

**ADMINISTRATIVE APPEAL DECISION
CLEAN WATER ACT
Oakland International Airport Property
Port of Oakland
Alameda County, California
SAN FRANCISCO DISTRICT
FILE NUMBER 252600S**

DATE: 2 June 2009

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

Appellant: Bruce Flushman, Wendel Rosen, Black & Dean, LLP, attorney representing the Port of Oakland (Appellant)

District Representative: Katerina Galacatos, Army Corps of Engineers, San Francisco District (District)

Authority: Clean Water Act (33 USC 1344)

Receipt of Request for Appeal: 30 June 2008

Appeal Meeting and Site Visit Date: 16 December 2008

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 prior to making its final decision. The District must clearly describe the analysis which leads to the conclusion as to whether these waters are properly determined to be jurisdictional under Section 10 of the Rivers and Harbors Act of 1899. It must further clarify whether all waters over which it has asserted jurisdiction on the Airport property are regulated on the basis that they possess wetland characteristics or whether some are regulated as other waters based solely on the presence of an ordinary high water mark (OHWM). The District must document its analysis as to whether drainage features on the Airport property were excavated within waters or whether they were excavated in dry land and, for any features it may determine to have been excavated on dry land, document the case-by-case analysis and the conclusion as to whether such waters should be determined to be waters of the United States for each such feature. The District, in its final decision, must fully consider the possibility that features on the Airport property should be exempt from jurisdiction as a waste treatment system. Finally, the District must rectify the error of omission on the jurisdictional determination (JD) form and insure the acreages in its final decision are consistent with associated maps.

Background Information: The Property is an approximately 2,447 acre portion of the Oakland International Airport (Airport), located south of Oakland, Alameda County, California. The Oakland International Airport is located west of state route 880 on the eastern edge of the San Francisco Bay, southwest of San Leandro Bay, Latitude 38 43' 00" North, Longitude 122 14' 00" West. The Airport is owned and operated by the Port of Oakland, an autonomous department in the City of Oakland.

The Airport is divided into two main functional areas: the North Airport, which supports runways, maintenance, and support facilities for cargo and general aviation operations; and the South Airport, which contains the Airport's principal runway, as well as taxiways, and support facilities for both commercial aviation and air cargo operations.

The site on which the airport is located was historically salt marsh, open water, and mudflat. The Airport was developed in two phases; construction of the North Airport, known originally as the Oakland Municipal Airport began in the 1920's and construction of the South Airport began in the mid 1950's and continues to the present. The North Airport was a tidal marsh, essentially at sea level, drained by several tidal sloughs. It was built on fill placed along the edge of San Francisco Bay. The South Airport was built behind dikes that were constructed in an open water portion of San Francisco Bay.

For purposes of evaluation during the CWA jurisdictional determination, the Appellant's consultant evaluated the site using the 1987 *Wetland Delineation Manual* (1987 WDM), the Code of Federal Regulations (CFR) definitions of jurisdictional waters, and supporting guidance documents. With the October 9, 2006 submittal, the Appellant's consultant concluded that there are 513.78 acres of jurisdictional waters and 5.59 acres of ditches dug on dry land.

A delineation of the Oakland Airport property was previously verified on September 6, 2000. That jurisdictional determination concluded that there were 519.65 acres of waters of the United States, including wetlands and that there were 7.29 acres of "non-jurisdictional drainage ditches dug on dry land".

During the period between the previous and current delineations 1.70 acres of ditches previously verified as non-jurisdictional were filled by construction activities.

The District reviewed the Appellant's October 9, 2006 proposed CWA jurisdictional determination map. The review included two field visits on April 17, 2007 and October 17, 2007.

As a result of these field visits, the District concluded that 3.64 acres of ditches were determined to be jurisdictional as other waters, 1.87 acres of ditches were determined to be jurisdictional as wetlands, and 0.08 acres of those waters were determined to still be non-jurisdictional.

On June 20, 2007, the Port of Oakland requested, based on the previous jurisdictional determination and the June 5, 2007, joint Corps/EPA Rapanos Guidance, that the District reconsider excluding the 5.51 acres of ditches from jurisdiction, which had been excluded from jurisdiction in the previous jurisdictional determination.

On May 1, 2008, the Port of Oakland provided the District with a letter indicating its intent to provide the District with relevant information to “better inform the ACOE regarding potential jurisdiction at OAK”. The Port of Oakland further requested that the District postpone until further notice, verification of the delineation and that the information would be provided to the District by July 1, 2008.

On May 1, 2008, the District issued its CWA jurisdictional determination for the Property. The District concluded that the site contained 522.88 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 A1: Airport waters are not jurisdictional as a result of their location on historic tidelands and past use for interstate commerce.

FINDING: This reason for appeal has merit.

ACTION: In its final decision, the District must clearly describe the analysis which leads to the conclusion as to whether these waters are properly determined to be jurisdictional under Section 10 of the Rivers and Harbors Act as diked baylands in the documentation supporting its final jurisdictional determination. In that analysis, the District must discuss existing District policy, any implications on jurisdiction under Section 404 of the Clean Water Act, and the effect of the joint Corps/EPA guidance, dated June 5, 2007 and the revised joint Corps/EPA guidance, dated December 2, 2008 for implementing the *Rapanos* decision on the jurisdictional determination.

DISCUSSION: The Appellant has asserted that the Airport was developed in accordance with a Section 10 RHA permit, under which the Appellant transformed wetlands to dry land before enactment of the Clean Water Act. The Corps authorized perimeter levee construction and placement of fill necessary to support airport facilities and aviation operations and the necessary supporting infrastructure, including the Airport drainage system. Further, the Appellant has asserted that the Corps has granted, sanctioned, and consented to relinquishing navigable water status for an area of once navigable waters of the Bay and terminating connection of the Airport to TNW and that the Airport drainage system continues to function, without abandonment. Consequently, the Appellant asserts that the Airport remains outside of Corps jurisdiction under either the CWA or RHA. The Appellant further asserts that *Rapanos* makes it clear that areas that have acquired wetland characteristics and man-made tributaries that are located in

the former location of navigable waters do not become waters of the United States without a significant nexus with TNW. The Appellant asserts that even though some pre-Rapanos cases, such as Leslie Salt Co. v. U.S., 896 F.2d 354 (9th Cir. 1990), *cert denied*, 498 U.S. 1126 (1991); Leslie Salt Co. v. U.S., 55 F.3d 1388 (9th Cir. 1995), held that waters of the United States include such waters as exist on the Airport property, Rapanos v. United States and Carabell v. United States, 126 S. Ct. 2208 (2006) (*Rapanos*) has qualified those earlier cases and that Corps jurisdiction over waters on the Airport property depend on a significant nexus with a TNW.

The Appellant asserted in its response to questions asked at the appeal conference that the District cannot rely on its “Historic Tideland Policy” because the policy was never formally adopted by the District or noticed for public review and comment. The policy itself was not included in the Administrative record and is not otherwise publicly available, impermissibly overbroad, and as applied, is in conflict with recent Supreme Court decisions, including *Rapanos*. The Appellant asserts that there is no indication that the District ever re-evaluated the “Historic Tidelands Policy” in light of recent Supreme Court cases, including *Rapanos*. The Appellant further asserted the Revised Rapanos Guidance provides that wetlands may be adjacent to a TNW if their proximity is “reasonably close,” based on “an ecological interconnection with jurisdictional waters” that is neither implied nor insubstantial. The Revised Rapanos Guidance requires a meaningful ecological interconnection as exemplified by movement of amphibians or anadromous or catadromous fish between such waters, and that at the Airport there is no ecologic interconnection.

The District asserted jurisdiction on wetland areas and drainage ditches. The District indicated that wetland areas were jurisdictional because they showed indicators of hydrology, soils, and vegetation as described in the 1987 wetland delineation manual. Additionally, the District, in the Administrative record, p 00189, indicated that the entire area of the Airport is diked baylands and that lower areas are either on a clay fill or represent the original bay mud. The District further indicated in the appeal conference that the basis for the determination that these waters are jurisdictional is Leslie Salt Co. v. Froehlke, 578 F.2d 742 (9th Cir. 1978) and, in response to a question posed by the Appellant, that diked baylands could be found on the District website. The map which depicts those diked baylands is referenced in Regional General Condition 1 for the Nationwide Permit program when used within San Francisco District boundaries:

1. Notification to the Corps (in accordance with General Condition No. 27) is required for any activity permitted by NWP if it will take place in waters or wetlands of the U.S. that are within the San Francisco Bay diked baylands (undeveloped areas currently behind levees that are within the historic margin of the Bay. Diked historic baylands are those areas on the Nichols and Wright map below the 5-foot contour line, National Geodetic Vertical Datum (NGVD) (see Nichols, D.R., and N. A. Wright. 1971. Preliminary map of historic margins of marshland, San Francisco Bay, California. U.S. Geological Survey Open File Map)). The notification shall explain how avoidance and

minimization of losses of waters or wetlands are taken into consideration to the maximum extent practicable (see General Condition 20(a)).

I have concluded that, while the District has been able, in response to questions raised during the course of the appeal, to describe a basis for regulating diked baylands under Section 10 of the Rivers and Harbors Act, that basis is not sufficiently explained in the documentation supporting the jurisdictional determination for the Airport property. The District must therefore clearly document the analysis which leads to the conclusion as to whether these waters are properly determined to be jurisdictional under Section 10 of the Rivers and Harbors Act as diked baylands. In that analysis, the District must discuss existing District policy, any implications of this analysis on Section 404 of the Clean Water Act, and the effect of the joint Corps/EPA guidance, dated June 5, 2007 and the revised joint Corps/EPA guidance, dated December 2, 2008 for implementing the *Rapanos* decision on the District's "Historic Tideland Policy".

REASON A2: Airport waters are not jurisdictional as wetlands adjacent to San Francisco Bay.

FINDING: This reason for appeal does not have merit.

ACTION: No action is required.

DISCUSSION: The Appellant has asserted that there is no guidance on what constitutes reasonable proximity for adjacency and that jurisdiction has been denied over waters which are only a few feet from a TNW. No definitive distance for adjacency has been established by agency rule or court opinion and no judicial case holds all wetlands adjacent to a TNW are conclusively covered by the CWA. The Revised Rapanos guidance confirms that geographic distance is a case-specific determination by providing criteria for evaluating whether wetlands are reasonably close to a TNW and that geographic distance is merely a part, not the end of the analysis. The Appellant indicates that some of the Airport waters are distant, separated from the Bay, and as far as 3,700 feet from the Bay. The Appellant indicates that waters and wetlands are separated from the Bay by roadways, taxiways, runways, parking lots, and a levee. One wetland travels approximately 8,000 feet before ultimately and potentially being intermittently and infrequently dumped into the TNW. Even wetlands 20 to 30 feet from the bay must travel as much as 4,000-8,000 feet before reaching a pumphouse for possible discharge into the bay. Due to very shallow, nearly flat, gradient and long periods without rainfall, the transit time can be lengthy. Waters leaving most Airport wetlands are too remote from the bay both in distance and time, to have more than an insubstantial or speculative effect on the chemical, physical, or biological integrity of the bay. The Appellant further asserted that the Corps' reliance on geographic proximity (distance) between Airport Waters and the Bay to establish CWA jurisdiction is arbitrary and capricious and not in accordance with the law. The Appellant states that the Corps' assertion of jurisdiction may be simply based on the location of wetlands within the 100-year floodplain. The Appellant states that such an assertion would be without authority in statute or regulation

and that there is no basis for asserting jurisdiction over waters simply because they are located within the 100-year floodplain.

In the administrative record, the District asserted that the wetlands present on the Airport property are adjacent to the San Francisco Bay because the wetlands are neighboring the San Francisco Bay and the Airport was constructed on historic baylands. There is no indication in the administrative record that the District's assertion of jurisdiction was simply based on the location of wetlands within the 100-year floodplain. In 33 CFR 388.3, the term "adjacent" is defined as "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'". In its written and verbal response to appeal conference questions, the District indicated that a wetland is considered neighboring to a waterbody if it has topographic, hydrologic and/or ecological connection with that waterbody. The wetlands on the Oakland International Airport have a topographic and a hydrologic connection to the San Francisco Bay. The topographic connection is due to the fact that the Oakland International Airport is within historic tidal shorelines and bay margins. The diked historic baylands have been identified as those areas on the Nichols and Wright map below the 5-foot contour line, National Geodetic Vertical Datum (NGVD) Preliminary map of historic margins of marshland, San Francisco Bay, California. U.S. Geological Survey Open File Map, 1971. This map is referenced in the San Francisco District's Regional Condition 1 for Nationwide Permits and available on the San Francisco District website:

<http://www.spn.usace.army.mil/regulatory/nwp/REGCON07.pdf>

The revised joint Corps/EPA guidance, dated December 2, 2008 (Revised Guidance), directs the agencies to assert jurisdiction over wetlands "adjacent" to traditional navigable waters as defined in the agencies' regulations. Under EPA and Corps regulations and as used in the revised guidance, "adjacent" means "bordering, contiguous, or neighboring". The revised guidance further states that finding a continuous surface connection is not necessary to establish adjacency under this definition.

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 criteria, the agencies consider wetlands adjacent if one of the following three criteria is satisfied. First, there is an unbroken surface connection 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. Because of 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.

Finally, the Revised Guidance indicates that the *Rapanos* decision does not affect the scope of jurisdiction over wetlands that are adjacent to traditional navigable waters because at least five justices agreed that such wetlands are “waters of the United States”.

I have therefore determined that the District has adequately documented adjacency of the Airport wetlands to the San Francisco Bay and that no further action or documentation is required in response to this reason for appeal.

REASON A3: Airport waters are not jurisdictional because there is not a significant nexus between the airport waters and traditionally navigable water.

FINDING: This reason for appeal does not have merit.

ACTION: No action, other than the minor data sheet correction described below, is required.

DISCUSSION: The Appellant asserted that a significant nexus analysis is relevant to wetlands adjacent to a TNW as well as wetlands adjacent to tributaries to a TNW. The Appellant asserted even though the District failed to undertake a significant nexus analysis, that observable facts argue against any finding of a significant nexus between the Airport waters and either the bay or jurisdictional tributaries. The Appellant indicated in the Request for Appeal (RFA) that there is no surface water, ground water, or other direct connection between Airport waters and the nearest TNW, San Francisco Bay. The Appellant then stated that storm water discharges to the bay occur intermittently and infrequently. The Appellant suggested that relative to the volume and tidal activity of the bay, the Airport discharge is insignificant and that it is reasonable to conclude that such a connection does not significantly affect the chemical, physical and biological integrity of a waterbody as substantial as the bay and there is no significant nexus. Further, the Appellant asserted that the Corps’ reliance on an infrequent, intermittent, and man-induced discharge as a surface connection to TNW in order to establish CWA jurisdiction is arbitrary and capricious, and not in accordance with law. The Appellant asserted also that since there is no direct connection between Airport Waters and the bay, Airport waters do not contribute in any meaningful way, biologically, to the aquatic environment of the San Francisco Bay. The Appellant indicates that Airport waters may provide isolated habitat for certain local wildlife, but that wildlife attracted by Airport waters presents an aviation hazard and the U.S. Department of Agriculture regularly destroys birds in Airport waters. The Appellant asserts that Corps’ reliance on such a supposed

ecological connection between Airport waters and the bay would be arbitrary and capricious, and not in accordance with law.

In the Administrative Record, the San Francisco District determined that the wetlands were adjacent to the San Francisco Bay, a traditional navigable water (TNW) (administrative record pg. 00093). If a wetland is adjacent to a TNW then no significant nexus determination is required.

The San Francisco Bay is a traditional navigable water because it is subject to the ebb and flow of the tide. As per 33 C.F.R. §329.4, “waters that are subject to the ebb and flow of the tide” are by definition navigable waters of the U.S.

The June 5, 2007, U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook (pg. 15) states that the agencies (i.e., Army Corps of Engineers and U.S. Environmental Protection Agency) will assert jurisdiction over wetlands adjacent to TNWs. A significant nexus with a TNW is required when agencies will exert jurisdiction over:

- a) non-navigable tributaries that are not relatively permanent;
- b) wetlands adjacent to non-navigable tributaries that are not relatively permanent;
- and
- c) wetlands adjacent to but that do not directly abut a relatively permanent non-navigable tributary.

Since neither a), b), nor c) apply to this case, SPN determined it was not necessary to complete this section and document a significant nexus finding.

The District indicated in its response that it had neglected to complete Section III.D.1 indicated in Section III.A. However, since Section III.D.1 contains similar information to Section III.A, the District believes this omission to be immaterial.

I have therefore determined that, beyond the correction of the omission from Section III.D.1 of the data sheet indicated above, the District has no further action to take in response to this reason for appeal. Neither the June 5, 2007, Rapanos guidance nor the Revised Guidance require that the District accomplish a significant nexus analysis for waters, including wetlands, such as those present on the Airport property.

REASON A4: Airport waters are not jurisdictional as waters abutting waters other than San Francisco Bay.

FINDING: This reason for appeal may have merit.

ACTION: The District, in its final decision, must clarify whether all waters over which it has asserted jurisdiction on the Airport property possess wetland characteristics or whether there are waters which are tributaries, based on the presence of an OHWM, which do not possess wetland characteristics. If there are tributaries on the Airport

property, which are not themselves wetlands and, therefore not adjacent wetlands, the District must, in its final decision evaluate those waters, and any adjacent wetlands, in accordance with the Rapanos guidance.

DISCUSSION: In the RFA, the Appellant indicates that while certain wetlands on the Airport property are proximate and have a relationship with tributaries on the Airport property, the tributaries are not waters of the United States since their impact on the TNW is insignificant and speculative due to the infrequent, intermittent nature of any connection with the TNW and that Corps' assertion of jurisdiction over abutting wetlands is arbitrary and capricious, and that a significant nexus analysis is required.

In the Administrative Record the San Francisco District considered the jurisdictional wetlands as adjacent to a TNW, the San Francisco Bay. The San Francisco District did not consider the jurisdictional wetlands as abutting jurisdictional tributaries. The drainage ditches on the Oakland International Airport are acting as water collection features that are functionally replacing tributary systems with wetland characteristics. The San Francisco District considered jurisdictional those drainage ditches that possessed wetland characteristics or an ordinary high water mark (OHWM) as stated in the administrative record (pg. 000190).

In the appeal conference the District indicated that the wetlands are adjacent, not abutting or tributaries.

I have determined that, while the District has indicated, both in the administrative record and in response to questions asked at the appeal conference, that it determined all waters on the Airport as being water features with wetland characteristics, it was also indicated that the District "considered jurisdictional those drainage ditches that possessed wetland characteristics or an ordinary high water mark (OHWM)". The District must therefore, in its final decision, clarify whether there were features on the Airport property, which the District considered to be jurisdictional as a result of possessing an OHWM, which did not possess wetland characteristics. If the District did assert jurisdiction over features possessing an OHWM, but not wetland characteristics, it must separately evaluate those features in accordance with the Rapanos guidance.

REASON A5: Airport waters are not jurisdictional as drainage ditches dug on dry land are not wetlands or other waters.

FINDING: This reason for appeal may have merit.

ACTION: The District must document its analysis as to whether drainage features on the Airport property were excavated within waters or whether they were excavated in dry land. If the District concludes that the drainage features on the Airport property were excavated in dry land, the District must then document its analysis and decision as to whether those features, as the result of a case-by-case determination, should be determined to be waters of the United States.

DISCUSSION: In the RFA, the Appellant states that the Corps claims jurisdiction over Airport waters consisting of tributaries that include man-altered or man-made waterbodies exhibiting OHWM and carrying flow directly or indirectly to the TNW. The Appellant indicated that in previous jurisdictional determinations the Corps did not assert jurisdiction over such features. The Appellant believes that Airport ditches, whether classified as “other waters” or wetlands should be excluded from jurisdiction since they were excavated on dry land. Fill material for the Airport was deposited before the CWA was enacted and that fill material was dewatered and dried in order for the excavation and grading of the waste treatment and fuel containment facilities to occur. The Appellant indicates that water flows in Airport ditches only after rainfall or when pumping occurs, intermittently for only minutes at a time, rather than weeks or months. The Appellant asserts that Airport ditches are ephemeral tributaries, which flow only in response to precipitation and have no continuous flow. The Appellant suggests that the Corps believes that standing water in the ditches constitutes “relatively permanent flow” and that drainage ditches would not contain water for a long period. The Appellant asserts that this conclusion is supported only by a July 23, 2002 Memo signed by Calvin Fong, which is not referenced or included in Administrative Record. Further, the Appellant suggests that the Corps relied on the presence of an OHWM and standing water to assert jurisdiction, without evaluating Airport drainage ditches under the significant nexus standard. In sum, the Appellant asserts that the Corps has asserted jurisdiction over drainage ditches dug in dry lands part of an engineered waste treatment system, which the Appellant believes is arbitrary and capricious, an abuse of its discretion, and not in accordance with law.

In the Administrative Record (pg. 000190) the San Francisco District asserted jurisdiction over the drainage ditches that possess wetland characteristics or an ordinary high water mark (OHWM). The drainage ditches were constructed on historic diked baylands and are connected to tidal water through the water control facilities on the property.

The District provided a map attached to its response to question 2 that shows the wetlands and waters that historically existed on the Oakland International Airport site.

The Revised Guidance indicates that “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 preamble to Corps regulations indicates that the Corps generally does not consider non-tidal drainage and irrigation ditches excavated on dry land waters to be “Waters of the United States.” However, the Corps reserves the right on a case-by-case basis to determine that a particular waterbody within these categories of waters is a water of the United States. EPA also has the right to determine on a case-by-case basis if any of these waters are “waters of the United States.”

Therefore, while the District has asserted that drainage ditches were constructed on historic diked baylands, the Appellant has asserted that all waters and wetlands on the

Airport property were filled prior to construction of Airport facilities and the system of drainage features now present on the Airport property. The District must, therefore, in its final decision document its analysis as to whether drainage features on the Airport property were excavated within waters or whether they were excavated in dry land. If the District concludes that the drainage features on the Airport property were excavated in dry land, the District must then document its analysis and decision as to whether those features, as the result of a case-by-case determination, should be determined to be waters of the United States.

REASON B: Airport waters are excluded from jurisdiction as a waste treatment system.

FINDING: This reason for appeal has merit.

ACTION: The District must evaluate the potential that the waters and wetlands on the Airport property should be classified as a waste treatment system. Documentation of that analysis must be included in the administrative record supporting the final District decision.

DISCUSSION: The Appellant asserts that, even if one were to assume that Airport waters exhibit characteristics that might warrant classification as waters of the United States, the Airport drainage system, including all Airport waters, would be excluded from Corps jurisdiction as a waste treatment system. The Appellant indicates that the treatment and disposal of excess surface water is accomplished through an extensive network of conduits and basins designed and engineered for that purpose. As surface runoff originates from industrial and commercial facilities and activities, it should properly be considered industrial or commercial wastewater. The Airport drainage system also provides important containment and treatment in the event of a fuel spill or other release of hazardous materials. The Appellant contends that the District ignored the administrative record which establishes that Airport wetlands and drainages contain facilities operated to collect, retain, treat, convey, and dispose of excess surface water, which the Appellant asserts constitutes a waste. The Appellant believes that water constitutes a waste because it potentially contains wastes and because, due to its quantity it is unusable, unwanted, and must be disposed of.

The District's memorandum transmitting the administrative record dated August 4, 2008, which was not part of the administrative record, indicated that "no waste is being treated and the Alameda County general NPDES permit provided by the Port for storm water discharge cannot reasonably have the effect of extinguishing all Clean Water Act jurisdiction for Alameda County."

In response to questions asked at the appeal conference, the District asserted that the permit for Alameda County, NPDES Permit No. CAS0029831 issued by Order No. 97-030 on February 19, 1997, and modified by Order No. 99-049 on July 21, 1999, is for the discharge of stormwater. Oakland International Airport has "vegetated swales, retention basins and detentions basins" (RFA, pg. 12) to treat stormwater.

The District further asserted that Stormwater is defined as “stormwater runoff, snow melt runoff, and surface runoff and drainage” in 40 CFR 122.26(b)(13). “Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA” are not considered waters of the U.S. (33 C.F.R. § 328.3 (a) (7)). However, this exclusion is for waste treatment systems and does not include stormwater treatment systems.

Finally, the District referenced the following court case which held that claims of exemption, from the jurisdiction of the Clean Waters Act's (CWA) broad pollution prevention mandate must be narrowly construed to achieve the purposes of the CWA. Northern California River Watch v. City of Healdsburg, 496 F.3d. 993, 1001 (9th Cir. 2007), citing U.S. v. Akers, 785 F.2d 814, 819 (9th Cir. 1986). “The waste treatment system exemption was intended to exempt either water systems that do not discharge into waters of the U.S. or waters that are incorporated in an NPDES permit as part of a treatment system.” Healdsburg at 1001; See 44 Fed. Reg. 32,858 (June 1, 1979). “In other words, no permit is required to discharge pollutants into a self-contained body of water that has no connection to a water of the United States, or into a body of water that is connected to a water of the U.S., but that is part of an approved treatment system.” Healdsburg at 1001-1002. The District concluded that the Port does not have a NPDES “waste water treatment system,” permit and that a stormwater permit is NOT a wastewater treatment permit. Therefore, the Port cannot avail itself of this exemption.

It is clear from regulatory history and the various court cases that have touched on the subject that a claim under this exemption must be narrowly construed. However, it is not clear from the administrative record that the District, prior to making its decision, considered the potential that Airport waters and wetlands might fall under the exemption. Therefore, I am directing the District to fully consider the implications of this exemption as it relates to Airport waters, prior to making its final decision.

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 (RFA), discussions at the appeal meeting, and the Appellant’s written responses to questions provided with the agenda and discussed at the appeal conference. During the course of the appeal conference, information received from the Appellant and the District indicated that information had been omitted from the District’s JD form and that the District’s JD form contained a discrepancy in the acreage of waters from the verified map. In addition to responding to the above items from the RFA, the District is instructed to correct these items prior to making its final determination.

Conclusion: I conclude that the District must clearly describe the analysis which leads to the conclusion as to whether these waters are properly determined to be jurisdictional under Section 10 of the Rivers and Harbors Act of 1899. It must further clarify whether all waters over which it has asserted jurisdiction on the Airport property are regulated on the basis that they possess wetland characteristics, or whether some are regulated as other

waters based solely on the presence of an ordinary high water mark (OHWM). The District must document its analysis as to whether drainage features on the Airport property were excavated within waters or whether they were excavated in dry land; and, for any features it may determine to have been excavated on dry land, document the case-by-case analysis and the conclusion as to whether such waters should be determined to be waters of the United States. The District, in its final decision, must fully consider the possibility that features on the Airport property should be exempt from jurisdiction as a waste treatment system. Finally, the District must rectify the error of omission on the jurisdictional determination (JD) form and insure the acreages in its final decision are consistent with associated maps.

ORIGINAL SIGNED

JANICE L. DOMBI
Colonel, EN
Commanding