

**ADMINISTRATIVE APPEAL DECISION
CLEAN WATER ACT
NAPA JUNCTION ROAD PROPERTY
SAN MATEO COUNTY, CALIFORNIA
SAN FRANCISCO DISTRICT
FILE NUMBER 2001-26557N**

DATE: MAR 03 2010

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

Appellant: Rick Gooch, Union Pacific

District Representative: David Wickens, Army Corps of Engineers, San Francisco District

Authority: Clean Water Act (33 USC 1344)

Receipt of Request for Appeal: June 26, 2009

Appeal Meeting and Site Visit Date: October 29, 2009

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. If the District's decision is to continue to assert that wetlands on-site are adjacent to a Traditionally Navigable Water (TNW), it must document the rationale that leads to that conclusion. The District must reconsider its decision that the drainage on the property is a seasonal Relatively Permanent Water (RPW). If the District's final determination is that the drainage is a seasonal RPW, that determination must be based on observations or other data which support that conclusion. In order to comply with policy requirements of 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), the District must document that its conclusion that the drainage is an RPW has been evaluated under the "significant nexus standard". Additionally, the District is required to complete a significant nexus evaluation for the non-RPW, and a separate significant nexus analysis for those wetlands which are adjacent and abut the non-RPW. The District must also include an analysis and conclusion of whether wetlands on the property have been abandoned, and are thus potentially jurisdictional. Finally, the District must clearly document the jurisdictional

status and role of the culvert and other man-made or man-altered features, such as the ditch along the outside of the berm, in its final decision.

Background Information: The Napa Junction property is an approximately 16.5-acre property, located east of Highway 29 and north of Napa Junction Road, in the City of American Canyon, California. The site can be found on the Cuttings Wharf U.S.G.S. 7.5" quadrangle, Section 13, Township 4 North, Range 4 West (APN 059-020-028 and 059-020-035). The site is bordered by currently operational railroad tracks to the east. The southeastern portion of the site, immediately north of Napa Junction Road, contains a few small structures, some of which are abandoned. A large berm associated with the abandoned railroad turn-around forms the remainder of the property boundary. Vegetation on the property consists primarily of non-native grasses and herbs.

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 August 15, 2001 submittal, the Appellant's consultant concluded that there are 1.48 acres of potentially jurisdictional waters within the 16.5 acre property.

The District reviewed the Appellant's August 15, 2001 request for a CWA jurisdictional determination. The review included a field visit on January 28, 2002. On January 29, 2002, the Appellant's consultant provided the District with its revised delineation report, incorporating the District's requested changes, which resulted from the site visit. The January 29, 2002, submittal concluded that there are 1.70 acres of potentially jurisdictional waters within the 16.5 acre property.

On February 8, 2002, the District issued its CWA jurisdictional determination for the Property. The District concluded that the site contained 1.70 acres of waters of the United States, including wetlands within CWA jurisdiction.

On February 6, 2007, the Appellant's consultant provided the District with a letter which concluded that all wetlands and other waters on the Napa Junction property are isolated and, consequently, would not come under Corps jurisdiction. The letter requested a disclaimer of jurisdiction from the District for the previously verified delineation.

On March 4, 2009, the District issued its CWA jurisdictional determination for the property. The District concluded that the site contained 1.70 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 wetlands are not a water of the United States.

FINDING: This reason for appeal has merit.

ACTION: If the District's decision is to continue to assert that wetlands on-site are adjacent to a TNW, it must document the rationale that leads to that conclusion. The District must reconsider its decision that the drainage on the property is a seasonal RPW. If the District's final determination is that the drainage is a seasonal RPW, that determination must be based on observations or other data which support that conclusion. In order to comply with policy requirements of the Revised Rapanos Guidance, the District must document that its conclusion that the drainage is an RPW has been evaluated under the "significant nexus standard". Additionally, the District is required to complete a significant nexus evaluation for the non-RPW, and a separate significant nexus analysis for those wetlands which are adjacent and abut the non-RPW. The District must also include an analysis and conclusion of whether wetlands on the property have been abandoned, and are thus potentially jurisdictional. Finally, the District must clearly document the jurisdictional status and role of the culvert and other man-made or man-altered features, such as the ditch along the outside of the berm, in its final decision.

DISCUSSION: In the RFA, the Appellant asserted that the wetlands are present as a result of Union Pacific's activities and are not naturally occurring. According to the Appellant, Union Pacific first started using the property for its railroad operations in 1917. The company constructed the railroad berms for the balloon-shaped turnaround track in 1928. The Appellant further indicated that the wetlands resulted from one of two activities; some wetlands were created in the middle of the parcel when Union Pacific removed the old tracks, others were formed from borrow pits created by Union Pacific when it built the berms. The Appellant indicated that they have never abandoned the property or the artificially created wetlands and that they continue to maintain the property.

The District's January 6, 2009, Approved Jurisdictional Determination Form indicates, in Section III.A, that the wetland on the property is adjacent to a TNW. The District supports this conclusion by indicating that the wetland discharges into a ditch off-site to the west via two culverts. The ditch flows into a roadside ditch, which flows to North Slough. North Slough drains into the Napa River. This section also indicates that the Napa River is the TNW.

Section III.D.2 indicates that one drainage is a RPW, with continuous flow seasonally that flows directly or indirectly into a TNW. The District's overall rationale for this conclusion is that "the unnamed stream is organized with bed, banks and there is evidence of flow. In addition, sediment deposited on banks and vegetation bent over in the direction of flow indicate a change from dry to wet conditions associated with the collection and passage of flood pulse. This allows aquatic and terrestrial biota to use the same space but at different times, thus vastly increasing biodiversity and bioproductivity of the riverscape". The form indicates that data supporting the conclusion of seasonality is found in Section III.B.

In section III.B, the District provides information on the size of the watershed and drainage area. Further, it indicates that the drainage to which wetlands on the site are adjacent flows through 2 tributaries before entering the RPW the TNW. It is also indicated that the “unnamed stream discharges across the adjacent property to the west and into the State Highway 29 roadside ditch. The roadside ditch flows into North Slough which generally flows west and then south and discharges into the Napa River”. Further, the data sheet indicated that the tributary provides for seasonal flow, with 20 or more events in the review area per year and that the unnamed stream is flashy and prone to flooding banks. The District did not include data or indications of observations in support of this conclusion.

Subsequently, in Section III D 6, the District indicated that the wetlands on the property are adjacent to non-RPWs that flow directly or indirectly into TNWs. The form indicates that data supporting the conclusion of seasonality is found in Section III.C.

In Section III.C, the District indicated that wetlands on the property, which are adjacent to an RPW, but do not directly abut the RPW, likely provide value by performing the following functions: flood flow alteration (i.e. storage and flow desynchronization), sediment/toxicant/pathogen retention, biogeochemical cycling (i.e. biologic, physical, chemical transformations of various nutrients within the soil and water), and wildlife habitat (i.e., wetland macroinvertebrates). Of these functions, sediment retention was observed during the site visit. Based on limited information, potential and observed functions and values provided by the wetlands on site are translated into increased food web production, flood retention, and improved water quality delivered to the North Slough and the Napa River. Therefore, it is likely that the aquatic features on the subject property have the ability to significantly affect the chemical, physical, and biological integrity of a downstream TNW. No specific studies have been completed to determine the magnitude of functions and values that are being performed.

In a December 19, 2008, letter from the Appellant’s attorney, a concern was raised that the Corps may consider wetlands on the property to be potentially jurisdictional as a result of abandonment. The letter indicates that the wetlands on the property were created incidental to construction of the turn-around track in approximately 1928 and that Union Pacific has actively maintained and managed the property. The letter asserts that the on-going management would preclude wetlands on the property from falling under Corps jurisdiction. Additionally, the letter asserts that the man-made culvert is not a tributary, nor does it connect the wetlands to any tributary.

The District’s January 6, 2009, Memorandum for the Record (MFR) includes an unsupported conclusion that the railroad spur has been abandoned. The MFR does not respond to the status of the wetlands on the property relative to abandonment. It also does not respond to the assertion that the culvert does not connect the wetlands on the property to downstream waters.

The Revised Rapanos Guidance indicates 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. The reference to “typically three months” in the joint guidance is an example and does not set a standard.

In addition, the Revised Rapanos 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 Rapanos 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 Revised Rapanos Guidance further indicates that 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". Under this definition, the agencies consider wetlands adjacent if one of 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.

The Revised Rapanos Guidance further 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. a., 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 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. As a matter of policy, Corps and EPA regions will include in the record any available information that documents the existence of a significant nexus between a relatively permanent tributary that is not perennial (and its adjacent wetlands if any) and a traditional navigable water, even though a significant nexus finding is not required as a matter of law.

In response to questions asked at the appeal conference, the District asserted that wetlands on the property are jurisdictional under the CWA as waters of the United States because they are adjacent to and connected to waters of the United States that drain into a TNW. The District described the ditch as an unnamed stream with an ordinary high water mark (OHWM), seasonal flow regime. The unnamed stream is located on the property to the west. The District indicated that water detained in the wetlands on the Napa Junction Road property is discharged into the stream via a short culvert. The District further noted that, during the site visit on February 5, 2008, water was discharging into the unnamed stream from the culvert and flowing to the North Slough, which is located approximately 500 feet west of the property. The North Slough flows into the Napa River, a TNW. The District stated that sediment deposits and observable effects to vegetation supported its determination. The District asserted that Justice Kennedy's test is the controlling test, as a result of the decision in United States v. Moses, 496 F.3d 984 (9th Cir. 2007) (Moses) and that their decision is supported by other court cases.

In response to questions asked at the appeal conference, the Appellant indicated that the wetlands and ditches on the site are entirely man-made due to Union Pacific's historic activities on the site. The Appellant further indicated that water flows in the ditches intermittently and only in response to rainfall and does not have continuous flow for three months, which the Appellant believes is required to call a drainage an RPW. The Appellant asserts that the wetland is of marginal value and that there is no evidence that it has any impact on the Napa River, let alone a significant effect. The Appellant believes that any link between the wetland and the Napa River is based on speculation, any connection that might exist is insubstantial and, for those reasons, there is not a significant nexus between the wetland on the property and the Napa River. The Appellant does not believe that the District has met its burden under the Kennedy or the plurality test under Rapanos and that the District has failed to meet the requirement from the Revised Rapanos Guidance, which requires the Corps to document which of the classes of jurisdictional waters a particular waterbody falls under. The Appellant believes that the District used the decision from Moses in a way that would create a separate set of criteria from those resulting from Rapanos, but that there is nothing inconsistent between Moses and the Revised Rapanos Guidance. The Appellant does not believe that the administrative record contains documentation that there is a significant nexus between the wetland on the property and the Napa River. The Appellant further indicated that prior to 2005, the area within the berm did not drain until the depth of water reached two feet. The Appellant indicated that this did not change until 2005, when a new lower culvert was placed through the berm, allowing the area within the berm to drain at a lesser depth.

The basis for District's conclusion in its January 6, 2009, data sheet that the wetland onsite is adjacent to a TNW is unclear and is not supported by the administrative record. The conclusion later in the data sheet, which the District provides some support for as described above, is that there is a tributary of a TNW on the property, with continuous flow "seasonally" and that the wetlands onsite are adjacent to a non-RPW that flows directly or indirectly into a TNW. The data sheet indicates that "project waters are 2-5 river miles from TNW". Additionally, while the District has summarized a number of biological, chemical, and physical functions that are likely being performed by wetlands on the property, the District indicates, in the same paragraph that no specific studies have been completed on the project site to determine the magnitude at which the above functions are being performed. The District did, however, cite a single instance of observed sediment retention in wetlands on the project site. The District also indicates that the seasonal wetland on site likely functions to increase food web production, flood retention, and improved water quality delivered to the North Slough and the Napa River. The District further indicates that, for these reasons, it is likely that the aquatic features on the subject property have the ability to significantly affect the chemical, physical, and biological integrity of a downstream TNW. The District has not included data in the administrative record to sufficiently support its conclusions. If the District's decision is to continue to assert that wetlands on-site are adjacent to a TNW, it must document the rationale that leads to that conclusion. The District must reconsider its decision that the drainage on the property is a seasonal RPW. If the District's final determination is that

the drainage is a seasonal RPW, that determination must be based on observations or other data which support that conclusion. In order to comply with policy requirements of the Revised Rapanos Guidance, the District must complete a significant nexus evaluation for that drainage. Additionally, the District is required to complete a significant nexus evaluation for the non-RPW, and a separate significant nexus analysis for those wetlands which are adjacent and abut the non-RPW. The District must also include an analysis and conclusion of whether wetlands on the property have been abandoned, and are thus potentially jurisdictional, and clearly document the jurisdictional status and role of the culvert and other man-made or man-altered features, such as the ditch along the outside of the berm, in its final decision.

REASON 2: The wetlands are considered isolated under Rapanos.

FINDING: This reason for appeal does not have merit.

ACTION: No action is required.

DISCUSSION: In the RFA, the Appellant asserted that all of the wetlands within the boundaries of the approximately 10 to 15 foot high old railroad berms are isolated features and have no surface connection to any of the surrounding drainage features. Further, the Appellant indicated that the drainage ditch that flows along the southern and western boundary of the project site outside of the railroad berms receives runoff from the property via a culvert under the railroad tracks and developed portions of the southern portion of the neighboring property. This water is then dispersed as sheetflow before reaching an off-site ditch on the adjacent property alongside Highway 29. The Appellant suggests that an RPW must have more than three months of continuous water flow and that there is no feature on the property that meets. The Appellant further suggests that the wetlands on site do not have a significant nexus with a TNW. The Appellant asserts that the wetlands on-site are completely isolated and lack any natural connection to a tributary, relatively permanent or not, and that the man-made culvert is not a tributary.

The District's January 6, 2009, Approved Jurisdictional Determination Form indicates, in Section III.A indicates that the wetland discharges into a ditch off-site to the west via two culverts. The ditch flows into a roadside ditch, which flows to North Slough. North Slough drains into the Napa River. This section also indicates that the Napa River is the TNW.

In response to questions asked at the appeal conference, the District asserted that the wetlands on the property are not isolated. The District believes that this conclusion is supported by referencing the February 5, 2008, observation of flow from the wetlands on the property to the North Slough. The District asserted that wetlands on the site are adjacent to navigable waters and cannot be considered isolated. The District indicated that wetlands on the property have a significant nexus to a TNW. The District believes that water detained in the wetlands is of a volume, duration, and frequency to be considered significant. The District also believes that the observed effects to vegetation,

sediment deposits, and observation of flow further support the conclusion that the wetlands have a significant nexus to a TNW.

In response to questions asked at the appeal conference, the Appellant responded that they believed that wetlands on the property were not adjacent and were, therefore, isolated. Further, the Appellant suggested that the mere fact that a ditch carries water after a rainstorm will not avoid isolation. The Appellant asserted that the drainage ditch on the property does not defeat isolation, given that the wetlands on the property are clearly surrounded by berms. The Appellant suggested that the District had asserted that there is a significant nexus without supporting that conclusion and that seasonal flow and the single observation of flow by the District is insufficient to support its conclusions. The Appellant's concerns in providing this reason for appeal appear, from supporting documentation and responses to questions asked at the appeal conference, to be related to concerns that the District has not put on-site wetlands and other waters into the proper classes as described in the Revised Rapanos Guidance, sufficiently documented conclusions, and conducted significant nexus determinations as required by the Revised Rapanos Guidance.

The District has sufficiently demonstrated that there is a hydrologic connection between wetlands on the property and the nearest TNW. The Appellant's stated concerns in the discussion of this reason for appeal will be addressed once the District has completed the evaluation required in response to reason 1, above.

REASON 3: The wetlands have reduced in size by up to approximately 0.25 acres.

FINDING: This reason for appeal does not have merit.

ACTION: No action is required. The District should, however, consider the Appellant's new information concerning the extent of wetlands on the property prior to making its final decision.

DISCUSSION: In the RFA, the Appellant indicated that Ross Dobberteen from LSA Associates visited the site on May 21, 2009 to determine whether conditions had changed since the original survey was conducted in 2001. During that visit Mr. Dobberteen recorded transect measurements of the outer limits of areas dominated by hydrophytic vegetation through all wetlands. The Appellant included a report from Mr. Dobberteen with the RFA. The report concluded that there was a reduction in acreage of wetland on site of between 0.15 and 0.25 acres. The Appellant, in the RFA, requested that, in the event the Corps determines that the wetlands are jurisdictional, that the District consider this new information and reconsider the size of any jurisdictional determination.

In response to questions asked at the appeal conference, the District responded that they did not believe that the acreage or the configuration of the wetlands on the property had changed in any material way. Further, the District asserted that neither the landowner's environmental consultant, nor any other landowner representative, ever suggested that the

extent or configuration of the wetlands changed from that which was previously mapped. The District indicated that no new delineation information was submitted by the Appellant prior to the District's jurisdictional determination.

In response to questions asked at the appeal conference, the Appellant stated that they believe that the extent and configuration of wetlands on the property had changed. The Appellant noted that the placement of the culvert in the pond controlled the ability of the wetlands to pond. The Appellant further indicated that a newer culvert had been placed in the berm, at an elevation lower than the original, which resulted in a reduction in the extent of wetlands.

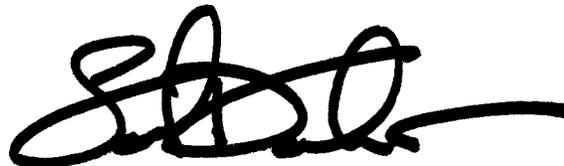
The administrative record does not contain any evidence that the District received information from the Appellant concerning a potential change in extent or configuration of wetlands on the property prior to making its jurisdictional determination. The report from the Appellant's consultant is new information and, as such, was not considered in determining whether the Appeal had merit. However, to ensure accuracy of the final jurisdictional determination, the District should consider information provided by the Appellant concerning potential changes

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, discussions at the appeal meeting, and written responses to questions provided with the agenda and discussed at the appeal conference from the Appellant and the District. The Appellant provided new information in a document entitled, "Summary of Recent Wetland Delineation Analysis and Field Review at the Union Pacific Napa Junction Property in American Canyon, CA", dated June 25, 2009, with the RFA, which was not considered in the review of this appeal.

CONCLUSION: The District's determination was not arbitrary, capricious or an abuse of discretion, and was not plainly contrary to applicable law or policy. However, this decision is remanded to the District for further evaluation. If the District's decision is to continue to assert that wetlands on-site are adjacent to a TNW, it must document the rationale that leads to that conclusion. The District must reconsider its decision that the drainage on the property is a seasonal RPW. If the District's final determination is that the drainage is a seasonal RPW, that determination must be based on observations or other data which support that conclusion. In order to comply with policy requirements of the Revised Rapanos Guidance, the District must complete a significant nexus evaluation for that drainage. Additionally, the District is required to complete a significant nexus evaluation for the non-RPW, and a separate significant nexus analysis for those wetlands which are adjacent and abut the non-RPW. The District must also include an analysis and conclusion of whether wetlands on the property have been abandoned, and are thus potentially jurisdictional, and clearly document the jurisdictional status and role of the culvert and other man-made or man-altered features, such as the ditch along the outside

of the berm, in its final decision. This concludes the Administrative Appeal Process. The District shall, upon completion of these tasks, provide its final decision to the Division Engineer and Appellant.

A handwritten signature in black ink, appearing to read 'SFD', with a long horizontal stroke extending to the right.

Scott F. "Rock" Donahue, P.E.
Colonel (P), Corps of Engineers
Commanding