USEPA, Region 7 vs. C&S Enterprise, L.L.C.
Iowa County, Iowa

The Clean Water Act (CWA) regulates discharges of pollutants into waters of the United States (WOTUS). The CWA prohibits the discharge of pollutants from a point source into a WOTUS except in compliance with permit issued under Section 404 of the CWA. Jurisdictional waters subject to the CWA are tributaries, streams and rivers that have a bed, a bank, and an ordinary high water mark that flow into a traditionally navigable water. Adjacent wetlands and other open waters such as ponds that are next to a jurisdictional water are also considered WOTUS.

For the Respondent to be liable for CWA Enforcement, including penalties, the affected waters must be WOTUS as defined in Section 502 of the CWA, 40 C.F.R. Section 232.2.

The Complaint alleges that in July 2015, the Respondent discharged fill into an unnamed intermittent tributary of Deep Creek. The Complaint further alleges that the unnamed intermittent tributary of Deep Creek discharges directly into Deep Creek on the southern edge of the Respondents property (see Section B, CWA Jurisdiction, page 6, Complainant's Prehearing Exchange, May 31, 2018). The Complaint further alleges that prior to the fill activity initiated by the Respondent, the section of the unnamed intermittent tributary of Deep Creek exhibited all the characteristics of a relatively permanent water and had a "significant nexus" to a traditionally navigable water". The Complaint references Agency Exhibit AX-10 containing historical aerial photographs showing a defined bed and bank and water in the channel at certain times. The Complaint references Agency Exhibit AX-24 showing LiDAR imagery showing historical presence of a defined bed and bank. The Complaint references Agency Exhibits AX1, AX2, AX4 and AX19 for photographs and videos from site visits showing the tributary upstream and downstream of the area in question. The Complaint also references Agency Exhibit AX-13 containing an expert's opinion of the jurisdictional nature of the unnamed internment tributary.

The documentation listed by the Complaint shows the lower reach of the unnamed intermittent tributary of Deep Creek does not show all the characteristics necessary to be defined as a WOTUS under the CWA.

The Agency Exhibit AX18 on page 1 of 3 indicates that the U.S. Army Corps of Engineers felt the early aerial record shows the drainageway on the upland steeper slopes was wooded and well defined while the portion of the unnamed tributary to Deep Creek that flows over the bottom grassland had no defined channel present. The Agency Exhibit AX18 on page 1 of 3 indicates that the U.S. Army Corps of Engineers interprets the aerial record to show that in 2009 and 2010 that portion of the drainageway to Deep Creek that flows over the bottom grassland had no defined channel present. In the absence of a defined channel bed and bank and ordinary high water mark, a grassed drainageway that intermittently discharges water is not considered a WOTUS. A grassed drainageway than does not have a defined channel bed and defined channel bank and only intermittently discharges water does have a significant nexus to downstream waters. If the downstream portion of the unnamed drainageway is not a WOTUS due to lack of a significant nexus to downstream waters, then the drainageway on the upland steeper slope also lacks the significant nexus and is not a WOTUS.

Agency Exhibit AX24 page 1 of 1 shows several locations along the unnamed drainageway where a defined channel is not present. Exhibit RX-3 is a modified representation of the Agency Exhibit AX24 showing several areas where a defined channel is not present along the bottomland grassed unnamed drainageway

Agency Exhibits AX1, AX2, AX4 and AX19 containing ground photographs and videos from site visits showing the tributary upstream and downstream of the area in question indicate a defined channel exists. However, no evidence is contained in the Agency Record showing the bottom grassland portion of the unnamed grassed drainageway before the tile lines were installed.

Agency Exhibit AX1 refers to the upstream wooded unnamed drainageway as a reference site for the downstream bottomland grassed drainageway. The two separate portions of the unnamed drainageway occupy different landforms and therefore cannot serve as a reference sites for each other.

The results of the Rapanos and Carabell cases places a burden on the EPA and the Corps of Engineers to show that upstream waters have a significant nexus to downstream waters on a case-by-case basis.

The term zero-order stream refers to swales, hollows and drainageways that lack distinct stream banks and are commonly not considered headwaters.

The topographic maps commonly used as catalogues of stream networks are not detailed enough to serve as a basis for stream management and protection (Where Rivers are Born, 2007, Meyer et. al.).

The landowner purchased the property in March 2008. In the fall of 2008 the Natural Resources Conservation Service (NRCS) approved pattern tile systems on the farmed areas north and south of the bottomland grassed drainageway. After installation of the tile lines the landowner conducted drainageway maintenance on selected areas of the bottomland grassed drainageway to promote surface water flow.

Exhibit RX 5 shows the USEPA aerials from the Iowa State University Geographic Information Systems Support and Research Facility. The aerial photographs are from the dates listed below.

1930	2007
1950	2008
1960	2009
1970	2010
1980	2011
1990	2013
2002	2014
2004	2015
2005	2016
2006	2017

Exhibit RX 5 page 12 of 27 is the 2008 aerial photograph from the same database that was not included in the USEPA aerials. The aerial photograph from 2007 in Exhibit RX on page 11 of 27

shows the woody vegetation and cover was removed from the bottomland grassed drainageway by 2007, before the current landowner bought the property. Exhibit RX 5 page 12 of 27 is the 2008 aerial photograph that shows the bottomland grassed drainageway does not contain a defined channel. The aerial photograph from 2009 in Exhibit RX 5 page 13 of 27 was reproduced to a smaller scale and is shown on Exhibit RX 5 page 14 of 27. The aerial photograph from 2009 shows the bottomland grassed drainageway does not contain a defined channel.

Exhibit RX 4 shows United States Department of Agriculture (USDA), Farm Services Administration (FSA), Farm Records that indicate no wetlands exist on Farm 5663, Tract 2128 on October 30, 2014. This information was provided to the landowner and relied upon to make decisions regarding farm planning and management. Exhibit RX 4 seem to be in direct conflict with Agency Exhibit AX11 Page 7 of 16 that indicates on Farm 5663, Tract 2128 on October 29, 2015, one year later, that 1.3 acres of wetland was converted to non-wetland in 2014. Based on existing aerial topography and ground photographs of the area, it appears that the non-farmed areas over the current tile line likely have or are developing wetland characteristics.

The documentation listed by the Complaint shows conflicting information from the US Army Corps of Engineers indicating the lower reach of the unnamed intermittent tributary of Deep Creek does not show all the characteristics necessary to be defined as a WOTUS under the CWA. The documentation listed by the Complaint shows conflicting information from the USDA indicating wetlands did not exist on the property and then did exist.

During my visit to the site on March 30, 2018, it was apparent that the activity conducted by the landowner is consistent with recommendations from watershed and agricultural officials to decrease nutrients and sediments reaching Iowa's waterways. By tiling the grassed bottomland drainageway and detaining surface water flow during heavy precipitation events, the current system allows removal of agricultural chemicals and sediment that previously were washed directly into Deep Creek.

Findings in this report are based upon the site's current utilization, information derived from the most recent reconnaissance and from other activities described herein; such information is subject to change. Certain indicators of the presence of environmental conditions may have been latent, inaccessible, unobservable, or not present during the most recent reconnaissance and may subsequently become observable (such as after site renovation or development). No warranties, express or implied, are intended or made.

Sincerely,

Gerald T. Hentges, P.G.,
Senior Hydrologist
Terracon