

**ADMINISTRATIVE APPEAL DECISION  
CLEAN WATER ACT  
SOUTH PINO ARROYO  
ALBUQUERQUE, BERNALILLO COUNTY, NEW MEXICO  
ALBUQUERQUE DISTRICT  
FILE NUMBER SPA-2012-00190**

**DATE: 26 June 2014**

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

**Appellant:** Jerry Lovato, P.E., Albuquerque Metropolitan Arroyo Flood Control Authority (AMAFCA) (Appellant)

**District Representative:** Ed Paulsgrove, Army Corps of Engineers, Albuquerque District (District)

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

**Receipt of Request for Appeal:** January 14, 2013

**Appeal Meeting and Site Visit Date:** May 22, 2013

**Summary of Decision:** The reasons for appeal of this Clean Water Act (CWA) Jurisdictional Determination (JD) do not have merit. The District's decision is upheld and no further action is required of the District.

**Background Information:**

The appellant, AMAFCA, is appealing a jurisdictional determination issued by the Albuquerque District, U.S. Army Corps of Engineers on November 13, 2012 stating that the South Pino Arroyo, an AMAFCA owned facility, is subject to jurisdiction under Section 404 of the Clean Water Act.

On April 18, 2012, the Appellant's attorney requested an AJD from the District. In that submittal, the Appellant's attorney asserted that the South Pino Arroyo is not a water of the United States (WOUS).

On November 13, 2012, after reviewing the new information provided to the District and site visits on May 17, 2012, July 19, 2012, August 3, 10, and 13, 2012, the District provided its AJD for the Pino Arroyo to the Appellant. The District concluded that the South Pino Arroyo is a non-relatively permanent water (RPW) that flows directly or indirectly into a traditionally navigable water (TNW) and that it has a significant nexus

with a TNW, and that is therefore jurisdictional as a WOUS. The Appellant disagreed and appealed citing the reasons for appeal addressed in this appeal decision.

The Appellant's overarching reason for appeal was provided as:

**Reason One:** The District Office incorrectly applied the laws, regulations, and/or officially promulgated policies in determining jurisdiction over the trapezoidal concrete channel identified in NPDES MS4 permit NMS000101 as the South Pino Arroyo. This MS4 drainage facility collects and conveys storm water runoff from the permitted MS4 urban area.

Specific reasons for appeal were provided as reasons 2 through 8, as detailed with responses, below.

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

**REASON 2:** The District Office incorrectly applied the current regulatory criteria and associated guidance for asserting jurisdiction over Non-RPWs that flow directly or indirectly into TNWs.

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

**ACTION:** No action is required.

**DISCUSSION:** In the RFA, the Appellant described South Pino Arroyo as a flood control channel located in the City of Albuquerque, County of Bernalillo, in the state of New Mexico. The Appellant asserted that the South Pino Arroyo is exclusively a flood control facility, not an arroyo. The Appellant indicated that the nearest water body is the Rio Grande River and that the drainage basin is approximately 8.3 square miles beginning at the crest of the Sandia Mountains, and becomes almost entirely developed as it enters the Albuquerque metropolitan area. The Appellant stated that the South Pino Arroyo does not reach the river, but instead empties into the North Diversion Channel (NDC). The Appellant indicated that the South Pino Arroyo is identified on maintenance maps as a flood control facility associated with NPDES permit NMS000101, dated March 1, 2012.

The Appellant described the uppermost 3.8 sq. mi. of the watershed as being characterized by extremely steep slopes within the Cibola National Forest and, thereafter, as entering the city, through low-density development and natural landscaping and as controlled by the Pino Dam. The Appellant stated that regulated flows are then diverted through a golf course and that additional medium to high density residential runoff is added at this location. The Appellant described the South Pino Arroyo as, thereafter, becoming a stable, manmade naturalistic earthen channel for approximately four thousand (4,000) feet before transitioning into a trapezoidal concrete channel, which traverses a mix of commercial, multi-family and single residential land, and light

industrial and commercial properties as it approaches the NDC. The Appellant stated that, from that point, the entire channel is concrete-lined except at the inlet to the NDC.

The Appellant indicated that the South Pino Arroyo has a number of storm drain (underground pipes) connections that drain the identified drainage basin. As part of NPDES permit NMS000101, the Appellant stated that it is required to initiate Best Management Practices (BMP). As an example of such a BMP, the Appellant described a debris structure located at the terminus of the South Pino Arroyo at the NDC, where "first flush" flows are diverted into a storm water pond and then diverted back toward the NDC. The Appellant indicated that the NDC is a concrete diversion channel that collects large stormwater flows from numerous concrete flood control channels throughout the eastern part of the city. The Appellant stated that the NDC was built in 1969 by the Corps in order to address frequent flooding in the valley floor from area arroyos and that flood protection is accomplished by diverting storm runoff north approximately nine miles, allowing it to circumvent the valley floor, and discharging in a safe location. The Appellant indicated that the NDC diverts storm water parallel to the Rio Grande at adverse grade before discharging upstream of Albuquerque into a large stilling basin and that water remains in the stilling basin unless and until sufficient flows exist which enable discharges from the NDC into the Rio Grande River, which occurs approximately ten times a year.

The Appellant stated that flows of less than 100 cfs are diverted into a water quality pond, which has a footprint of one acre, whereas only larger storm events drain directly into the NDC. The Appellant asserted that the AJD incorrectly characterizes the South Pino Arroyo inlet into the NDC. The Appellant asserted that the inlet is on approximately six (6) acres of land, but that the AJD labels the entire inlet as a "Water Quality Facility" (WQF), whereas the Appellant asserted that only one acre is used for water quality. The Appellant indicated that the remaining five acres contain two earthen dikes that were built at the same time as the original NDC with the intent of focusing the then natural run off into the NDC.

The Appellant asserted that there is no flow into or toward the Rio Grande River from the South Pino Arroyo except during storm events of 100 cfs or greater and that, although water is diverted into the NDC during larger storm events, the water remains in the stilling basin and only flows from storms or a series of storms producing a high volume of water that exceeds the stilling basin. The Appellant also asserted that data indicates that the South Pino Arroyo typically flows less than forty hours per year, with only a portion of those flows reaching the Rio Grande River.

The Appellant summarized the AJD as concluding that the entire South Pino Arroyo channel is a non-Relatively Permanent Water (non-RPW) that flows directly or indirectly into a Traditional Navigable Water (TNW), the Rio Grande River. The decision, according to the Appellant, is based on the Ordinary High Water Mark (OHWM) and concludes that the South Pino Arroyo is a natural and manipulated tributary consisting of ephemeral flow, with flow events "common" year-to-year. The appellant asserted that jurisdiction is based on the high volume of floatables that are routinely removed from the

South Pino Arroyo through water quality control features, and the likelihood that at least some floatables are making it past the control features as well as the likelihood that the South Pino Arroyo may convey chemical pollutants from those floatables to the Rio Grande River. The Appellant further stated that the AJD concludes that a significant nexus exists between the South Pino Arroyo and the Rio Grande River because discharges from the South Pino Arroyo into the river are common. Finally, wetland features, including a riparian corridor and wetland fringe are identified in a small portion of the South Pino Arroyo.

The District completed one AJD Form for the South Pino Arroyo.

In Section I.C of the AJD form, the District identified the Rio Grande as the nearest downstream TNW and the nearest waterbody. Section II.B indicates that there are “waters of the U.S.” within Clean Water Act (CWA) jurisdiction, as defined by 33 C.F.R. § 328, in the review area. Section II.B.1.a of the AJD form indicates that the review area contains non-RPWs that flow directly or indirectly into TNWs. Section II.B.1.b indicates that there are 62,720 linear feet by 10’ wide or 13,939 acres of non-wetland waters in the review area and, in Section II.B.1.c, that the limits of jurisdiction were established by an ordinary high water mark (OHWM).

Section III.B.1 indicates that the watershed size is 8.3 square miles, the average annual rainfall is 9.7 inches, that project waters are between 5 and 10 river miles from the TNW, and that project waters are between 2 and 5 aerial miles from the TNW. The Section further indicates that the South Pino Arroyo headwaters begin at the crest of the Sandia Mountains east of Albuquerque. It is further indicated that flows are then conveyed via a natural earthen channel, for about 4.5 miles, to the Pino Dam, on the Eastern edge of the City of Albuquerque. The District indicated that the Pino is concrete lined beginning at the dam outlet and continuing as a concrete lined channel for approximately 6 miles, except for a 2.1 mile earthen channel, in the middle of the city. The Pino discharges flow of less than 100 cfs through a low flow diversion to a trash removal pond and then, to a water quality enhancement basin. From there, water flows into the North diversion channel for 3.3 miles to the NDC settling pond. From the NDC, flows are then conveyed to the Rio Grande.

Section III.B.1.b further describes the tributary as a natural stream, which has been manipulated and concrete lined in some areas to improve drainage conveyance. Section III.B.1.c indicates that the tributary conveys ephemeral flows and that the tributary has an ordinary high water mark (OHWM), demonstrated by: changes in the character of the soil; vegetation matted down, bent, or absent; sediment deposition; the presence of litter and debris; destruction of terrestrial vegetation; the presence of a wrack line; sediment sorting; multiple observed or predicted flow events; and water staining. Section III.B.1.c further indicates that, in the concrete lined reaches, staining is evident from cyclic runoff.

The Corps regulations, at 33 CFR § 328, define “waters of the United States” and prescribe policy, practice and procedures to be used in determining the extent of such jurisdiction.

33 CFR § 328.3 defines waters of the United States as including: all waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide; all interstate waters including interstate wetlands; all other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce, including any such waters, which are or could be used by interstate or foreign travelers for recreational or other purposes, from which fish or shellfish are or could be taken and sold in interstate or foreign commerce; which are used or could be used for industrial purpose by industries in interstate commerce; and tributaries of waters identified and tributaries of waters identified as waters of the United States.

§ 328.3 defines the term ordinary high water mark means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial trial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

33 CFR § 328.4, limits of jurisdiction, indicates that, in non-tidal waters of the United States, in the absence of adjacent wetlands, jurisdiction extends to the ordinary high water mark.

As described above, the District documented that the South Pino Arroyo meets the definition of “waters of the United States” from 33 CFR § 328.3, in that it flows directly or indirectly into a TNW and that the limits of jurisdiction were established by an OHWM. The District demonstrated that the tributary meets the definition of “waters of the United States” from 33 CFR § 328.3 in Section III.B.1.c of its AJD form. Section III.B.1.c of the AJD form documents that the tributary conveys ephemeral flows and that the tributary has an OHWM. The District concluded that an OHWM is present, based on observed changes in the character of the soil; vegetation matted down, bent, or absent; sediment deposition; the presence of litter and debris; destruction of terrestrial vegetation; the presence of a wrack line; sediment sorting; multiple observed or predicted flow events; and water staining. Section III.B.1.c further indicates that, in the concrete lined reaches, staining is evident from cyclic runoff. The District concluded that the drainages on the property are non-RPWs. The joint Corps/EPA guidance, dated 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) requires that Corps districts and EPA regions demonstrate and document in the record that a particular water either fits within a class, which it identifies as not requiring a significant nexus determination, or that the water has a significant nexus with a TNW. As the South Pino Arroyo was not determined to fit within a class which did not require a significant nexus determination, the District was, therefore, required by the Revised Rapanos Guidance to demonstrate that the non-RPW has a significant nexus with a TNW. The District’s significant nexus is described above and, as further discussed in response to reason for appeal 3, below. As indicated in response to reason for appeal 3, below, the District

concluded that the tributary and its associated features decrease the level of contaminants or debris conveyed to the Rio Grande and thus have a beneficial significant physical and chemical nexus to the TNW Rio Grande and that when these features are overloaded the Pino has an adverse physical and chemical nexus to the Rio Grande. The District has, therefore, sufficiently demonstrated compliance with regulation and associated guidance to assert jurisdiction over the South Pino Arroyo, a non-RPW that flow directly or indirectly into TNW.

Therefore, this reason for appeal does not have merit.

**REASON 3:** Flow from the South Pino Arroyo into the Rio Grande River does not have a substantial effect on the physical, chemical, and/or biological integrity of the river.

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

**ACTION:** No action is required.

**DISCUSSION:** In the RFA, the Appellant asserted that there is no significant nexus between the South Pino Storm Water Facility and the Rio Grande River. The Appellant stated that the Albuquerque metropolitan area usually experiences storms during the summer and early fall. The rainy season results in about 5 inches of precipitation and is characterized by storms which are highly unpredictable in duration, location, and intensity. Precipitation occurs in short intervals and lasts no more than a couple hours. Outside of the storm season, Albuquerque receives little precipitation and the flood control facilities typically remain dry for most of the year. The Appellant asserts that, since the South Pino Arroyo is a flood control structure, intended to collect and divert storm water, it does not run or provide significant flow outside of these short events. The Appellant asserts that this is insufficient to meet requirements for the Corps to assert jurisdiction. The Appellant further asserted that gauge data from October 1999 to September 2010, with flow data recorded every 15 minutes, that the South Pino Arroyo averages 24 events that exceed 100 cfs. The Appellant asserts that water from the South Pino Arroyo reaches the Rio Grande River between 8 and 12 times per year, for periods of time of less than a couple hours each.

In Section III.C.1, the AJD form states that the entire South Pino Arroyo channel is a non-RPW that flows directly or indirectly into a TNW, the Rio Grande River. The AJD stated that, while the Appellant had indicated that flows in excess of 100 cfs are very infrequent and provided USGS gauge data over a 10-year period to show how infrequently those flows occurred, peak flow rates provided by USGS show that flows in excess of 100 cfs are common year-to-year. Further, the AJD form indicates that, in 1995, the Waterways Experiment Station found that the 2-year developed flow events at the Pino's confluence with the NDC was 402 CFS. The AJD form concludes that the ponds and the arroyo discharge into the unlined arroyo channel within the WQF frequently enough for the channel to have clear indicators of an OHWM. The AJD form cites the presence of wrack lines at the base of cottonwood trees and willows as evidence more frequent high flows.

Section III.C.1 describes the reach of the Rio Grande into which the Pino discharges as being classified as an impaired water by the New Mexico Environment Department and lists examples of identified contaminants. Section III.C.1 further describes evidence that large amounts of debris accumulate in basins prior to entering the Rio Grande. The District concluded that these features may decrease the level of contaminants or debris conveyed to the Rio Grande and thus have a beneficial significant physical and chemical nexus to the TNW Rio Grande and that when these features are overloaded the Pino has an adverse physical and chemical nexus to the Rio Grande. The District documented that South Pino runoff is the result of stormwater conveyed into the channel. The runoff originates primarily from developed residential, commercial, and industrial areas, as well as a golf course. The District noted that, during site visits, water was discolored to a brownish hue. The District noted that specific pollutants included those found in aerosol cans, petrochemical contaminants, contaminants associated with discarded computer equipment, that *Escherichia coli* (*E. coli*) had been detected upstream, and that a hydraulic fluid spill had been reported in December 2010. The District concluded, based on documentation and on-site observations, that the tributary has the capacity to reduce the amount of pollutants that would otherwise enter the TNW and, thus, established that the South Pino Arroyo has a more than speculative significant nexus with the TNW Rio Grande.

The Revised Rapanos Guidance requires the agencies to ensure that information in the record adequately supports any JD and that Corps districts and EPA regions demonstrate and document in the record that a particular water either fits within a class, which it identifies as not requiring a significant nexus determination, or that the water has a significant nexus with a TNW. Further, the Revised Rapanos Guidance states that the agencies will assert jurisdiction over the following types of waters when they have a significant nexus with a TNW: (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).

As indicated above in response to Reason 2, the District described the South Pino Arroyo as a non-RPW and documented the presence of an OHWM, based on observed changes in the character of the soil; vegetation matted down, bent, or absent; sediment deposition; the presence of litter and debris; destruction of terrestrial vegetation; the presence of a wrack line; sediment sorting; multiple observed or predicted flow events; and water staining. The District included documentation of flow from the South Pino Arroyo to the nearest TNW, the Rio Grande. As detailed above, the District included sufficient evidence that the South Pino Arroyo has a significant nexus with the Rio Grande. Finally, while the Appellant asserted that the normal factors utilized in determining the OHWM would not be applicable to the South Pino Arroyo, there is nothing in the administrative record that supports a conclusion that the factors utilized by the District in determining the OHWM would not be applicable or that the OHWM should be determined to be other than as characterized by the District. The record does not support

a conclusion that evidence of the OHWM was based on such extraordinary events that it should not be considered.

Therefore, this reason for appeal does not have merit.

**REASON 4:** Material facts presented in the submitted JD form were omitted from the evaluation of the South Pino Arroyo storm water facility and should have been included in the basis for the decision.

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

**ACTION:** No action is required.

**DISCUSSION:** The appellant provided a letter dated April 18, 2012 to the District which asserted that the South Pino Arroyo should not be jurisdictional. The Appellant completed and provided its own AJD form with the letter. The Appellant asserted that the District omitted information contained in that AJD form from the evaluation of the South Pino Arroyo and from the Districts' jurisdictional determination.

The April 18, 2012, letter and supporting AJD form primarily contain the Appellant's conclusions. The Appellant's AJD form does not contain information contrary to that used by the district in reaching its conclusion as to the jurisdictional status of the South Pino Arroyo.

The Appellant concludes that water reaching the North Diversion Channel may reach the Rio Grande, but only under limited circumstances. The Appellant asserts that discharge from the South Pino Arroyo alone is insufficient to cause a discharge into the Rio Grande and only reaches the Rio Grande as part of a mixture of stormwater collected from the numerous channels in Albuquerque, approximately 8-12 times a year. The Appellant states that the South Pino has the ability to carry pollutants, but pollutant controls have been incorporated to reduce the number of pollutants reaching the arroyo.

While the appellant offers a conclusion is contrary to the District's, on the ability of pollutants in the South Pino Arroyo to have an effect on the Rio Grande River, the information with which the Appellant supports its conclusions is not substantially different than that relied upon by the District. The Revised Rapanos guidance states that the agencies will assert jurisdiction over non-navigable tributaries of TNWs where the tributary typically flows year-round or have continuous flow at least seasonally without the need to demonstrate that there is a significant nexus with a downstream TNW. The Revised Rapanos guidance further states that "relatively permanent" waters do not include ephemeral tributaries which flow only in response to precipitation and intermittent streams which do not typically flow year-round or have continuous flow at least seasonally. The District correctly classified the South Pino Arroyo as a non-RPW, with ephemeral flow. The Revised Rapanos guidance refers to ephemeral and intermittent waters as non-navigable tributaries that are not relatively permanent, or non-RPWs, and requires that the agencies assert jurisdiction over non-RPWs when they have

a significant nexus to a TNW. The significant nexus analysis requirement was established to evaluate those waters that cannot be presumed jurisdictional, based upon being in the category into which they fit, such as TNWs and RPWs. Therefore, any tributary, which cannot be demonstrated to be either a TNW or an RPW, is jurisdictional only if it can be demonstrated that it has a significant nexus with a TNW. There is no minimum flow requirement necessary to classify a tributary as a non-RPW. The District was, therefore correct in classifying a tributary with flow to the Rio Grande 8-12 times per year as a non-RPW. The District documented the presence of an OHWM as detailed in response to reason for appeal 2, above, and completed a significant nexus analysis as detailed in response to reasons for appeal 2 and 3, above. The District appropriately considered the information in the AR provided by the appellant in determining that the South Pino is jurisdictional under Section 404 of the CWA. There is no indication of material facts having been omitted from the District's evaluation.

Therefore, this reason for appeal does not have merit.

**REASON 5:** Incorrect data was used in forming the basis for the decision.

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

**ACTION:** No action is required.

**DISCUSSION:** While the appellant offers different conclusions than the District in response to the data, there is no support in the AR for a conclusion that the data relied upon by the District is incorrect. As discussed throughout this decision, the District appropriately considered the information in the AR provided by the appellant in determining that the South Pino is jurisdictional under Section 404 of the CWA. In some cases, however, the Appellant's assertions are simply incorrect. For instance, the Appellant incorrectly asserted that riparian corridors and wetland fringes are only associated with non-ephemeral waters and that the District misunderstands these categories. That is not the case and such characteristics are not uncommon along ephemeral waters.

Therefore, this reason for appeal does not have merit.

**REASON 6:** The information forming the basis of the AJD for the Facility and the South Pino Arroyo storm water quality pond is an overstatement and is not representative of the conditions of the Facility.

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

**ACTION:** No action is required.

**DISCUSSION:** As discussed above, the administrative record supports the District's conclusions. The District made its decision, using the best available data. There is nothing in the AR to support the Appellant's assertions that the information used by the

District to support its findings on the AJD are not representative of the conditions and functions that currently exist in the arroyo. As indicated above, in the discussion under reason for appeal 2, the Appellant asserted that the inlet is on approximately six (6) acres of land, but that the AJD labels the entire inlet as a WQF, whereas the Appellant asserted that only one acre is used for water quality. The Appellant indicated that the remaining five acres contain two earthen dikes that were built at the same time as the original NDC with the intent of focusing the then natural run off into the NDC. However, as the District has documented the connections between the South Pino Arroyo and the nearest downstream TNW, the Rio Grande, the presence of an OHWM, and a significant nexus with the TNW, the distinction would not affect the jurisdictional determination for the South Pino Arroyo. Also, while the Appellant has pointed out that three concrete “debris drying bins”, which the District noted as an indication of the extent of garbage and contaminant sources that could affect the South Pino Arroyo, are used for materials from other sources, it is clear that the District’s jurisdictional determination and significant nexus analysis described above are not dependent on the quantity of materials in these debris drying bins.

Therefore, this reason for appeal does not have merit.

**REASON 7:** The criteria forming the basis of the AJD are improper.

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

**ACTION:** No action is required.

**DISCUSSION:** The criteria forming the basis of the approved jurisdictional determination are discussed throughout this decision. As detailed in the responses to previous reasons for appeal, the district correctly applied the appropriate criteria forming the basis of the AJD.

Therefore, this reason for appeal does not have merit.

**REASON 8:** The chemical characterizations used to determine a significant nexus exists between the storm water facility and the river is insubstantial and speculative in nature.

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

**ACTION:** No action is required.

**DISCUSSION:** In its RFA, the Appellant states that it is aware of the debris and floatable pollutants which enter the South Pino Arroyo from various point sources. The Appellant further indicated that the South Pino Arroyo accepts water from various locations throughout the watershed, which the Appellant indicated it is aware may contain contaminants. The Appellant further stated that, in compliance with its NPDES permit, it has implemented controls to collect debris in the South Pino Arroyo and prevent it from

being carried downstream. The Appellant further indicated that, as stormwater reaches the NDC ponding area, it is again subject to water quality treatment measures.

As described above, by both the District and the Appellant, The South Pino Arroyo, in combination with its various water quality features, result in a decrease in the level of contaminants or debris conveyed to the Rio Grande and thus have a beneficial significant physical and chemical nexus to the Rio Grande. The Revised Rapanos Guidance directs the agencies to consider the functions performed by the tributary, together with functions performed by any adjacent wetlands. One such factor is the extent to which the tributary and adjacent wetlands have the capacity to carry pollutants (e.g., petroleum wastes, toxic wastes, sediment) or flood waters to TNWs. Another factor is the extent to which the tributary and adjacent wetlands have the capacity to reduce the amount of pollutants or flood waters that would otherwise enter TNWs. In this case, the District documented the extent to which the tributary has the capacity to reduce the amount of pollutants or flood waters that would otherwise enter TNW. The District's conclusion is, therefore, consistent with the Revised Rapanos Guidance and its documentation and on-site observations are sufficient to establish that the South Pino Arroyo has a more than speculative significant nexus with the Rio Grande.

Therefore, this reason for appeal does not have merit.

**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), and discussions at the appeal meeting

**Conclusion:** I, therefore, conclude that these reasons for appeal do not have merit. The District's determination was not arbitrary, capricious or an abuse of discretion, and was not plainly contrary to applicable law or policy. This concludes the Administrative Appeal Process.



Thomas J. Cavanaugh  
Administrative Appeal Review Officer