

**ADMINISTRATIVE APPEAL DECISION
CLEAN WATER ACT
TRACY LAKES PROPERTY
SAN JOAQUIN COUNTY, CALIFORNIA
SACRAMENTO DISTRICT
File Number SPK-2011-01069**

DATE: September 9, 2015

Review Officer: Thomas J. Cavanaugh, U.S. Army Corps of Engineers (Corps), South Pacific Division, San Francisco, California

Appellant: Tom Zuckerman, Tracy Lakes Property (Appellant)

District Representative: Mary Pakenham-Walsh, U.S. Army Corps of Engineers, Sacramento District (District)

Authority: Clean Water Act (33 U.S.C. 1344)

Receipt of Request for Appeal: December 23, 2014

Appeal Meeting and Site Visit Date: March 30, 2015

Summary of Decision: Reasons for appeal 1, 2, 4, and 5 of this Clean Water Act (CWA) jurisdictional determination have merit. The District's decision is remanded to the District to re-evaluate and document, as directed below. The District must include sufficient documentation of its evaluation of the aquatic features on the Property and of the potential for hydrologic connections to exist between those features and the Mokelumne River.

Background Information: The Tracy Lakes Property (Property) is an approximately 190-acre site, located on the Mokelumne River, in Section 8, Township 4 North, Range 6 East, MDBM, Latitude 38.2121 North, Longitude -121.3481 West.

For purposes of evaluation during the CWA jurisdictional determination, the District evaluated the site using the July 29, 2013, "Figure 4, Jurisdictional Delineation Map", prepared by Sycamore Environmental Consultants, using the 1987 Wetland Delineation Manual, the Code of Federal Regulations (CFR) definitions of jurisdictional waters, and supporting guidance documents.

On July 31, 2013, the Appellant's consultant submitted a request for a jurisdictional determination for the Property. The District's review included a field visit on April 10,

2014. On October 30, 2014, the District issued its CWA jurisdictional determination for the Property. The District concluded that the site contained 29.85 acres of waters of the United States, including wetlands, within CWA jurisdiction.

The Appellant's attorney submitted a Request for Appeal (RFA) on December 22, 2014. The Appellant disagreed with the District's conclusion that the 6.778 acres of Tracy Lake North and the 13.034 acres of Tracy Lake South are waters regulated under Section 404 of the Clean Water Act as either traditional navigable waters ("TNW") or wetlands adjacent to a TNW. The Appellant asserted that the District's administrative record(AR) does not support its determination.

Appeal Evaluation, Findings and Instructions to the District Engineer (DE):

INFORMATION RECEIVED AND ITS DISPOSAL DURING THE APPEAL REVIEW: The administrative appeal was evaluated based on the District's AR, the Appellant's Request for Appeal, and discussions at the appeal meeting with the Appellant and the District.

REASON 1: There is adequate documentation in the Administrative Record that the Tracy Lakes have an Ordinary High Water Mark (OHWM) as defined at 33 CFR 328.3(e). There is no documentation in the Administrative Record supporting the District's decision to discount and ignore the physical characteristics of an OHWM at Tracy Lakes. Regulatory Guidance Letter 2005-05 (RGL 05-05) identifies fifteen physical indicators of OHWM, many of which are present at the Tracy Lakes. The District's decision to classify a "waters" with an OHWM as a "wetlands" as defined in 33 CFR 328.3(a)(7) is inconsistent with the Corps' regulations and guidance.

FINDING: This reason for appeal has merit.

ACTION: The District must reconsider its decision that the Tracy Lakes are wetlands. The District must include sufficient documentation in the AR to support its final decision.

DISCUSSION: In the RFA, the Appellant asserted that the District did not follow the procedures in the "Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Arid West Region" (Version 2.0), September 2008 (ERDC/EL TR-08-28)(Arid West Regional Supplement)for determining what is a "wetland", versus a "water" with an ordinary high water mark (OHWM). The Appellant indicated that documents in the record identify Tracy Lakes has having an ordinary high water mark. Page 29 of the Sycamore Report indicates that: "The approximate OHWM elevation of the Tracy Lakes was established based on a review of multiple years of aerial photos (Table 2) and supplemented with observations by Moore Biological Consultants. The approximate elevation of the OHWM of the south lake is 18 ft. The approximate OHWM elevation of the north lake is 16 ft (Figure 4)." The Appellant indicated that the Moore Report, cited by the AJD form as proof that the Lakes are "laguna-type" wetlands, says: "Tracy Lake, as defined by an ordinary high water is approximately 115 acres and North Tracy Lake, also defined by an ordinary high water is approximately 28 acres." (p.14) The Appellant

indicated that Figure 5 of the Moore Report is titled "Seasonal Lakes" with a line around the lakes with text annotation reading: "Approximate 18' contour." The Appellant further asserted that Google Earth aerial photography from 2003 to 2014 shows that Tracy Lakes are inundated throughout the wet season except during droughts of extended durations, and remain inundated during the peak of the growing season for over half of the eleven year period. Finally the Appellant asserted that, because the Lakes have an OHWM, and therefore are "waters" and not "wetlands", the assertion of jurisdiction cannot be based on the Lakes being adjacent to the Mokelumne River. The Appellant asserts that waters that are adjacent to jurisdictional waters are not jurisdictional waters and cites *San Francisco Baykeeper v. Cargill Salt Division* (9th Cir., 2007) 481 F.3d 700. The Appellant noted that the District called the Lakes "impoundments" of Jahant Slough, which the Appellant asserted is inconsistent with characterizing the Lakes as "wetlands."

The District completed one Approved Jurisdictional Determination (AJD) Form for the Property.

In Section I.C of the AJD form, the District identified the Mokelumne River as the nearest downstream TNW. Section II.B.1.a of the AJD form indicates that the review area contains TNWs; wetlands adjacent to TNWs; relatively permanent waters (RPWs) that flow directly or indirectly into TNWs; and impoundments of jurisdictional waters. Section II.B.1.b indicates that there are 4185 linear feet (~4.80 acres) of non-wetland waters and ~25.05 acres of wetlands in the review area.

Section III.A.1 of the AJD Form indicates that the Mokelumne River is documented to be tidal and subject to jurisdiction under Section 10 of the Rivers and Harbor Act, approximately 2 miles downstream of the Property and that tidal influence may extend into study area. The section further indicates that documented historical and current commercial and recreational navigation occurs upstream and downstream and through the study area. Finally, the Section states that the Mokelumne at this location may also be susceptible to use for interstate or foreign commerce.

Section III.A.2 of the AJD Form states that the impounded features described as "Lakes" in the delineation report are better characterized as wetlands, as that is their condition most of the time in normal years. The District further stated that, like the other wetlands mapped on the site, they do periodically fill up with water and overflow, and that the open water condition is not perennial. The District further stated that water in these wetlands is from rainfall, runoff and other potential sources. The District determined, based on aerial imagery, topography, Lidar, and soils data, that water from these seasonal wetlands flows laterally across the surface, or near the surface in hyporheic or phreatic zones, downslope to the south and west, into the river. The District also stated that water leaves these wetlands via evapotranspiration. The District indicated that the larger wetlands, Tracy Lake North and Tracy Lake South are bounded on their downslope margins by earthen dams with various outlets to prevent failure in high water periods. The District asserted that they are impoundments of Jahant Slough and several other unnamed tributaries to the Mokelumne River. The District concluded that wetlands on the Property, including the features labeled Tracy Lakes, are only separated from the

river (a water of the United States) by manmade dikes or barriers, natural river berms, dunes, and the like. The District further concluded that wetlands on the Property are geographically proximate; neighboring; and appear to contribute hydrology to the Mokelumne River. The river is downslope from these wetlands. In above normal rainfall years and periods with higher rainfall, water will flow on the surface below the impoundments and through (some listed) hydric sandy or loamy soils above restrictive layers into the river. The District indicated that some of the soils in and around mapped wetlands are relatively deep and well drained while others have limited permeability and would allow higher water in the impoundments and other wetlands to drain into the river. The District stated that Lidar and other topographic mapping of the site show pathways for water moving across the surface to the river and that some available images during higher rainfall periods show water in and outside downslope of the mapped wetlands and drainage features. The District referenced documentation, including a biological assessment prepared for an overlapping excavation project, that described the features labeled "Lakes" as "laguna-type" wetlands which are generally seasonal, normally drying down in summer or fall. The District asserted that, in 2012, the lakes remained relatively full late into the year, in response to releases from Camanche Reservoir, an upslope navigable in fact impoundment of the Mokelumne River. The District stated that the bottoms and elevations of the "Lakes" and other wetlands are above the elevation of the adjacent Mokelumne River. Additionally, the District indicated that the wetlands on the site are within the FEMA mapped floodplain on a Flood Insurance Rate Map for the area. Although Sycamore's report references a landowner statement that the Mokelumne River did not overtop its banks in recent high water events, the mapped wetlands are close enough and in a landscape position which allows for chemical, biological and physical interactions with the TNW. The District asserted that insects and other biota, which breed or feed in the wetlands seasonally, can easily migrate through the contiguous, partially-forested, riparian zone, into the river where they provide food for federally-listed fish and other aquatic organisms. The District cited National Wetland Inventory Maps as showing these wetlands and the river in the study area as one relatively contiguous complex and further cited USGS and EPA mapping as showing these wetlands and their tributaries comprising the lowest portion of an approximately 10,000-acre hydrologic unit abutting and draining into the river at the study area. Based on all of the available information the District concluded that wetlands within the Property are adjacent to the Mokelumne River, a TNW.

The Corps regulations, at 33 CFR Parts 328 and 329, define "waters of the United States" and "navigable waters of the United States", respectively, and prescribe policy, practice and procedures to be used in determining the extent of such jurisdiction. In addition, 33 CFR Part 331, Administrative Appeal Process, provides terms and definitions for jurisdictional determinations.

The 1987 Wetland Delineation Manual states that the Corps of Engineers (*Federal Register* 1982) and the EPA (*Federal Register* 1980) both define wetlands as: "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. Wetlands generally include swamps, marshes, bogs, and similar areas.”

Regulatory Guidance Letter (RGL) 05-02 affirms that all approved geographic jurisdictional determinations completed and/or verified by the Corps must be in writing and will remain valid for a period of five years, unless new information warrants revision of the determination before the expiration date, or a District Engineer identifies specific geographic areas with rapidly changing environmental conditions that merit re-verification on a more frequent basis.

Regulatory Guidance Letter (RGL) 05-05 provides Corps Districts with guidance for identifying the OHWM. RGL 05-05 indicates that, for purposes of Section 404 of the Clean Water Act (CWA), the lateral limits of jurisdiction over non-tidal water bodies extend to the ordinary high water mark (OHWM), in the absence of adjacent wetlands. RGL 05-05 further states that, when adjacent wetlands are present, CWA jurisdiction extends beyond the OHWM to the limits of the adjacent wetlands. RGL 05-05 restates the definition of the term “ordinary high water mark” for purposes of the CWA lateral jurisdiction from 33 CFR 328.3(e), which states: “The term ordinary high water mark means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.” RGL 05-05 provides examples of OHWM indicators, but indicates that the list is not exhaustive.

The Arid West Regional Supplement, in the “sparse and patchy vegetation” section (Chapter 5, section 4 b), refers to areas influenced by seasonal ponding of water. That section indicates that, for delineation purposes, an area should be considered vegetated (and a potential wetland) if there is 5 percent or more areal cover of plants at the peak of the growing season. That section indicates that to be considered an unvegetated area, an area would have less than 5 percent plant cover. The section concludes that, in some cases, the unvegetated portions of a site may be considered as other waters of the United States if they exhibit ordinary high water (OHW) indicators (see 33 CFR 328.3(e)).

There is nothing in regulation or guidance that precludes the District from concluding that wetlands exist below an OHWM or that suggests wetlands cannot exist below an OHWM. The delineation of wetlands and the evaluation of whether an OHWM is present, as referenced above, are independent procedures. Neither the procedures, nor the conclusions, are mutually exclusive. The District’s decision to classify waters on the Property as wetlands is therefore not inconsistent with regulation, policy, or guidance. Additionally, RGL 05-02 recognizes that, over time, jurisdictional or wetland boundaries vary as a result of environmental or climatic variation. RGL 05-02 indicates that, in areas where jurisdictional or wetland boundaries shift as a result of environmental or climatic variation, revisiting jurisdictional determinations or wetland delineations after five years, when new information warrants revision, or when the District Engineer identifies specific areas that merit re-verification on a more frequent basis is appropriate. So, while the

aquatic features on the property may be appropriately delineated as wetlands during a drought or dryer than normal year, inundation during a wetter than normal year might preclude the growth of wetland vegetation in, at least, some of the area, and result in delineation of less area as wetland. That is why jurisdictional determinations cannot remain valid for an indefinite period of time.

The District must, however, include sufficient documentation in the AR to support its final decision. In particular, the District must include documentation, including wetland data sheets, documenting its evaluation of the potential for aquatic features on the Property to be wetlands and documentation of the evaluation of any of potential hydrologic connections between aquatic features on the Property and the Mokelumne River.

REASON 2: The Administrative Record does not support the Corps' classification of Tracy Lakes as "wetlands" as defined in 33 CFR 328.3(a)(7). No Arid West Regional Supplement datasheets are included in the Administrative Record to support the mapping of Tracy Lakes as a wetland.

FINDING: This reason for appeal has merit.

ACTION: The District must include documentation, including wetland data sheets, of its evaluation of the potential for aquatic features on the Property to be wetlands.

DISCUSSION: The AR does not contain data sheets, which support the District's conclusions, as asserted by the Appellant. Procedures for delineation of wetlands are described in the 1987 Wetland Delineation Manual and the Arid West Regional Supplement, as referenced above. Both of these documents contain numerous requirements to record specific information on wetland data forms, in the evaluation of a potential wetland. A District's determination that a particular area meets the three wetland factors and is, therefore, properly determined to be a wetland, must be documented. Therefore, the District must include sufficient number and quality of data forms, along with documentation of its evaluation in support of its final decision, as to the status of the aquatic features on the Property.

REASON 3: The Arid West Regional Supplement provides guidance for delineating wetlands with sparse and patchy vegetation. The "sparse and patchy vegetation" guidance does not supplant the use of OHWM.

FINDING: This reason for appeal does not have merit.

ACTION: No action is required.

DISCUSSION: The Arid West Regional Supplement, in the Sparse and patchy vegetation section (Chapter 5, section 4 b), refers to areas influenced by seasonal ponding of water. That section indicates that, for delineation purposes, an area should be considered vegetated (and a potential wetland) if there is 5 percent or more areal cover of

plants at the peak of the growing season. That section indicates that to be considered an unvegetated area, an area would have less than 5 percent plant cover. The section concludes that, in some cases, the unvegetated portions of a site may be considered as other waters of the United States if they exhibit ordinary high water (OHW) indicators. There is no aspect of the “sparse and patchy vegetation” guidance, contained in the Arid West Regional Supplement that supports the Appellants repeated assertion that Districts are precluded from determining that wetlands exist below an OHWM.

REASON 4: The Corps’ jurisdiction along the Mokelumne River, a TNW, extends beyond its OHWM to the limit of the adjacent wetlands (33 CFR 328.4(c)). The Tracy Lakes are isolated waters. Mere adjacency provides a basis for CWA coverage only when the relevant waterbody is a “wetland” (San Francisco Baykeeper v. Cargill Salt Division).

FINDING: This reason for appeal has merit.

ACTION: The District must first complete and document its evaluation of whether or not the aquatic resources on the Property are wetlands, as described above in the responses to reasons 1 and 2, above. If the District’s conclusion is that the aquatic resources on the Property are wetlands, the District must then document its evaluation of whether or not those aquatic features can be considered adjacent wetlands.

DISCUSSION: In Section III.A.2, the District concluded that wetlands on the Property, including the features labeled Tracy Lakes, are only separated from the river which is a water of the United States by manmade dikes or barriers, natural river berms, dunes, and the like. The District further concluded that the wetlands on the Property are geographically proximate, neighboring and appear to contribute hydrology to the river which is downslope from these wetlands and that, in above normal rainfall years and that during periods with higher rainfall, water will flow on the surface below the impoundments and through (some listed hydric) sandy or loamy soils above restrictive layers into the river. The District did not, however, sufficiently document its conclusion that the aquatic features on the Property are wetlands, as described above under reasons 1 and 2, or that the hydrologic connections exist, as described below under reason 5. As the District is required to include sufficient documentation in the AR to establish whether or not the aquatic features on the Property are wetlands, prior to the consideration of whether adjacency to the Mokelumne River might serve as a basis for jurisdiction, the District must include sufficient documentation of its evaluation of the aquatic features on the Property and of the potential for hydrologic connections to exist between those features and the Mokelumne River.

REASON 5: There is no evidence in the record that the waters of the Tracy Lakes are tributaries of the Mokelumne River, a TNW, or otherwise hydrologically connected to the Mokelumne River.

FINDING: This reason for appeal has merit.

ACTION: District must reconsider assertion that there are hydrologic connections between the aquatic features on the Property and the Mokelumne River.

DISCUSSION: In Section III.A.2, the District determined, based on aerial imagery, topography, Lidar, and soils data, that water from these seasonal wetlands flows laterally across the surface, or near the surface in hyporheic or phreatic zones, downslope to the south and west, into the river. The District also stated that water leaves these wetlands via evapotranspiration. The District indicated that the larger wetlands, Tracy Lake North and South are bounded on their downslope margins by earthen dams with various outlets to prevent failure in high water periods. The District asserted that they are impoundments of Jahant Slough and several other unnamed tributaries to the Mokelumne River. The District concluded that wetlands on the site, including the features labeled Tracy Lakes, are only separated from the river which is a water of the United States by manmade dikes or barriers, natural river berms, dunes, and the like. The District further concluded that they are geographically proximate, neighboring and appear to contribute hydrology to the river which is downslope from these wetlands and that, in above normal rainfall years and periods with higher rainfall, water will flow on the surface below the impoundments and through (some listed hydric) sandy or loamy soils above restrictive layers into the river. The District described some of the soils in and around mapped wetlands as relatively deep and well drained and others as having limited permeability which would allow higher water in the impoundments and other wetlands to drain into the river. The District stated that Lidar and other topographic mapping of the site show pathways for water moving across the surface to the river and that some available images during higher rainfall periods show water in and outside downslope of the mapped wetlands and drainage features. The District, while having a basis to believe that these hydrologic connections might exist from its review of Lidar, aerial photographs, and topographic maps, as described above, did not document observations or other evidence which would confirm the existence of the hydrologic connections it expected to find.

CONCLUSION: Boundaries of wetlands and other waters of the United States vary over time, as a result of environmental or climatic variation. That is why jurisdictional determinations cannot remain valid for an indefinite period of time. In this case, North and South Tracy Lakes appear to be wetlands, following a period of drought. During periods when water levels are high, for a longer period, vegetation growth might be precluded or limited, as suggested by the Appellant. However, RGL 05-2 speaks to changing circumstances and revisiting areas more often that change frequently. Therefore, the District was not precluded from providing the Appellant with a jurisdictional determination that the aquatic features on the Property are wetlands. The Appellant can always request a new jurisdictional determination when the current one expires or if conditions on the Property change. However, the District did not include sufficient documentation of its evaluation of the aquatic features on the Property as potential wetlands and of the potential for hydrologic connections to exist between those features and the Mokelumne River.

I, therefore, conclude that reasons for appeal 1, 2, 4, and 5 have merit. The decision is, therefore, remanded to the District. The District must include sufficient documentation

of its evaluation of the aquatic features on the Property as potential wetlands and of the potential existence of hydrologic connections between those features and the Mokelumne River. The District's determination was not otherwise arbitrary, capricious or an abuse of discretion, and was not plainly contrary to applicable law or policy. This concludes the Administrative Appeal Process.

A handwritten signature in black ink, appearing to read 'Thomas J. Cavanaugh', written in a cursive style.

Thomas J. Cavanaugh
Administrative Appeal Review Officer