

**ADMINISTRATIVE APPEAL DECISION  
CLEAN WATER ACT  
MICHIGAN BAR – LATROBE ROAD PROPERTY  
EL DORADO COUNTY, CALIFORNIA  
SACRAMENTO DISTRICT  
FILE NUMBER SPK 2009-00787**

**DATE: September 15, 2010**

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

**Appellant:** David Cort (Appellant)

**District Representative:** Peck Ha, U.S. Army Corps of Engineers, Sacramento District (District)

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

**Receipt of Request for Appeal:** January 4, 2010

**Appeal Meeting and Site Visit Date:** April 16, 2010

**Summary of Decision:** This Clean Water Act (CWA) jurisdictional determination is remanded to the District for further evaluation and consideration of information provided by the Appellant. The District must, in its final decision, correct errors related to watershed size and stream order, consider the Appellant's assertion that pond 3 and wetland 6 are isolated waters, and include data or observations that support its final decision as to whether there is a significant nexus between waters on the property and the nearest TNW. The District must also further explain the relationship of waters on the property to spawning habitat and explain statements in the administrative record concerning pollutants on the property and the degree to which waters on the property function in both the attenuation and conveyance of the flow of pollutants to the nearest TNW. The District should include a more complete description of downstream connections, relevant reaches, and available information on flow regimes. The District should also clearly reference the status of jurisdictional determinations on adjacent properties that it relies on in its final decision.

**Background Information:** The Michigan Bar-Latrobe Road property is an approximately 35.43-acre property, located in Section 9, Township 8 North, Range 9 East, M.D.M.& B., on the Latrobe U.S.G.S. 7.5" quadrangle, northwest of the intersection of Latrobe Road and South Shingle Road, in the Town of Latrobe, El Dorado County, California, at Latitude 38.55964 North, Longitude -120.98689 West.

For purposes of evaluation during the CWA jurisdictional determination, the Appellant's consultant evaluated the site using the 1987 Wetland Delineation Manual, the Code of Federal Regulations (CFR) definitions of jurisdictional waters, and supporting guidance documents. In its May 2009, submittal, the Appellant's consultant concluded that there are two non-Relatively Permanent Waters (RPW) and wetlands abutting and adjacent to the non-RPWs, which lack a significant nexus to the nearest Traditional Navigable Water (TNW) within the 35.43 acre property.

The District reviewed the Appellant's May 2009, proposed CWA jurisdictional determination map. The review included a field visit on June 9, 2009.

In June 2009, the Appellant's consultant provided the District with its June 2009, revised delineation report, incorporating the District's requested changes, following the site visit. The June 2009, submittal concluded that there are 1.16 acres of waters, which lack a significant nexus to the nearest TNW, within the 35.43 acre property. The Appellant provided additional information, in the form of the Rapanos Approved Jurisdictional Form (AJD Form), to the District in July and September 2009.

On November 5, 2009, the District issued its CWA jurisdictional determination for the Property. The District concluded that the site contained 1.16 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:** The Sacramento District failed to properly document and substantiate the basic characteristics of the physical, chemical, and biological properties required under the significant nexus evaluation. The AJD Form contains numerous mistakes of facts and thus cannot be relied upon to support a significant nexus between the functions of the non-RPWs, the wetlands adjacent to the non-RPWs, and the nearest TNW.

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

**ACTION:** The District must, in its final decision, correct errors related to watershed size and stream order. The District must also more clearly describe its consideration of both CH1 and CH2, along with wetlands associated with each of these non-RPWs. The District must consider the Appellant's assertion that pond 3 and wetland 6 are isolated waters in its final decision and document any connection it may find between those features and the non-RPWs on the property. If the District, after reevaluation, determines that pond 3 and wetland 6 are isolated, it must evaluate them accordingly. The District must, in order to support its final decision as to whether there is a significant nexus between waters on the property and the nearest TNW, include data or observations that support its conclusions.

**DISCUSSION:** In the RFA, the Appellant asserted that the District included incorrect and incomplete information in the administrative record and that, as a result, the District has not demonstrated that a significant nexus exists between the non-RPWs and other aquatic features on the property and the nearest TNW.

The Appellant states that the District's Approved Jurisdictional Determination (AJD) Form indicates that the watershed size is unknown and includes no indication of the size of the drainage area. The Appellant indicated that the District was provided information in documents submitted in May 2009 and in July 2009, which each indicated that the watersheds of non-RPW CH1 and non-RPW CH 2 are 75 acres and 77 acres, respectively. The Appellant asserted that no determination of a significant nexus can be made without accurately documenting the flow, duration, and volume of flow. The Appellant suggested that, since the combined watersheds of the non-RPWs on the property are 0.00037 of the Cosumnes River watershed, there appears to be an insignificant relationship to the nearest TNW.

The Appellant also asserted that the District's AJD Form includes incorrect information regarding the stream order of the two non-RPWs on the property and that the incorrect documentation of stream order exaggerates the physical relationship of the non-RPWs to the TNWs. The Appellant indicated that the District's AJD Form does not consistently distinguish between the two non-RPWs and that CH2 is not documented in some portions of the AJD Form. The Appellant further asserted that the analysis of surface flow in the AJD is incorrect in that it states that there is no evidence of subsurface flow, and then indicates that vegetation persists during a drought, with a reference to numerous wetlands in the area being supported by seeps and springs. The Appellant concluded that the presence of herbaceous annual vegetation in the seasonal wetlands is evidence only of groundwater during the growing season and that if groundwater were present later, vegetation would be expected to remain green, alive, and growing later into the season. The Appellant also asserted that no seeps or springs were observed on the project site or off the project site in a location where they would drain toward the site. The Appellant further stated that the District's indications in the AJD Form that Federally listed species and that fish and/or spawning areas occur in the waters on the property are incorrect and that the appropriate conclusion should be that neither occurs on the site.

The Appellant indicated that the District's AJD Form treats all wetlands as one complex. The Appellant pointed out that wetlands 4 and 5 occur along CH2, which has a separate watershed. The Appellant asserted that the wetlands along CH1 and CH2 do not occur in the same relevant reach.

The Appellant further stated that the District's AJD form incorrectly asserts that all wetlands on the property are directly abutting either CH1 or CH2. The Appellant asserted that neither wetland 6 nor pond 3 is directly abutting the non-RPWs. The Appellant believes that these two features should be considered isolated in determining their jurisdictional status and that the District has incorrectly concluded that there is flow from these two features to the non-RPW and then to the TNW. The Appellant also asserted that the District did not substantiate claims about the ability of pollutants to enter

all wetlands on the property and claims that the wetlands on the property have both the capacity to carry pollutants and floodwaters and to reduce the amounts of pollutants or floodwaters.

The District completed a single AJD Form for all waters on the property. The District's October 5, 2009, AJD Form includes an analysis of two non-RPWs, CH1 and CH2, and a number of ponds and wetlands. The AJD Form indicates, in Section III.B.1(i), that the "total watershed is unknown acres", as stated above by the Appellant. Additionally, stream order is represented in Section III.B.1(ii), as described above by the Appellant.

Section III.B.1(ii)(c) and (iii), include information on CH1 and a number of associated seasonal wetlands. No mention is made of CH2. This section indicates that subsurface flow is unknown, but indicates that vegetation persists at the time of a site visit, during a drought year. It then indicates that the area surrounding the site has numerous wetlands fed by seeps and springs. Section III.B.1 (iv) includes information concerning both CH1 and CH2, as well as their associated wetlands. The block for Federally listed species is checked, but the word none was added following that block. The District also checked the block for Fish/Spawn Areas, but indicated in that section that there is flow to the Cosumnes River, which supports Rainbow and Brown Trout. Section III.B.2(i) provides a general description of the wetlands and ponds on the property. Section III.B.2(i)(b) indicates that water flows during the rainy season and references a possibility that wetlands are spring fed. Section III.B.2(i)(c) indicates that wetlands on the property are directly abutting the non-TNW. Pond 6 and SW 3 are both listed as directly abutting wetlands in Section III.B.3. In Section III.C.2, the District described a number of functions that it believes the non-RPWs and wetlands perform, which support its conclusion that there is a significant nexus between waters on the property and the nearest TNW.

The December 2, 2008, "Revised Guidance on Clean Water Act Jurisdiction Following the Supreme Court Decision in *Rapanos v. U.S.* and *Carabell v. U.S.*" (Revised *Rapanos* Guidance), states that the agencies will assert jurisdiction over the following types of waters when they have a significant nexus with a traditional navigable water: (1) non-navigable tributaries that are not relatively permanent, (2) wetlands adjacent to non-navigable tributaries that are not relatively permanent, and (3) wetlands adjacent to, but not directly abutting, a relatively permanent tributary (e.g., separated from it by uplands, a berm, dike or similar feature).

Additionally, the Revised *Rapanos* Guidance states that, in considering how to apply the significant nexus standard, the agencies have focused on the integral relationship between the ecological characteristics of tributaries and those of their adjacent wetlands, which determines in part their contribution to restoring and maintaining the chemical, physical and biological integrity of the Nation's traditional navigable waters. The ecological relationship between tributaries and their adjacent wetlands is well documented in the scientific literature and reflects their physical proximity as well as shared hydrological and biological characteristics. The flow parameters and ecological functions that Justice Kennedy describes as most relevant to an evaluation of significant nexus result from the

ecological inter-relationship between tributaries and their adjacent wetlands. For example, the duration, frequency, and volume of flow in a tributary, and subsequently the flow in downstream navigable waters, is directly affected by the presence of adjacent wetlands that hold floodwaters, intercept sheet flow from uplands, and then release waters to tributaries in a more even and constant manner. Wetlands may also help to maintain more consistent water temperature in tributaries, which is important for some aquatic species. Adjacent wetlands trap and hold pollutants that may otherwise reach tributaries (and downstream navigable waters) including sediments, chemicals, and other pollutants.

The Revised Rapanos Guidance also requires that Corps districts and EPA regions will demonstrate and document in the record that a particular water either fits within a class identified above as not requiring a significant nexus determination, or that the water has a significant nexus with a traditional navigable water.

Furthermore, as mentioned in the Revised Rapanos Guidance, the regulations define "adjacent" as follows: "The term adjacent means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands'" (33 C.F.R. 328.3(c)). Under this definition, the agencies consider wetlands adjacent if one of the following three criteria is satisfied. First, there is an unbroken surface or shallow sub-surface connection to jurisdictional waters. This hydrologic connection may be intermittent. Second, they are physically separated from jurisdictional waters by man-made dikes or barriers, natural river berms, beach dunes, and the like. Or third, their proximity to a jurisdictional water is reasonably close, supporting the science-based inference that such wetlands have an ecological interconnection with jurisdictional waters. Due to the scientific basis for this inference, determining whether a wetland is reasonably close to a jurisdictional water does not generally require a case specific demonstration of an ecologic interconnection. In the case of a jurisdictional water and a reasonably close wetland, such implied ecological interconnectivity is neither speculative nor insubstantial. For example, species, such as amphibians or anadromous and catadromous fish, move between such waters for spawning and their life stage requirements. Migratory species, however, shall not be used to support an ecologic interconnection. In assessing whether a wetland is reasonably close to a jurisdictional water, the proximity of the wetland (including all parts of a single wetland that has been divided by road crossings, ditches, berms, etc.) in question will be evaluated and shall not be evaluated together with other wetlands in the area.

In response to questions at the appeal conference, the Appellant indicated that they believed the District had failed to document and substantiate the existence of a significant nexus and that the District's analysis exaggerates the relationship of water on the property with the nearest TNW. The Appellant restated the assertion from the RFA that they did not believe seeps and springs contributed to the hydrology of the wetland, but that it is a result of precipitation alone. The Appellant indicated that they believed that the District should have used two separate AJD Forms in evaluating the waters on the property. The Appellant believes that a separate AJD Form should be used for each of

the two tributaries and their associated wetlands, as separate relevant reaches on the property. The Appellant also restated their concern that the District evaluated two wetlands on the property as directly abutting non-RPWs, when the Appellant believes them to be more properly evaluated as isolated waters.

In response to questions asked at the appeal conference, the District acknowledged that there are some errors in the AJD Form, but indicated that they believe these errors to be minor and easily corrected. The District indicated that the channels on the property converge downstream and that the wetlands are part of that contributing system. The District indicated that information in the administrative record, which was not referenced in the AJD Form, included observations that lead to the conclusions regarding pollutants in the AJD Form. The District also indicated that there was seepage from near surface groundwater into wetlands and the non-RPWs on the property. The District indicated that they do not believe that fish or fish spawning habitat exists on the property.

As the District has concurred with the Appellant that there are errors in the AJD Form, the District must, in its final decision, correct errors related to watershed size and stream order. The District must also more clearly describe its consideration of both CH1 and CH2, along with wetlands associated with each of these non-RPWs. In doing so, the District should consider the possibility that use of two separate AJD Forms might result in more clarity than attempting to use a single AJD Form to describe both non-RPWs and their respective adjacent wetlands. The District must consider the Appellant's assertion that pond 3 and wetland 6 are isolated waters in its final decision and document any connection it may find between those features and the non-RPWs on the property. If the District, after reevaluation, determines that these features are isolated, it must evaluate them accordingly. The District concluded that the drainages on the property are non-RPWs. The District is required, by the Revised Rapanos Guidance, to complete a significant nexus evaluation for the non-RPWs, as well as the wetlands on the property. Finally, while the District has listed a number of biological, chemical, and physical functions that are being performed by the non-RPWs and wetlands on the property, it has not provided data or observations that would support the conclusion that functions are being performed. The District must, in order to support its final decision as to whether there is a significant nexus between waters on the property and the nearest TNW, include data or observations that support its conclusions.

**REASON 2:** The AJD Form lacks sufficient facts to substantiate how an ephemeral tributary with a documented low volume, infrequent and short duration flow has more than a speculative or insubstantial effect on the chemical, physical, or biological integrity of the nearest TNW.

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

**ACTION:** In addition to taking the steps described under Reason 1, the District must clearly describe what available data or observations were used in making its determinations as to whether the waters on the property have a significant nexus with the nearest TNW. The District must further explain the relationship of waters on the

property to spawning habitat and further explain statements concerning pollutants on the property and the degree to which waters on the property function in both the attenuation and conveyance of the flow of pollutants to the nearest TNW. The District should include a more complete description of downstream connections, relevant reaches, and available information on flow regimes. The District should also clearly reference the status of jurisdictional determinations on adjacent properties that it relies on in its final decision.

**DISCUSSION:** The Appellant also asserted that in several instances that the District failed to include information in the AJD Form that would be necessary to support its conclusions and properly characterize “similarly situated features”. The Appellant asserted that the AJD Form does not indicate that the District verified the downstream connections to the nearest TNW or that it documented at what point Clark Creek ceases to be a non-RPW and becomes an RPW. The Appellant asserts that the AJD Form does not clearly explain where relevant reaches begin and inadequately documents the stream order flow regimes of tributaries between CH1, CH2, and the nearest TNW.

The Appellant indicated that the AJD Form states that there are no known pollutants in the waters on the property and then states that there are potential agricultural pollutants, automobile pollutants from roadway, and naturally occurring pollutants from erosion. The Appellant asserted that the District’s speculation does not constitute evidence and also asserted that, based on the indication in the Rapanos Guidebook that erosional features are generally not waters of the United States, that erosion should not be a factor used to establish significant nexus.

The Revised Rapanos Guidance indicates that Corps districts and EPA regions will demonstrate and document in the record that a particular water either fits within a class identified above as not requiring a significant nexus determination, or that the water has a significant nexus with a traditional navigable water.

The Appellant questioned the District’s use of another JD, which was not included in the administrative record as support for CH2. The Appellant suggested that the District should not have relied on this JD unless it is an approved JD, with an evaluation of significant nexus, rather than a preliminary JD.

Finally, the Appellant asserted that the District has not distinguished between a negligible or insubstantial nexus and a significant nexus. The Appellant cites an EPA comment on the Rapanos guidance which suggests an implied presumption of non-jurisdiction for intermittent and ephemeral tributaries and headwater wetlands.

In response to questions at the appeal conference, the Appellant indicated that the District’s AJD Form makes unsupported, speculative statements. The Appellant asserted that the District did not verify downstream connections to the nearest TNW. The Appellant suggested that the District extrapolated things that might be as support for the existence of a significant nexus. The Appellant reiterated the concern for using erosion as a basis for concluding that there is a significant nexus. Finally, the Appellant asserted

that the District has not distinguished between a negligible and insignificant nexus and a significant nexus.

In response to questions asked at the appeal conference, the District stated that sediment may or may not be a pollutant in a given situation and that individual observations and comments made in the AJD Form, which are required in light of the Rapanos guidance, are not individually the basis of decisions. The District indicated that it would be able to further explain references to spawning habitat, and better document statements regarding pollutants. The District cited the example of the stream passing under the home on the property as a potential source of pollutants being introduced to the waterway.

Therefore, in addition to taking the steps described under Reason 1, the District must clearly describe what available data or observations were used in making its determinations as to whether the waters on the property have a significant nexus with the nearest TNW. The District must further explain the relationship of waters on the property to spawning habitat and further explain statements concerning pollutants on the property and the degree to which waters on the property function in both the attenuation and conveyance of the flow of pollutants to the nearest TNW. The District should include a more complete description of downstream connections and the degree to which those connections affect its final decision. The District should clearly indicate where each relevant reach begins. While there is no specific requirement to document flow regimes of the various tributaries between CH1, CH2, and the nearest TNW, the District may find it useful to include and consider such data, if it is available, in its final decision. As suggested by the Appellant, the District should only rely on jurisdictional determinations on adjacent property if they are approved, rather than preliminary, jurisdictional determinations and should clearly reference the status of referenced jurisdictional determinations in its final decision.

**REASON 3:** The AJD Form lacks sufficient facts to distinguish swales, small washes, and man-made roadside ditches from the ephemeral tributaries on the property.

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

**ACTION:** No action is required.

**DISCUSSION:** In the RFA, the Appellant asserted that the ephemeral, non-RPWs on the property have the same general characteristics as features described in the Revised Rapanos Guidance as generally lacking a significant nexus to TNWs. The Appellant further asserted that the “Kennedy test” creates the presumption that ephemeral, non-RPWs with low volume and infrequent, short duration flows lack a significant nexus. The Appellant also asserted that the District’s AJD Form lacks sufficient facts to support the conclusion that the non-RPWs on the property are different from similar features that generally lack a significant nexus.

The Revised Rapanos Guidance states that Corps districts and EPA regions will demonstrate and document in the record that a particular water either fits within a class identified above as not requiring a significant nexus determination, or that the water has a significant nexus with a traditional navigable water.

The Revised Rapanos Guidance also states that swales or erosional features (e.g., gullies, small washes characterized by low volume, infrequent, or short duration flow) are generally not waters of the United States because they are not tributaries or they do not have a significant nexus to downstream traditional navigable waters. In addition, ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water are generally not waters of the United States because they are not tributaries or they do not have a significant nexus to downstream traditional navigable waters.

The Revised Rapanos Guidance further states that certain ephemeral waters in the arid west are distinguishable from the geographic features described above where such ephemeral waters are tributaries and they have a significant nexus to downstream traditional navigable waters. For example, in some cases these ephemeral tributaries may serve as a transitional area between the upland environment and the traditional navigable waters. During and following precipitation events, ephemeral tributaries collect and transport water and sometimes sediment from the upper reaches of the landscape downstream to the traditional navigable waters. These ephemeral tributaries may provide habitat for wildlife and aquatic organisms in downstream traditional navigable waters. These biological and physical processes may further support nutrient cycling, sediment retention and transport, pollutant trapping and filtration, and improvement of water quality, functions that may significantly affect the chemical, physical, and biological integrity of downstream traditional navigable waters.

In response to questions at the appeal conference, the Appellant indicated that they believe that the waters on the property should be regarded as non-RPWs that lack a significant nexus to the nearest TNW.

In response to questions asked at the appeal conference, the District indicated that they did not compare the waters on the property with swales, small washes, and man-made roadside ditches, which would generally not be considered waters of the United States, because they had not felt that they had a burden to do so.

The District has established that CH1 and CH 2 are tributaries, ultimately to a TNW. The burden that is placed on the District is to demonstrate that these tributaries and their adjacent wetlands have a significant nexus with a TNW. So, while the Revised Rapanos Guidance states that certain types of features are generally not considered waters of the United States, it clearly allows that there are similar features that are tributary which, provided they have a significant nexus with a TNW, are properly determined to be waters of the United States. So, while the District is required to engage in further analysis regarding its conclusion that there is a significant nexus, the District does not have a

separate specific obligation to compare waters on the property with those waters that are generally not considered waters of the United States.

**INFORMATION RECEIVED AND ITS DISPOSAL DURING THE APPEAL**

**REVIEW:** The administrative appeal was evaluated based on the District's administrative record, the Appellant's Request for Appeal, and discussions at the conference with the Appellant and the District.

**CONCLUSION:** I conclude the District must further evaluate and consider its decision. In its final decision, the District must correct errors related to watershed size and stream order. The District must consider the Appellant's assertion that pond 3 and wetland 6 are isolated waters in its final decision and document any connection it may find between those features and the non-RPWs on the property. If the District, after reevaluation, determines that these features are isolated, it must evaluate them accordingly. The District must, in order to support its final decision as to whether there is a significant nexus between waters on the property and the nearest TNW, include data or observations that support its conclusions. The District must clearly describe what available data or observations were used in making its determinations as to whether the waters on the property have a significant nexus with the nearest TNW. The District must also further explain the relationship of waters on the property to spawning habitat and explain statements in the administrative record concerning pollutants on the property and the degree to which waters on the property function in both the attenuation and conveyance of the flow of pollutants to the nearest TNW. The District should include a more complete description of downstream connections, relevant reaches, and available information on flow regimes. The District should also clearly reference the status of jurisdictional determinations on adjacent properties that it relies on in its final decision. 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. The District shall, upon completion of these tasks, provide its final decision to the Division Engineer and Appellant.



Thomas J. Cavanaugh  
Administrative Appeal Review Officer