

ADMINISTRATIVE APPEAL DECISION
APPROVED GEOGRAPHIC JURISDICTION FOR
DAVENPORT PROPERTY
SAN FRANCISCO DISTRICT
File number 20651N

April 29, 2003

Review Officer: Douglas R. Pomeroy, U.S. Army Corps of Engineers, South Pacific Division, San Francisco, California.

Appellant Representative: Ken Davenport, Industry West, Santa Rosa, California

Corps District Representative: Katarina Galacatos, San Francisco District

Jurisdiction: Section 404 of the Clean Water Act (33 U.S.C. 1344)

Receipt of Request For Appeal (RFA): December 30, 2002

Site Visit and Appeal Conference: March 28, 2003

Overview: The Corps San Francisco District and the Appellant disagree as to whether the property under consideration is within Clean Water Act jurisdiction, and disagree as to the extent of wetlands present on the 23 acre property. The District asserts the property contains approximately 12.8 acres of wetlands within Clean Water Act jurisdiction. The Appellant asserts that only 0.66 acre of wetlands are present and that none of the wetlands on the property are within Clean Water Act jurisdiction.

Summary of Decision: I conclude the District's decision was reasonable is supported by the administrative record. The appeal did not have merit.

Appeal Decision and Instructions to the San Francisco District Commander (DE):

Background Information: The undeveloped Davenport property consists of a 10 acre and 13 acre parcel forming a continuous 23 acre rectangular property located in the southern portion of Santa Rosa, California. The northern portion of the site is approximately 2.5 to 5 feet higher in elevation than the southern portion of the site. The elevation contours of the property are such that about two-thirds of the property drains toward the southwest corner of the site and one-third of the property drains toward the southeast corner of the site. A storm drain, the West Robles Conduit Project (District file number 20153N), constructed in 1997 – 1998 intercepts surface water flowing toward the project from the north. The Appellant asserts that the property has been in almost continuous agricultural use over 20 years. The San Francisco District (District) agrees that the property has been used for agriculture in the past, but disagrees as to the extent that agricultural use has occurred and/or been documented.

The jurisdictional status of the property has been the subject of discussion between the Appellants and the Corps since 1996. The purpose of this administrative appeal decision is to document whether or not the District's approved Clean Water Act (CWA) jurisdictional determination issued October 1, 2002, and reconfirmed December 26, 2002, was arbitrary, capricious, an abuse of discretion, not supported by substantial evidence in the administrative record, or plainly contrary to a requirement of law, regulation, an Executive Order, or officially promulgated Corps policy guidance. A detailed evaluation of all past actions of the District and the Appellant regarding this property is beyond the scope of the Corps Administrative Appeal process, but a limited discussion of past activities as it is relevant to this administrative appeal is provided below.

During 1992 – 1994, a wetland delineation and CWA jurisdictional determination for the Sonoma County Water Agency, West Robles Conduit Project (a 72-inch storm drain project) was conducted in the vicinity of the Appellant's property (admin record pages 712 – 813) and a portion of the proposed project route was on the Appellant's property. That wetland delineation report provided wetland boundaries for the amount of wetlands present on the proposed alignments of the storm drainage easement as well for the remainder of the Davenport property (admin record pages 779 – 781). The District completed a jurisdictional map for West Robles Avenue Conduit project on July 10, 1995 (admin record page 29). This map confirmed the wetland delineation only for the West Robles Conduit Project easement area, but not for the entire Davenport property. The remainder of the Davenport property did not receive a Corps confirmed jurisdictional determination at that time because representatives of the property owners had contacted the Sonoma County Water Agency and advised them that they only had authorization to work in West Robles Conduit Project proposed easement area, not on the entire property.

On August 21, 1996, the District issued Cease and Desist Orders to the Davenport family members who were the owners of record for the parcels based on the conclusion that unauthorized activities involving the filling of wetlands had occurred. Between August 1996 and April 2002, the Appellant and the District had numerous discussions regarding

the proper methods and wetland delineation manual appropriate to determine the extent of CWA jurisdiction on this property. During the first several years after the Cease and Desist Order was issued, the District requested that the Appellant complete the wetland delineation for this property at his expense. The District later offered to delineate the wetlands on the property at government expense. On April 30, 2002, the District's letter to the Appellant concluded that no wetland fill had occurred and rescinded the District's Cease and Desist Order of August 21, 1996. The District's April 30, 2002 letter (admin record page 413) also identified that wetlands within CWA jurisdiction were present on the property.

The West Robles Avenue Conduit was built along the northern property line of the Appellant's property in the 1997 – 1998 time period. The District and the Appellant agree that this new storm drain collects sheet flow of water north of the property and routes it into the storm drain, instead of allowing it to continue to flow down slope in a southerly direction across the Appellant's property. The District and the Appellant agree that the storm drain project has reduced the amount of water entering the property from the north by an unquantified amount.

In August 2000, the Appellant's consultant submitted a "Pre-Jurisdictional Determination Report" (Waaland Report) developed to meet the requirements of a wetland delineation in accordance with the National Food Security Act (NFS) Manual and concluded that 0.66 acre of the site was wetlands. After a series of discussions between the District and the Appellant from year 2000 to 2002, representatives of the Corps South Pacific Division office met with the Appellant on May 17, 2002 and agreed to have Corps personnel from outside San Francisco District provide a wetland delineation for the property. The understanding of the Corps of Engineers Division and District personnel of the agreements reached at the May 17, 2002 differs from the Appellant's understanding of that meeting.

As a result of the May 17, 2002 meeting, Corps representatives Tom Cavanaugh and Kathy Norton from Sacramento District, and James Wakeley from the Corps Engineering Research and Development Center, Vicksburg, Mississippi, conducted a wetland delineation of the site on July 9 – 10, 2002 (C/W delineation).

The Appellant subsequently requested another independent wetland delineation for the site because Mr. Cavanaugh had talked to a San Francisco District representative about the site. The Appellant believes this had the potential to bias the independence of the C/W wetland delineation and considered such communication to be inconsistent with the agreement reached between the Appellant and the South Pacific Division on May 17, 2002.

Subsequently, the San Francisco District Engineer agreed to have another independent wetland delineation completed to meet Corps 1987 Manual and NFS Manual wetland delineation requirements. Former Corps Headquarters Regulatory Office staff member (and now private consultant) Michael Smith and Corps Engineering Research and

Development Center, Vicksburg, Mississippi soil scientist Chris Noble completed this subsequent wetland delineation on August 7 and 8, 2002 (S/N Delineation).

On September 25, 2002, the District Engineer conducted supplemental elevation surveys to determine whether water could flow off the property.

On October 1, 2002 the District issued its jurisdictional determination for the property. That determination found that approximately 12.8 acres of the property, including Wetland W-1 and Wetland W-2, were wetlands within CWA jurisdiction. Wetland W-2, an approximately 0.4 acre wetland area, was determined to be outside CWA jurisdiction.

The Appellant then submitted additional topographic survey and other information that he believed should convince the District that the property was not within CWA jurisdiction and that only 0.66 acre of wetland was present on the property. The District reviewed this information, disagreed, and on December 26, 2002, reconfirmed its October 1, 2002 CWA jurisdictional determination. The Appellant then appealed that CWA jurisdictional determination.

Appeal Reason 1: The Appellant asserts that most of this property should be considered outside of jurisdiction of the Clean Water Act because it is prior converted cropland rather than wetlands. The Appellant further asserts that the determination as to whether or not the property is prior converted cropland should be based on at wetland delineation done in accordance with the Natural Resources Conservation Service, National Food Security Act Manual (NFSA Manual), not the Army Corps of Engineers 1987 Wetlands Delineation Manual (Corps 1987 Manual).

Finding: The appeal did not have merit.

Action: None required

Discussion: The San Francisco District is responsible for wetland delineations on both agricultural and non-agricultural lands for Clean Water Act purposes in the nine counties around the San Francisco Bay area, California due to special exceptions to the standard procedures in the *"Memorandum of Agreement among the Department of Agriculture, the Environmental Protection Agency, the Department of the Interior, and the Department of the Army concerning the delineation of wetlands for purposes of purposes of Section 404 of the Clean Water Act and Subtitle B of the Food Security Act"* explained in the San Francisco District Public Notice 94-2 dated September 1, 1994.

The Appellant asserts only 0.66 acre of his property is wetland, as defined in the Waaland Report of August 1, 2000 (Waaland report). The Waaland report was developed to meet the requirements of a wetland delineation under the NFSA Manual. On July 5, 2000, prior to submittal of the Waaland report, the Natural Resources Conservation Service modified the NFSA Manual. One of the modifications was Section 513.22 of the NFSA Manual which was revised to state:

“Non-agricultural lands include but are not limited to: agricultural lands where non-agricultural uses have been established, *or will be established* (urbanizing areas), to the extent that agricultural production will no longer occur or is no longer feasible.” (italics added).

The NFSA Manual further identifies in Section 513.22 that the Corps 1987 Manual will be used to make wetland determinations on non-agricultural lands. The Appellant has stated in the administrative record that he has obtained industrial zoning for this property and plans to sell the property for industrial development. The Appellant and the District agreed at the March 28, 2003 appeal meeting that the Waaland Report was not designed to meet the requirements of the Corps 1987 Manual. The administrative record indicates that the District became aware of the new NFSA Manual standards on October 23, 2000 and transmitted this new information and requirements to the Appellant’s consultant on November 13, 2000 (admin record page 289). The July 5, 2000 changes to the NFSA Manual provided new standards that the District followed for CWA jurisdictional determinations on agricultural property.

At present, the District cannot consider a prior converted cropland determination for the Appellant under the NFSA Manual, because based on the Appellant’s description of the property it is urbanizing land, and any wetland delineation for the property must be done in accordance with the Corps 1987 Manual. The District’s use of the Corps 1987 Manual in this instance was reasonable and consistent with the Corps regulations, policy, and guidance.

The Appellant asserted he received arbitrary treatment because the District issued a CWA jurisdictional determination, prior converted cropland determination, and wetland delineation, for District file number 23320 (admin record pages 910 – 912) on September 13, 2000, using the NFSA manual after the NFSA Manual changes went into effect. The Review Officer reviewed District file number 23320 and found that this other action did not involve urbanizing land, and so was not comparable to the Appellant’s property. In addition, District file 23320 also included evidence that the District had required and received documentation of cropping history information consistent with the requirements of NFSA Manual CA-1 amendment. The District had disputed the Appellant’s evidence of cropping history, but cropping history information was no longer germane to the District’s CWA determination after the July 5, 2000 NFSA Manual changes. Once the District had identified that this was an urbanizing property after July 5, 2000, it was not appropriate to make a prior converted cropland determination for the property using the NFSA Manual.

Appeal Reason 2: The Appellant asserts the District's approved jurisdictional determination is flawed because the determination did not sufficiently document the presence of hydrophytic vegetation, hydric soils, and wetland hydrology, the three criteria necessary to identify wetlands for purposes of the Clean Water Act.

Finding: The Appeal did not have merit

Action: None required

Discussion: Both the Corps and the Appellant stated in May 2002 that they desired to complete a CWA jurisdictional determination for the Appellant's property in the Summer of 2002. This timing restriction made it more difficult to identify field indicators that wetlands were present because the property was being evaluated for the presence of seasonal wetlands. The Corps 1987 Manual, Section G, provides procedures for problem areas such as this. In regard to seasonal wetlands, Section G, page 93, states:

“Seasonal wetlands. In many regions (especially in western states), depression areas occur that have wetland indicators of all three parameters during the wetter portions of the growing season, but *normally lack* wetland indicators of hydrology and/or vegetation during the drier portion of the growing season. Obligate hydrophytes and facultative wetland plant species ... normally are dominant during the wetter portions of the growing season, while upland species (annuals) may be dominant during the drier portions of the growing season. These areas may be inundated during the wetter portion of the growing season, but wetland hydrology indicators may be totally lacking during the drier portions of the growing season. ... The determination that an area exhibits wetland characteristics for a sufficient portion of the growing season to qualify as a wetland under the Clean Water Act must be made on a case by case basis. ...”
(italics added)

The Appellant stated that the District's representatives have identified that the dry season is not the best time to conduct a wetland delineation and CWA jurisdictional determination for this property. For a variety of reasons attributable to both the Corps and to the Appellant, and discussed in detail in the administrative record, a thorough wetland delineation by the Corps of all portions of the Davenport property including identification of hydrophytic vegetation, hydric soils, and wetland hydrology, has not occurred during the wet season. The Appellant and the Corps agreed to conduct an evaluation during the dry season of 2002 so as not to further delay the Appellant's anticipated sale of the property for industrial development. If the Appellant was critically concerned that the wetland delineation occur in the wet season, and/or under normal conditions (i.e. without the disturbance of agricultural activities) he could have agreed to conduct a CWA jurisdictional determination during the wet season and/or forgone agricultural production on the property during the wet season of 2002 or 2003.

The District's CWA jurisdictional determination for this property was issued October 1, 2002, and reconfirmed December 26, 2002. Mr. James Wakeley's memorandum of July

23, 2002, regarding the methods used in the C/W delineation, stated that the evidence of wetland vegetation and wetland hydrology were problematic on the site because of the active management of vegetation through periodic agricultural activities, and annual seasonal drought. Mr. Wakeley's July 23, 2002 memo specifically identified:

“For best accuracy, the delineation of wetland on this tract should be performed (1) during the early part of the growing season in a normal rainfall year and (2) before any agricultural disturbance (cultivation, seeding etc.) have been done that year. To evaluate the vegetation that would be present under normal circumstances, it might even be necessary to abandon all agricultural operations on the site for a number of years.”

The Appellant chose to continue agricultural use, and the Corps and the Appellant agreed to conduct the wetland delineation during the dry season. Nothing in this administrative appeal decision precludes the Appellant from collecting additional new information regarding the presence of hydrophytic vegetation, wetland hydrology, or hydric soils during the wet season to provide more precise information for the District to consider in potentially refining the exact location of the wetland boundaries within the property.

The San Francisco District “Information Needed for Verification of Corps Jurisdiction” two-page handout, dated October 2001, provides recommended formats and materials for submittal of CWA jurisdictional determinations. This document identifies that to avoid delays a wetland delineation should include:

“Written rationale for the choice of location and number of sample points...

Sample points need to be recoverable for verification during field inspection...

Signed data sheets for every sample point where data was gathered...

Location of every sample point needs to be accurately identified and located on the proposed jurisdictional map...

Paired sample points (transect) are to be used to identify upland/wetland boundaries...

Single sample points may be used to characterize upland or wetland areas but are not sufficient documentation to establish upland/wetland boundary”
(italics added)

At the appeal meeting the District stated that they considered Mr. Wakeley an expert in the field of wetland delineation and considered the C/W report consistent with the San Francisco District “Information Needed for Verification of Corps Jurisdiction” two-page handout, dated October 2001. However, when comparing the C/W report against the District’s standards several aspects of the report are inconsistent with the standards.

The Cavanaugh/Wakeley (C/W) wetland delineation had 4 data points that were documented in the administrative record. Mr. Wakeley's July 23, 2002 memo explains that they placed over 100 pin flags on the site to represent the wetland boundary. Mr. Wakeley's March 26, 2003 e-mail clarified that the C/W delineation boundaries were based primarily on hydric soil indicators, oxidized rhizospheres, vegetation patterns, and subtle topographic variations. Mr. Wakeley further stated that dozens of undocumented sample holes were dug, and the presence or absence of hydric soils evaluated at those locations, to determine the wetland boundary on the property.

Mr. Tom Cavanaugh stated at the appeal meeting that he, Mr. Wakeley, and Ms Norton, used paired sample points in establishing the wetland boundaries on the property, but their team only recorded data at 4 points. The unrecorded points could not be relocated because the Appellant chose to remove the flags marking the data points without surveying them. The administrative record indicates that the Appellant understood that Mr. Cavanaugh had discussed the property with representatives of the San Francisco District, and the Appellant considered such communication to be inconsistent with the agreement reached between the Appellant and the South Pacific Division on May 17, 2002. In the absence of additional information, I conclude the C/W delineation as documented in the administrative record would be insufficient to establish a wetland delineation boundary for the entire property in accordance with the standards established by the District.

However, in this case additional information regarding this property is available. The District used the West Robles Conduit Project wetland delineation information during its investigation in 1995 - 1996 prior to issuing a Cease and Desist Order (later rescinded) regarding the property. District representative Mr. Dan Martel reviewed the West Robles Conduit Project wetland delineation report, including conducting a field visit and collecting data evaluating the wetland/upland boundary on the north and west sides of the property on December 20, 1993 (Admin record pages 518 - 521). His observations included paired observations of wetland and non-wetland vegetation and data points showing the location of hydric and non-hydric soils on the western and northern portions of the Davenport property. The District also collected data points on the western and northern portions of the property (admin record pages 513 - 519) on January 7, 1997. A wetland boundary is shown in the West Robles Conduit Project report (admin record page 780) for the eastern or southern extent of wetlands on the Davenport property, but no data points are located in that area. That is to be expected as that area was not one of the alternative routes of the West Robles Conduit Project.

During the appeal process, the Appellant discussed the validity of the West Robles Conduit Project Report. The Appellant included in his clarifying information a portion of a sentence from the West Robles Conduit Project Report (admin record page 716):

“...the acreage figure is almost meaningless.”

to suggest that since much of the West Robles Conduit Project fieldwork was done in the dry season, that the wetland boundaries identified in that report were meaningless. That conclusion takes the statement out of context. The full statement was:

“The overall wetland acreage estimate [provided in the West Robles Conduit Project report] was calculated by planimetering the mapped polygons on the air photos, *but since the study area is somewhat arbitrary with respect to the total wetland distribution, project extent, and legal parcel lines*, the acreage figure is almost meaningless. The actual acreages of specific portions of features to be impacted will need to be calculated after a more exact alignment is defined (with all trench locations, access and work roads, material, and equipment storage areas, and any other places identified that might be physically disturbed).”

(Wording in [] brackets added for clarity, italics added for emphasis).

So what the West Robles Conduit Project Report was identifying as meaningless was the acreage of wetlands present in a designated study area with arbitrary boundaries, relative to the potential wetland impacts of the proposed project, and had nothing to do with determination of boundaries between wetlands and uplands in the area.

The wetland boundaries established in the West Robles Conduit Project report were based on aerial photograph interpretation supplemented by on-site data points where hydrophytic vegetation, wetland hydrology, and hydric soils were evaluated. The West Robles Conduit Project area wetland boundaries were confirmed by on-site data collection. The West Robles Conduit Project report identified specific patterns of wetland vegetation on the aerial photographs of these areas and extended these patterns onto the Davenport property where they matched the patterns that had been confirmed on the ground for the adjoining area. While such a boundary cannot be considered exact, it does provide an important indication of corroborating information that an area of wetlands similar to that boundary is likely present on the property.

The District’s Jan 7, 1997 site visit memorandum and field map (Admin record pages 513 – 517) indicates that data at several locations was collected but the memo does not specify whether each data point was a wetland or non-wetland data point. However, as the data points were plotted on a map showing the District’s previously identified wetland delineation boundary, and no changes to that boundary were identified, it appears the District determined that no changes to the prior delineation were considered appropriate based on the January 7, 1997 site visit.

The Smith/Noble (S/N) wetland delineation report is similar to the West Robles Conduit Project and the C/W wetland delineation reports in that the three reports agree that there are extensive wetlands on the western portion of the Appellant’s property. As the S/N fieldwork was completed on August 7 - 8, 2002, indicators of wetland hydrophytic (wetland) vegetation, and wetland hydrology were absent due to seasonal drought and the Appellant’s vegetation management practices. The S/N report includes 44 documented soil sampling data points, and identified hydric soils in the center of the property, as well as along the southern and eastern portions of the property, which assumed present but not

documented in other reports. The S/N report (admin record pages 634 - 711) identified approximately 18 acres of wetlands according to the standards of the Corps 1987 Manual. The S/N report appears to have established a more generalized boundary based on the conditions present late in the dry season. The S/N wetland delineation boundary has fewer curves but is generally consistent with the other reports as to the location of wetlands on property.

During the appeal process the Review Officer requested the District Engineer provide clarifying information regarding his choice of the C/W wetland determination boundaries over the S/N wetland delineation boundary. On April 4, 2003 the District Engineer clarified that he chose the C/W delineation for the property over the S/N delineation for the property because:

“(a) the C/W delineation was conducted closer to the wet season and there was a greater chance of accuracy the closer the wetland delineation was to the wet season, (b) the C/W team had more local experience and more wetland delineation experience than the S/N team, and (c) the C/W delineation was more consistent with prior West Robles Conduit Project wetland delineation.”

Both the Corps and the Appellant identified in the administrative record that they wanted Corps CWA jurisdictional determination, including a wetland delineation, completed for this property during the dry season in the summer of 2002. As described above, the Corps 1987 Manual provides for such delineations, but identifies that during the dry season the field indicators of the presence of seasonal wetlands are primarily the presence of hydric soils, and that direct indicators of hydrophytic vegetation and wetland hydrology are largely absent. The District used the best information it had available in reaching its conclusions, including the West Robles Conduit Project report data that was about 10 years old.

The District's Regulatory Policy Memo of February 6, 1996 identifies that a wetland delineation on the Santa Rosa plain would generally be reconsidered after three years, or a maximum of five years. Under other circumstances, one would expect the District to undertake the delineation of this property in the wet season and collect more data on hydrophytic vegetation and wetland hydrology, but as discussed above, both the Corps and the Appellant elected to forgo such additional information in order to proceed with a delineation during the dry season in the Summer of 2002.

The Appellant has asserted that the Waaland report should have been considered in the development of the District's conclusions. Based on the administrative record, it appears that the information in the Waaland report was considered to the extent it related to the District's determination of the extent of wetlands under the Corps 1987 Manual.

The Waaland report was developed to meet the requirements of the NFSA Manual, and therefore provided little information that could be used to delineate the extent of wetlands in accordance with the Corps 1987 Manual. The Waaland report provided data on the duration of ponding in 23 depressions on the Appellant's property. The Waaland report

did not provide data on the presence of hydrophytic vegetation or the extent of hydric soils on the site. Also, other than the duration and depth of water ponding on the site, the Waaland report did not provide information on wetland hydrology, such as evidence of soil saturation or routes of water flow.

When considered as a whole, the administrative record supports the District's conclusion regarding the extent of wetlands present on the Davenport property. The administrative record provides sufficient and reasonable documentation that all three necessary criteria to identify a wetland - hydrophytic vegetation, wetland hydrology, and hydric soils - were met.

Appeal Reason 3: The Appellant asserts that all areas on the property are isolated waters with an insufficient to interstate commerce to be regulated under the Clean Water Act.

Finding: The appeal did not have merit

Action: No action required

Discussion: The Appellant asserts that the property is an isolated water and that no water currently flows from the property. The Appellant and the District agree that the recently constructed (1997 – 1998) West Robles Conduit Project storm drain reduced the flow of water onto the property by intercepting surface water flows from north of the property and routing those into the storm drain. However, the determination whether any areas of this property are within CWA jurisdiction is based on the current conditions, not whether the property receives less surface water flow now than it received in the past.

The District believes water flows off the property with sufficient frequency along the southern boundary of the site to establish CWA tributary connections to the Laguna de Santa Rosa and the Colgan Creek Flood Control Channel. The Appellant believes this is not possible because of the elevation of the dirt berms at the southern property fenceline boundaries are too high to allow water to flow off the property. The District and the Appellant agreed that the off-site Colgan Creek Flood Control Channel and the Laguna de Santa Rosa were within CWA jurisdiction.

Corps regulation 33 CFR 328.3 (a) (5) identify that tributaries to waters within CWA jurisdiction are also within CWA jurisdiction. The Corps regulations at 328.3 (a) (7) identify that wetlands adjacent to waters within CWA jurisdiction are also within CWA jurisdiction unless they are wetlands adjacent to other wetlands.

The District identified that Wetland W-1 and Wetland W-3 were within CWA jurisdiction as adjacent to tributaries to waters within CWA jurisdiction, but that Wetland W-2 was outside of CWA jurisdiction because it was a wetland adjacent to another wetland (Admin record pages 836 - 840).

During the appeal conference, the District and the Appellant discussed the general nature of hydrology on the site and in the vicinity. Both parties agreed that the site functions as described in the West Robles Conduit Project wetland delineation (Admin record page 719). The property contains a seasonally perched water table that extends across the site on top of underlying clay layers, but at varying depths depending on the topographic position and the amount of loamy topsoil above the restrictive layer. As fall and winter rains wet the soil, the relatively shallow clay loam over thick impervious clay becomes saturated from the impervious layer up. Once saturated, prolonged runoff can occur from connecting swales.

The Appellant's surveyor stated that he did not believe that water could flow off the property because the elevation of the lowest area at the southern boundary of the site was lower than the dirt berms next to them. He concluded that water could flow onto the property from the roadside channel on the eastern boundary of the property, but that other water on the site would simply pond at the southern boundary and not flow off the property. At the appeal conference the Review Officer clarified that the opinion of the Appellant's surveyor was based on his evaluation of topographic elevations of the site, and his observations on a November 2002 site visit that occurred soon after several inches of precipitation occurred. The Appellant's surveyor stated that no water was flowing off of the property during that visit and that it was his opinion that water never flowed off the site.

The District's assertion is that water would stay on the property until the soil became saturated. Once the soil on the property was saturated, subsequent precipitation would result in surface water flows off of the property. The field observations of the Appellant's surveyor are consistent with the District's assertion that water would flow from the property only after the soil became saturated. The Appellant's surveyor collected no information on soil saturation levels and based his conclusions solely on topographic elevation data. If the water flows off the property in the manner described by the District, the timing of such flows would be expected to vary from year to year as sufficient precipitation and subsequent soil saturation to initiate such a water flow would not occur at exactly the same time every year.

As clarified by the District at the appeal meeting, in order for such flows to occur, the ground must be saturated. Also, water must pond to a sufficient depth in order raise the edge of the ponded water area to a sufficient elevation to flow over the dirt berms along the boundaries of the property. The District then asserts the water would flow both southeast into the roadside channel at Juniper Avenue, and flow south into a small channel extending south from the southwest corner of the property to Todd Road. If this happens under normal annual precipitation regimes, as the District claims, one would expect that evidence of hydric soils would occur at elevations equal to or higher than the elevation that water would need to reach in order for water to flow off the property.

The Corps 1987 Manual page 26 defines a hydric soil as:

“A hydric soil is a soil that is saturated, flooded, or ponded long enough during the growing season to develop anaerobic conditions that favor the growth and regeneration of hydrophytic vegetation.”

So the presence of a hydric soil would provide indirect evidence as to whether an area is saturated and/or ponded during some portion of the year. The elevation of hydric soils on the property would provide indirect evidence regarding the District's assertion that water flows from the property.

An exact determination of the topographic elevation of the various hydric soil sampling sites on the property cannot be made from the existing information. Any comparison of data between the Appellant's topographic maps, the C/W wetland delineation map, the S/N delineation map, the District's January 7, 1997 field map (which was based on the West Robles Conduit Project Map from 1993) will be only approximate because the hydric soil sampling locations were plotted on different base maps or aerial photographs by different methods which have different levels of accuracy and precision. The C/W map (after the Appellant declined to survey the locations of the C/W hydric soil and wetland delineation data points) was based on a sketched map. The District's January 7, 1997 field map was based on a sketch map. The S/N data points were based on GPS coordinates, but these coordinates were not referenced to the Appellant's topographic elevation survey data, and the Appellant's topographic survey information was not directly referenced to any of the hydric soil sampling locations. However, even considering that some error would be present in the estimates of the hydric soil data point locations, the available data support the conclusion that hydric soils are present across a substantial portion of the property, and that water ponds to a sufficient elevation on-site to flow off the property as described in detail below.

Based on the Appellant's topographic survey of the southeastern property line (Admin Record page 889) the elevation of the west berm of the roadside channel between the property and Juniper Avenue is between the 100 foot and 101 foot elevation mark approximately 20 feet west of the centerline of Juniper Avenue and 5 feet north of the southern boundary of the property. So water would have to pond higher than approximately the 101 foot elevation mark to flow from the property into the roadside channel.

In reviewing the Cavanaugh/Wakeley (C/W) map and data sheets (Admin Record pages 480 - 490), the C/W delineation point P1 is approximately between the elevation 101.5 foot and 102 foot level. The C/W report determined that hydric soil was present at C/W Point P1. Soil samples on the Smith/Noble (S/N) wetland delineation map (Admin record page 637) at delineation points 13 and 14 also identified hydric soils on the southeastern portion of the property. S/N points 13 and 14 are between approximately the 101.5 foot elevation and the 102.0 foot elevation. Both the C/W and S/N delineation data are consistent with evidence of soil saturation and/or ponding in the southeastern

corner of the property. This supports the District's conclusion that water ponds to a sufficient depth in this area to raise the water level at the edge of the ponded area to a sufficient elevation to allow water to flow from the site into the roadside channel that flows south along Juniper Avenue.

In the southwestern corner of the property the Appellant's cross section map (Admin Record 890) identified the lowest elevations near the southwestern boundary of the property at about the 99.0 foot elevation at the 2 + 60.00, 2 + 80.00, 3 + 00.00, and 3 + 20.00 survey points. The C/W data point P-3 is located approximately between the 98.5 foot elevation and the 99.0 foot elevation, and therefore provides no information regarding whether water might pond deep enough in the southwestern corner of the property to flow south off the site. The S/N wetland data points 30 and 31 also appear to be between approximately the 98.5 foot elevation and the 99.0 foot elevation, and also provide no information in that regard. But S/N data point 33 is between approximately the 99.5 foot elevation and 100 foot elevation and is consistent with saturation and/or ponding of water to a depth that could result in flow over the dirt berm in the southwest corner of the property. This water would subsequently flow south along the southwest fenceline towards Todd Road.

The C/W and S/N hydric soil data points show evidence of regular saturation and/or inundation at elevations and locations on the property that are consistent with a depth of ponding of surface water that would allow surface water flows to leave the southwest and southeast corners of the property. Given that the local soils have a perched water table underlain by a relatively impermeable clay layer, it was reasonable for the District to conclude that the site regularly has ponded water extending to the data points described above. Such ponding would be a sufficient to allow surface water flows to leave the southwestern and southeastern corners of the property.

Assuming that water did leave the property, the District and the Appellant then disagree as to whether the administrative record supports the conclusion that water can flow from the property to the Colgan Creek Flood Control Channel or the Laguna de Santa Rosa.

The District concluded that the March 13, 2000 color infrared aerial photograph of the Davenport property (number 7-9) shows evidence of a surface water connection via a channel flowing directly south from southwest corner of the Davenport property, continuing along the western boundary of the property immediately south of the Davenport property, and extending to Todd Road. The Appellant disputes this interpretation of the aerial photograph. The District and the Appellant agreed at the appeal meeting that the roadside channel on this portion of Todd Road flowed to the Colgan Creek Flood Control Channel. The District and the Appellant agreed the Colgan Creek Flood Control Channel is within CWA regulatory jurisdiction as a water of the United States.

During the site visit the Review Officer observed the small channel at the southwestern corner of the property that the District asserts extends to Todd Road. The Review Officer also observed a channel extending north from Todd Road towards the

approximate western boundary of the Davenport property during the site visit. The elevation in this area of Santa Rosa is known to generally decrease from northeast to southwest so water would be expected to flow in a south to southwest direction. My staff and I reviewed the aerial photograph 7-9 and associated materials and found the District's conclusion was reasonable.

The Appellant and the District agreed that water in the roadside channel that extends along the Davenport eastern property boundary flows south along Juniper Avenue to the Todd Road/Juniper Avenue intersection. This roadside channel then flows via culverts east under Juniper Avenue, then flows south under Todd Road. The Appellant stated that the roadside channel terminated in a pond south of Todd Road and does not reach the Laguna de Santa Rosa. Part of the claimed route of the channel between Todd Road and the Laguna de Santa Rosa was inaccessible and so the channel was not followed further during the site visit. The Appellant also stated that he had been involved with construction of this channel and pond many years ago and believed it did not extend to the Laguna de Santa Rosa.

The District concluded that the March 13, 2000 color infrared aerial photograph (7-8) of the Davenport property, shows evidence of a surface water connection via a series of roadside channels between the culvert approximately 100 feet east of the Todd Road/Juniper Avenue intersection and the Laguna de Santa Rosa to the south. My staff and I reviewed aerial photograph 7-8 and associated materials and found the District's conclusion was reasonable.

The evidence supporting the District's basis to conclude that the wetlands on the property are adjacent to tributaries to waters of the United States, and therefore within CWA jurisdiction, is scattered among several documents and reports. Unfortunately, the District did not clearly and concisely summarize that information. However, after a detailed review, I conclude that the District's October 1, 2002 CWA jurisdictional determination, reconfirmed on December 26, 2002, identifying that the Appellant's property contained wetlands that are within CWA jurisdiction as adjacent to waters of the United States was reasonable.

In response to one of the questions provided in advance as part of the annotated agenda for the appeal meeting, Mr. Jack Kerns of the San Francisco District Office of Counsel prepared a two page memo dated March 28, 2003, and submitted it at the appeal meeting. This memo summarized federal court decisions the District considered relevant to this situation, and provided the District's legal position that:

“Therefore, a wetland hydrologically connected by a stream, ditch or channel to navigable waters is “other waters of the United States” under the CWA.”

The Appellant was provided an opportunity to refute this legal position. The Appellant cited *United States v. Rapanos* 190 F. Supp. 2d 1011 (E.D. Mich 2002) and *Rice v. Harkin* 261 F. 3d 466 (5th Cir. 2001) to support his position that the property should be considered an isolated water. The District considered these decisions in its March 28,

2003 memo. The District argued both cases were factually distinguishable from the facts here. Moreover these cases were not consistent with relevant 9th Circuit federal court decisions such as *Headwaters v. Talent Irrigation* 243 F. 3d 526, 533 (9th Cir. 2001).

The District determined that the area identified in the C/W wetland delineation as Wetland W-2 was outside of CWA jurisdiction, in accordance with the U. S. Supreme Court's decision in *Solid Waste Agency of Northern Cook County v. U. S. Army Corps of Engineers*, 531 U.S. 159 (2001), because it was an isolated, intrastate, and non-navigable water, that had an insufficient connection to interstate commerce to be within CWA jurisdiction.

The District's decision to include Wetland W-1 and Wetland W-3 within CWA jurisdiction is consistent with the U. S. Supreme Court's decision in *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985) that adjacent wetlands are within CWA jurisdiction. The administrative record supports the District's conclusion that Wetland W-1 and W-3 border seasonally ponded areas on the southern boundary of the property that are within CWA jurisdiction as tributaries to waters of the United States.

The Appellant asserted that the District should have followed the opinion of Mr. Michael Smith former Corps Headquarters Regulatory Office staff member (and now private consultant) that all wetlands on the property were outside of CWA jurisdiction because they were isolated, intrastate waters, with an insufficient connection to interstate commerce to be regulated. Mr. Smith described the basis for his conclusion in an e-mail (Admin record 862) dated September 24, 2002, that:

“... (a) the Corps approved fill materials that were deposited in association with the construction corridor for the installation of two Sonoma County utility lines along the Northern P/L [property line] (and a portion of the Western P/L) actually prevent sheet flow onto or off of the property (this material has, in effect, created an impediment to any water leaving the property, via the drop intakes, in either direction); (b) the ditch at the Southeastern corner of the property is only approximately 50' in length and it originates within relic fill, (c) historic cultivation practices (plowing and discing methods) at the Southwest corner of the property have actually elevated this corner of the property over the years and there is no evidence of any drainage this direction, and (d) the area along the Eastern P/L [property line] is a combination of high ground and relic fill, thereby blocking drainage in this direction. It is my opinion that the water entering the property is via normal rainfall and that once that water falls to the ground, it becomes ponded and remains within the boundaries of the property until it evaporates or percolates into the soil. It is my hope that the above information is useful to you as you move toward your final decision in this matter.”

The administrative record shows that the District did consider the issues raised by Mr. Smith. The District collected additional information regarding topographic elevations along the south property line. The Appellant also collected additional topographic information, and his information was consistent with the District's elevation information except that the Appellant's information was referenced to a known elevation above sea

level, while the District only collected only relative elevation information. Also, as discussed above, a review of the elevation information in relation to the approximate location of hydric soils data points, suggests that extensive portions of the property are saturated and pond water in years with a normal precipitation regime. Finally, the Appellant only suggests that the District follow Mr. Smith's expert opinion when it agreed with his own. The Appellant rejected the conclusion of the Smith/Noble wetland delineation report when 18 acres of wetlands meeting the requirements of the Corps 1987 Manual were found on the property, rather than the 0.66 acre of wetland that he believed to be present.

Information Received and its Disposition during the Appeal Review: The Appellant's Request for Appeal submitted December 30, 2002, the San Francisco District's Administrative Record submitted March 17, 2003 (except as noted below), and the following information were used in the evaluation of this administrative appeal.

1. Part of the District's administrative record (pages 1018 to 1093) was determined by the Division to be new information, because they consisted of field observations of wetland hydrology made after the District's December 20, 2002 approved jurisdictional information was issued. That material was not considered during the administrative appeal in accordance with 33 CFR 331.7 (f). The Appellant also objected to the inclusion of page 941 and page 1094 in the Administrative Record. Page 941 of the Administrative Record, a District memo for the record dated December 11, 2002, but with signatures dated December 11, 2002, December 31, 2002, and January 2, 2003, was determined to be a record of District deliberations prior to District's December 26, 2002 decision and was considered clarifying information. Page 1094 of the record was memo to file dated March 10, 2003, which included an analysis of precipitation data that was conducted after the District's December 26, 2002 decision and was determined to be new information and was not considered further.
2. In late March, before the appeal meeting, the District provided photographs and data sheets that had been in the original Smith/Noble delineation report, but were inadvertently left out of the initial administrative record supplied by the District. This material was added to the administrative record and was considered.
3. The District submitted an April 14, 2003 memo including maps and two aerial photographs dated March 13, 2000 (photos 7-8 and 7-9) clarifying its determination regarding the location of tributary connections between the property and the areas agreed both parties to be waters of the United States. The Appellant's memos of April 16 and April 17, 2003 objected to this material, as he considered it new material. The Appellant also asserted that these photographs do not show evidence of tributary connections from the property to the Colgan Creek Flood Control Channel or the Laguna de Santa Rosa. I concluded these photographs were clarifying information and they were considered. Although there is not conclusive evidence it appears likely that these photographs were also provided to the District Engineer before his December 26, 2002 decision on this

action, and therefore likely should have been included in the original submittal of the administrative record.

4. The District document "*Information Needed For Verification of Corps Jurisdiction*" revised October 2001, was used as clarifying information.
5. The District document, REGMEMO of February 6, 1996 regarding the expiration of jurisdictional determinations was used as clarifying information.
6. The Appellant submitted comments on the April 10, 2003 regarding the Review Officer's summary of the March 28, 2003 appeal meeting and site visit. These comments were considered and attached to the summary. The Appellant also elected to use a court reporter to make a verbatim record of the appeal meeting, and that transcript was reviewed as part of development of this appeal decision.
7. The District submitted a March 28, 2003 two page memo by Jack Kerns, Assistant District Counsel, addressing federal court decisions relevant to the District's decision that the Davenport property is within Clean Water Act jurisdiction. This memo was considered clarifying information regarding the District's legal analysis of the jurisdictional issues at the time it reached its conclusions. The Appellant submitted a March 27, 2003 letter that any District legal opinion submitted should be considered new information. The South Pacific Division reviewed both these items and concluded the District's legal analysis memo was clarifying information.
8. At the request of the Review Officer, the District Engineer provided an e-mail on April 4, 2003 clarifying why he considered the C/W wetland delineation the most accurate basis on which to reach his decision. This e-mail was considered clarifying information.
9. The Appellant submitted an April 6, 2003 memo stating (a) that the James Wakeley memo of March 26, 2003 to Katerina Galacatos should be excluded as new information. The South Pacific Division considered the Appellant's position and concluded that the Wakeley, March 26, 2003 memo describing the C/W wetland delineation methods used on July 9 and 10, 2002 was clarifying information. The Wakeley memo was considered. The Appellant's memo also disagreed with the conclusions of the Assistant District Counsel's memo of March 28, 2003. The Appellant's interpretation of federal court decisions was considered.
10. The Appellant submitted a March 28, 2003 letter from his consultant Marco Waaland, stating that Mr. Waaland had not seen water leaving the property. This memo was considered.

11. The District submitted a July 23, 2002 memo for the record by James Wakeley describing the methods used for the wetland delineation of the Davenport property. This was considered clarifying information.

Conclusion: I conclude the District's decision was reasonable and is supported by the administrative record. The appeal did not have merit.

Original signed by

Robert L. Davis
Brigadier General, U.S. Army
Division Engineer