appellant also identified Malbis Lake as an impounded water. When posed with evaluating and determining the jurisdictional status of a particular feature, the District is required to interpret and apply regulation, guidance, and policy. The *Standard Operating Procedures for the U.S. Army Corps of Engineers Regulatory Program* (SOP) instruct staff to provide supportive rationale in the AR, disclose the data and information relied upon, and if applicable, explain what data or information received greater or lesser weight, and what professional judgment or assumptions were used in reaching the determination.<sup>28</sup> Documentation must provide a comprehensible foundation for the decision, explain gaps in the AR, and include logical argument to address inconsistent information.<sup>29</sup> The District is to note which specific aspect(s) of a submittal are not relied upon, state the reason why any such aspects were not relied upon, address objections from the requestor, and "clearly document the reasons for reaching a contrary conclusion."<sup>30</sup> It appears the District unnecessarily limited their evaluation to dams in a strict interpretation of the word (i.e., a structure with a spillway). The pre-2015 regulatory regime does not restrict impoundments to waters impounded by dams. Impoundments are defined as a standing body of open water created by artificially blocking or restricting the flow of a river, stream, or tidal area.<sup>31</sup>

If an aquatic resource is determined to be an impounded water, documentation for the determination of an (a)(4) water should discuss if the impoundment was created from "waters of the United States," or if that the water meets the criteria for another jurisdictional category.<sup>32</sup>

Although the District concluded that Malbis Lake was not an impoundment, neither the District's AJD MFR nor the AR contain sufficient information addressing whether the headwall and culvert associated with Highway 90 serve to impound the water in Malbis Lake. Therefore, this reason for appeal has merit. If the District re-evaluates and determines Malbis Lake is an impoundment, it should document whether it meets the definition of an (a)(4) water in section 7.d. or 8.f. of the AJD MFR.

### ***Reason for Appeal 2b: Malbis Lake, as an (a)(5) water***

The Appellant asserts that Malbis Lake should have been evaluated as an (a)(5) water. Under the pre-2015 regulatory regime, tributaries include natural, man-altered, or man-made waterbodies that carry flow directly or indirectly into a traditional navigable water

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<sup>28</sup>See SOP, p. 9.

<sup>29</sup>U.S. Army Corps of Engineers. 2016. Regulatory Guidance Letter, Subject: Jurisdictional Determinations. RGL 16-01. Department of the Army, Washington, D.C. See Questions and Answers #8.

<sup>30</sup>*Id.*

<sup>31</sup>1977 Final Regulations.

<sup>32</sup>EPA and Army Webinar Slides (slide 37) at [https://www.epa.gov/system/files/documents/2023-11/wotus-overview\\_tribes-and-states\\_11-15-23\\_508.pdf](https://www.epa.gov/system/files/documents/2023-11/wotus-overview_tribes-and-states_11-15-23_508.pdf).

and can include rivers, streams, lakes, ponds, and impoundments.<sup>33</sup> Furthermore, jurisdictional tributaries must be relatively permanent.<sup>34</sup> In paragraph 8.e. of the AJD MFR, the District identifies Malbis Lake as a pond that is a Relatively Permanent Water (RPW) and describes a potential flow path to Mobile Bay, a Traditional Navigable Water. The District then concludes that:

It appears as though Malbis Lake is isolated because the series of stormwater ponds to the north of Highway 90 do not provide for a direct connection to an RPW, TNW, interstate water, territorial seas, or an impoundment of a jurisdictional water.<sup>35</sup>

The District did not sufficiently support that Malbis Lake does not carry flow directly or indirectly to a traditional navigable water in the AR. Therefore, this reason for appeal has merit. When evaluating an aquatic resource as an (a)(5) water, the District must determine if the aquatic resource meets the criteria for a tributary, including whether it flows directly or indirectly into a relevant jurisdictional water. The Appellant is correct in its assertion that Malbis Lake has the potential to meet the definition of an (a)(5) water as Malbis Lake has an ordinary high water mark and is relatively permanent. The District did not adequately describe the flow regime and characteristics of the aquatic resources or features between Malbis Lake and the traditional navigable water.

***Reason for Appeal 2c: Wetlands as an (a)(7) water***

The Appellant asserts that the District did not assess the subject wetlands as (a)(7) waters. However, the District did evaluate the subject wetlands as (a)(7) waters in paragraph 8.f. of the AJD MFR.<sup>36</sup> Specifically, stating:

The 0.01-acre wetland was delineated between the top of the Malbis Lake bank, and the open water is a non-tidal wetland because it does not have a continuous surface connection to a TNW, RPW, interstate water, territorial seas, or impoundment of a jurisdictional water. The wetland, which abuts Malbis Lake, follows the path of culverts and series of stormwater ponds as described in the preceding section for Malbis Lake. Because the wetland does not have a continuous surface connection to a TNW, RPW, interstate water, territorial seas, or impoundment of a jurisdictional water, it is not a water of the U.S.<sup>37</sup>

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<sup>33</sup>EPA and Army Webinar Slides at [https://www.epa.gov/system/files/documents/2023-11/wotus-overview\\_tribes-and-states\\_11-15-23\\_508.pdf](https://www.epa.gov/system/files/documents/2023-11/wotus-overview_tribes-and-states_11-15-23_508.pdf) and *Rapanos Guidance* at footnote 24.

<sup>34</sup>Relatively permanent waters include tributaries that typically have flowing or standing water year-round or continuously at least seasonally (e.g., typically three months). The duration of seasonal flowing or standing water may vary regionally, but the tributary must have predictable flowing or standing water seasonally. EPA and Army Webinar Slides at [https://www.epa.gov/system/files/documents/2023-11/wotus-overview\\_tribes-and-states\\_11-15-23\\_508.pdf](https://www.epa.gov/system/files/documents/2023-11/wotus-overview_tribes-and-states_11-15-23_508.pdf).

<sup>35</sup>AR0600.

<sup>36</sup>AR0740.

<sup>37</sup>AR0740.



The District determined that the subject wetland was not an (a)(7) water; therefore, this portion of Reason for Appeal 2 does not have merit. However, if upon remand for Reasons for Appeal 2a and 2b the District determines that Malbis Lake is a jurisdictional water of the U.S., the determination regarding the jurisdictional status of the wetlands should also be re-evaluated.

**REASON FOR APPEAL 3:** Malbis Lake and its wetlands are part of a surface tributary system with a continuous surface connection to D'Olive Creek. Discharge from the Malbis Lake dam structure flows to the undisturbed portion of D'Olive Creek on the north side of Woodrow Lane when the lake water surface elevation exceeds the outlet structure invert elevation. Between Malbis Lake and Woodrow Lane the creek has been routed through culverts, ponds, drainage structures and flumes, providing a continuous surface connection to D'Olive Creek, a Relatively Permanent Non-navigable Tributary of Traditional Navigable Water.

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

**ACTION:** For the reasons discussed below, this AJD is remanded to the District for further evaluation, analysis, and documentation. The District should re-evaluate its observations and conclusions relative to the jurisdictional status of the aquatic feature known as Malbis Lake as an (a)(4) and/or (a)(5) water. In addition, the District should ensure these observations and conclusions are adequately documented in the AR and the AJD, in accordance with current regulation, policy, and guidance in place at the time of the reconsideration.

**DISCUSSION:** In this Reason for Appeal, the Appellant contends that Malbis Lake and the wetland should be waters of the United States because they are part of a surface water tributary system with D'Olive Creek. The Appellant references and includes the 2005 NWP notes that support their position.<sup>38</sup> The District should clearly document the basis for its conclusion, specifically addressing the 2005 NWP notes and the Appellant's position.

There is no evidence to suggest, or reason to believe, that the District failed to consider the best available information in its evaluation of the site for CWA jurisdiction because the 2005 NWP documents were included in the AR and portions of the NWP file were referenced in the AJD MFR. However, the District did come to different conclusions regarding Malbis Lake, but the AR did not clearly document the basis for its differing conclusion.

As noted in the discussion above for Reason for Appeal 2, the District did not clearly document and evaluate Malbis Lake as an (a)(4) or (a)(5) water and the District should re-evaluate its observations and conclusions and ensure they are adequately documented in the AR and the AJD, in accordance with current regulation, policy and guidance in place at the time of the reconsideration. This re-evaluation will also address Reason for Appeal 3. Therefore, this reason for appeal has merit.

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<sup>38</sup>AR0245.

**CONCLUSION:** Reasons for appeal 2a, 2b, and 3 have merit. Reasons for appeal 1 and 2c do not have merit. This action is remanded to the District for reconsideration consistent with the discussion in this appeal decision document.

FOR THE COMMANDER:



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JOHN D. FERGUSON, P.E.  
Chief, Operations and Regulatory Division