

**ADMINISTRATIVE APPEAL DECISION
CLEAN WATER ACT
DIAS LANE PROPERTY
WESTERN CARE CONSTRUCTION
Placer County, CA
SACRAMENTO DISTRICT
FILE NUMBER SPK-2007-02143**

DATE: 2 June 2009

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

Appellant: Shawn Garrity, Western Care Construction (Appellant)

District Representative: Erin Hess, Army Corps of Engineers, Sacramento District (District)

Authority: Clean Water Act (CWA) (33 USC 1344)

Receipt of Request for Appeal: 12 August 2008

Appeal Meeting and Site Visit Date: 9 February 2009

Summary of Decision: This CWA jurisdictional determination is remanded to the District for further evaluation and consideration of information provided by the Appellant. The District must further evaluate and document its conclusion as to whether waters and wetlands on the Dias Lane Property are hydrologically connected, via Secret Ravine, to the nearest downstream Traditional Navigable Water (TNW) and that these waters are Relatively Permanent Waters (RPW). If the District's conclusion remains that waters on the Dias Lane Property are RPWs and wetlands adjacent to RPWs, those waters are to be evaluated under the significant nexus standard. Any available information that documents the existence of a significant nexus between those RPWs and the nearest TNW must be included in the record in order to insure compliance with the joint Corps/EPA guidance. Once the District has reevaluated its determination that the waters to which the wetlands on the Dias Lane Property are adjacent are RPWs as required above, the District must consider whether, as a result of that reevaluation, there is a need to separately complete a significant nexus determination for the wetlands on the Dias Lane Property.

Additionally, the District must further evaluate whether new information provided by the Appellant, including the topographic map provided at the Appeal Conference and the Preliminary Site Assessment (Wallace, Kuhl and Associates, Inc., 1994), which was submitted with the Request for Appeal would alter its conclusions as to the jurisdictional nature of waters, including wetlands, on the Dias Lane Property.

Background Information: The Dias Lane Property is an approximately 20 acre site, located near Loomis, Placer County, California. The Dias Lane Property is located southeast of Interstate 80 and west of Dias Lane, in Section 16, Township 11 North, Range 7 East, MDB&M, Latitude 38.80771 North, Longitude 121.19794 West.

The Dias Lane Property is relatively flat with only slight elevation variations across the site, with the exception of three ponds that are approximately 15 feet deep. Several shallow drainages are on the Dias Lane Property, as well. The Dias Lane Property is grass covered and contains several large trees. There are currently no buildings on the Dias Lane Property; however two foundation-type features remain on the Dias Lane Property. There are several debris piles on the Dias Lane Property. The site was used as an orchard from 1954 to 1960, at which time it was converted and used as a small scale sod farm from 1960 to 1985. The Appellant has asserted that the ponds that exist today were not developed until 1981 and were used to irrigate the sod farm. There are indications that the Dias Lane Property has recently been used as horse pasture.

For purposes of evaluation during the CWA jurisdictional determination, the Appellant's consultant delineated the site using the 1987 *Wetland Delineation Manual* (1987 WDM) and the 2006 "Interim Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Arid West Region". The Appellant's consultant concluded that there are 4.63 acres of "non-jurisdictional waters of the U.S.", including 1.59 acres of ephemeral ponds and 3.04 acres of seasonal wetlands, and 0.22 acres of jurisdictional waters of the U.S., 0.22 acres of seasonal wetland on the Dias Lane Property.

The District reviewed the Appellant's January 2008, "Delineation of Waters of the United States for Dias Lane, Rocklin, California" along with the included "Dias Lane Delineation Map". On June 12, 2008, the District issued its CWA jurisdictional determination for the Dias Lane Property. The District concluded that the site contained 4.85 acres of waters of the United States, including wetlands within CWA jurisdiction. The Appellant disagreed and appealed citing the reasons for appeal addressed in this appeal decision.

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

REASON 1: Delineated features Pond 1, Pond 2, Pond 3, Seasonal Wetland 1, and Seasonal Wetland 2 are isolated waters/manmade features, without a direct or indirect connection to a TNW, and therefore do not provide a significant ecological nexus to a TNW.

FINDING: This reason for appeal has merit.

ACTION: The District must further evaluate and document its conclusion as to whether waters and wetlands on the Dias Lane Property are hydrologically connected, via Secret Ravine, to the nearest downstream TNW. If the District's conclusion remains that waters on the Dias Lane Property are RPWs and wetlands adjacent to RPWs, those waters must be evaluated under the significant nexus standard and any available information that documents the existence of a significant nexus between those RPWs and the nearest TNW must be included in the record in order for there to be compliance with the joint Corps/EPA guidance. Once it has reevaluated its determination that the waters to which the wetlands on the Dias Lane Property are adjacent are RPWs as required above, the District must consider whether, as a result of that reevaluation, there is a need to separately complete a significant nexus determination for the wetlands on the Dias Lane Property.

Additionally, the District must further evaluate whether new information provided by the Appellant, including the topographic map provided at the Appeal Conference and the Preliminary Site Assessment (Wallace, Kuhl and Associates, Inc., 1994) which was submitted with the Request for Appeal would alter its conclusions as to the jurisdictional nature of waters, including wetlands, on the Dias Lane Property.

DISCUSSION: The Appellant has indicated that they believe the only feature that exhibits substantial evidence of connectivity to navigable waters, via Secret Ravine, is Seasonal Wetland 3, located at the southeast corner of the project site.

At the Appeal Conference, the appellant summarized the Preliminary Site Assessment (Wallace, Kuhl and Associates, Inc., 1994), which was submitted with the Request for Appeal on September 9, 2008, and included in the existing record. The site history setting, under Geologic and Hydrologic Setting, indicates that the Dias Lane Property is underlain by the Mesozoic Rocklin Pluton, which it indicates to be essentially non-water bearing. It further states that ground water elevations within 4 and 5.6 miles from the vicinity of the Dias Lane Property were recorded by the California Department of Water Resources (DWR) to vary from 139.4 to 148.8 feet and 35 to 71 feet respectively. The Appellant indicated that the Dias Lane Property is at a higher elevation than these well sites as it is located on a ridge. The Appellant indicated that this elevation difference is evident on the USGS 7.5 Minute topographic map, Rocklin quadrangle which was provided by the District as part of the Administrative Record in December 2008. The Appellant indicated that they believe that this information substantiates that the ponds and seasonal wetlands are not supported or connected by a shallow, subsurface flow and do not have a hydrologic connection to a traditionally navigable waterway.

During the Appeal Conference, the appellant provided a topographic survey map which was not part of the existing administrative record. The District provided a copy of the Rocklin USGS 7.5 Minute topographic map with the Administrative Record on December 10, 2008. The Appellant further explained the site topography in an email

response sent on August 20, 2008. The Appellant indicated that they believe that the existing record demonstrates that the Dias Lane Property is flat and located on a ridge. The Appellant contends that the topographic survey map suggests that the site does not allow flows to move off site to Secret Ravine, with the exception of the area located to the east of Ephemeral Pond 3 on the far southeast corner of the Dias Lane Property. The Appellant further contends that the topographic survey map also demonstrates that flows are trapped on site and do not connect to the property located immediately south of the Dias Lane Property. The Appellant stated that those flow patterns were discussed on site with the District during the field verification meeting held on November 26, 2007. The Appellant discussed flow patterns and the topographic survey map during the site visit, stopping at each survey point to demonstrate the visual elevation changes and patterns. The topographic survey map suggests that a ridge line located at the western edge of Ephemeral Pond 3 may prevent flows from being directed into Ephemeral Pond 3 thereby suggesting that a connection between Ephemeral Pond 1 and 2, Seasonal Wetland 1 and 2, and Ephemeral Pond 3 might not be present. The Appellant asserted that Ephemeral Pond 1 and 2, and Seasonal Wetland 1 and 2, and Ephemeral Pond 3 do not have a hydrologic surface connection to the property located south of the Dias Lane Property or to Secret Ravine.

The Delineation of Waters of the U.S. (Quad Knopf, January 2008), which was submitted to the Corps prior to the field verification held on November 26, 2007, asserted that Ephemeral Pond 1 and 2 are no longer connected via a remnant irrigation piping system. The Appellant provided an explanation of the remnant piping system, along with the request for appeal, on page 5 and 6 of the Preliminary Site Assessment (Wallace, Kuhl and Associates, Inc., 1994) which was submitted with the Request for Appeal on September 9, 2008, and included in the existing record. The existing record includes a statement in the District's Conversation Record, dated July 30, 2008, which was included with the Administrative Record, which indicates a hydrologic connection existed through this remnant irrigation piping system. According to the Appellant, the remnant irrigation piping system was once used to supply water to the ponds via a Placer County Water Agency (PCWA) water supply connection. Historical information about the irrigation account is provided on page 7 of the Preliminary Site Assessment (Wallace, Kuhl and Associates, Inc., 1994) which was submitted with the Request for Appeal on September 9, 2008. During the Appeal Conference site visit, the appellant asserted that a connection no longer existed since the pipes were severed. Additionally, the Appellant indicated that there were caps at the ends of the pipe where they terminate at a junction pit and that a water supply was no longer being provided by PCWA. The Appellant asserted that a water mark exists within the junction pit solely due to rain waters that collect in the pit and that this was explained to the District during the field verification meeting held on November 26, 2007.

The Appellant indicated that, during the field verification with the District, on November 26, 2007, they indicated that the manmade ditch that runs north-northwest on the Dias Lane Property did not allow for a surface water connection between the Dias Lane Property and the pond on the property located to the south. This discussion is documented in the District's Conversation Record dated November 28, 2007. At the

Appeal Conference, the appellant provided photos of the pump house and active PCWA water supply which currently supplies water to the pond on the property to the south. The Appellant asserted that this substantiates that the pond on the property to the south of the Dias Lane Property is independently supported by an artificial water source and not by flows from the Dias Lane Property.

During the Appeal Conference the Appellant asserted that there is no shallow, subsurface or surface connection between Ephemeral Pond 3 and Seasonal Wetland 3. The District's Conversation Record, dated November 28, 2007, indicates that Seasonal Wetland 3 begins at the head of a remnant water pump and that no wetland vegetation was observed at the water pump. The Appellant asserted during the site visit that there was no evidence of flows overtopping the dam or berm of Ephemeral Pond 3 or that a seep or spring exists at the base of the dam or berm of Ephemeral Pond 3 and that there is not a shallow, subsurface connection or surface connection between Ephemeral Pond 3 and Seasonal Wetland 3 and that Ephemeral Pond 3 an isolated feature.

During the field verification with the District on November 26, 2007, and in the District's Conversation Record, dated November 28, 2007, the District questioned the historical use of the Dias Lane Property. In response, the Appellant submitted the Preliminary Site Assessment (Wallace, Kuhl and Associates, Inc., 1994) with the Request for Appeal, which provides a site history account starting on page 7. The report indicates that the Dias Lane Property was utilized as a small sod farm operation and that the three existing ponds, vaults, and pipes were used for storing and transporting water for sprinkler irrigation of the sod. The operation continued until 1985. The assessment also indicates that PCWA provided an irrigation service to the Dias Lane Property until 1986 at which time the account was closed. Beginning on page 8 of the assessment, a historic map review summary indicated that in 1954, the Dias Lane Property was used as an orchard. In 1967 historic topographic maps show the Dias Lane Property in the same condition as 1954 with the exception that the orchards had been removed. In 1981 historic topographic maps depict three manmade ponds on the Dias Lane Property. The Appellant asserts that this history substantiates that Ephemeral Pond 1, 2 and 3 are manmade structures and were not constructed in a natural stream or hydrologic system.

The Appellant's assertion is that, other than Seasonal Wetland 3, all aquatic features on the Dias Lane Property are manmade structures used solely for horticultural purposes confined to the Dias Lane Property and do not fall under federal jurisdiction and regulation under the Clean Water Act, 33 U.S.C. 1344 et seq.

The District indicated in response to questions asked at the appeal conference that Pond 1 and Pond 2 appear to have been constructed within a larger seasonal wetland complex, which includes Seasonal Wetland 1 and Seasonal Wetland 2. The District asserted that in historical aerial imagery, Pond 1 and Pond 2 appear to hold water for a significant period of time each year (greater than 3 months), collected from precipitation, surface runoff, and shallow subsurface flow. The District indicated that soils on site are moderately porous over a shallow granitic bedrock (which portions of are visible within the banks of the ponds), which allows water to percolate through and perches some water near the

surface. The District asserted that, in historical aerial imagery, vegetation found around the banks of Pond 1 and 2 appeared continuous between them before the firebreak path was established. The District asserted that Seasonal Wetland 2 abuts the southern property line and separate wetland delineation (Rocklin 105, SPK-2003-00250) found that the wetlands continued offsite through a series of ponds and drainages with a mostly continuous fringe wetland down slope to Secret Ravine.

The District further indicated in response to questions asked at the appeal conference that it believes that Seasonal Wetland 1 and Seasonal Wetland 2 have a hydrological connection to Secret Ravine principally through shallow subsurface flow which supports the hydrophytic vegetation found within the seasonal wetlands.

The District also indicated in response to questions asked at the appeal conference that Pond 3 appears to have been constructed within a topographic swale, which can be seen on the USGS 7.5 Minute Rocklin Quadrangle. The swale appears to have been dammed to collect runoff. The District indicated that, in historical aerial imagery, Pond 3 appears to hold water for a significant period of time each year (greater than 3 months). Soils on site are moderately porous over a shallow granitic bedrock, which allows water to seep through the base of the dam and contribute to the hydrology of Seasonal Wetland 3. Seasonal Wetland 3 continues offsite and is evident in aerial imagery continuing down slope through a series of ponds and swales to Secret Ravine.

Finally, the District asserted in response to questions asked at the appeal conference that Pond 3 has a hydrological connection to Seasonal Wetland 3, which has a hydrological connection to Secret Ravine, principally through shallow subsurface flow beneath the dam, which supports the hydrophytic vegetation found in the seasonal wetland.

The District's data sheets supporting the jurisdictional determination indicate that the waters on site are RPWs that flow directly or indirectly into TNWs and wetlands directly abutting RPWs that flow directly or indirectly into TNWs. The hydrologic connection from Seasonal Wetland 3 to the nearest TNW is documented in the District's administrative record. The District's data sheets document standing water in ponds, based on review of multiple years of aerial photography. The data sheets further indicate that the jurisdiction is supported with a conclusion that there is "most likely" a shallow subsurface hydrological connection. However, this shallow subsurface connection is not sufficiently documented to support the assertion of jurisdiction over the waters present on the Dias Lane Property beyond Seasonal Wetland 3. Further there is no discussion of the significant nexus between the RPWs on the Dias Lane Property and the nearest downstream TNW.

The joint Corps/EPA guidance, dated June 5, 2007, indicates that RPWs are jurisdictional under the CWA. It further states that, as a matter of policy, field staff will include in the record any available information that documents the existence of a significant nexus between a TNW and an RPW that is not perennial.

The revised joint Corps/EPA guidance, dated December 2, 2008, restated that guidance to indicate that RPWs typically flow year-round or have continuous flow at least seasonally. That guidance further indicates that CWA jurisdiction over these waters will be evaluated under the significant nexus standard. The guidance states that the agencies will assert jurisdiction over relatively permanent non-navigable tributaries of traditional navigable waters without a legal obligation to make a significant nexus finding.

In addition, the revised December 2, 2008, guidance indicates that the agencies will assert jurisdiction over those adjacent wetlands that have a continuous surface connection with a relatively permanent, non-navigable tributary, without the legal obligation to make a significant nexus finding. The revised guidance noted that the plurality opinion and the dissent in Rapanos v. United States and Carabell v. United States, 126 S. Ct. 2208 (2006) (Rapanos) agreed that such wetlands were jurisdictional. The December 2008, guidance further indicates that the Rapanos plurality opinion found that a "continuous surface connection" is a physical connection requirement. Therefore, a continuous surface connection exists between a wetland and a relatively permanent tributary where the wetland directly abuts the tributary (e.g., they are not separated by uplands, a berm, dike, or similar feature).

The District must further evaluate and document its conclusion as to whether waters and wetlands on the Dias Lane Property are hydrologically connected, via Secret Ravine, to the nearest downstream TNW. If the District's conclusion remains that waters on the Dias Lane Property are RPWs and wetlands adjacent to RPWs, those waters must be evaluated under the significant nexus standard and any available information that documents the existence of a significant nexus between those RPWs and the nearest TNW must be included in the record in order to insure compliance with the joint Corps/EPA guidance. Once the District has reevaluated its determination that the waters to which the wetlands on the Dias Lane Property are adjacent are RPWs as required above, the District must consider whether, as a result of that reevaluation, there is a need to separately complete a significant nexus determination for the wetlands on the Dias Lane Property.

Information Received and its Disposition during the Appeal Review: The administrative appeal was evaluated based on the District's administrative record, the Appellant's Request for Appeal, discussions at the appeal meeting, and written responses from the Appellant and the District to questions provided with the agenda and discussed at the appeal conference.

New information provided by the Appellant included the Preliminary Site Assessment (Wallace, Kuhl and Associates, Inc., 1994). This site assessment was provided for the first time with the Request for Appeal. The site assessment contains a good deal of information on the history of the site. In addition a topographic map of the site was presented for the first time at the Appeal Conference. The topographic map suggests that site drainage is not as the District concluded prior to making its jurisdictional determination. As both of these documents constituted new information, neither was considered in this evaluation.

Conclusion: I conclude the District must further evaluate and document its conclusion as to whether waters and wetlands on the Dias Lane Property are hydrologically connected, via Secret Ravine, to the nearest downstream TNW. If the District's conclusion remains that waters on the Dias Lane Property are RPWs and wetlands adjacent to RPWs, those waters must be evaluated under the significant nexus standard and any available information that documents the existence of a significant nexus between those RPWs and the nearest TNW must be included in the record in order to insure compliance with the joint Corps/EPA guidance. Once it has reevaluated its determination that the waters to which the wetlands on the Dias Lane Property are adjacent are RPWs as required above, the District must consider whether, as a result of that reevaluation, there is a need to separately complete a significant nexus determination for the wetlands on the Dias Lane Property.

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ORIGINAL SIGNED

JANICE L. DOMBI
Colonel, EN
Commanding