

**ADMINISTRATIVE APPEAL DECISION
CLEAN WATER ACT
DE YOUNG PROPERTIES, RIDGEVIEW DEVELOPMENT
CLOVIS, CALIFORNIA
SACRAMENTO DISTRICT
FILE NUMBER SPK-2018-00655**

DATE: December 13, 2019

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

Appellant Representative: Ryan De Young, President, De Young Properties (Appellant)

District Representative: Will Ness, U.S. Army Corps of Engineers, Sacramento District (District)

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

Receipt of Request for Appeal: August 9, 2019

Appeal Meeting and Site Visit Date: October 22, 2019

Summary of Decision: Reasons for appeal 1, 3, and 4 of this Clean Water Act (CWA) jurisdictional determination have merit. The District must reconsider its determination that the Alluvial Drain and the three nearby ponds are waters of the United States. In doing so, the District must document its consideration of the Appellant's assertion that all of these features were excavated in uplands and, therefore, not waters of the United States.

Background Information: The approximately 15.5-acre property (Property) is located on Locan Avenue, in Clovis, Fresno County, California, Latitude 36.856878°, Longitude -119.659062°.

For purposes of evaluation during the CWA jurisdictional determination, the District evaluated the site using the January 11, 2019, *Ridgeview Residential Development, Clovis, California Aquatic Resources Delineation Map* drawing, prepared by Quad Knopf, Inc.; the 1987, Corps of Engineers Wetlands Delineation Manual (87 Manual); the Code of Federal Regulations (CFR) definitions of jurisdictional waters; and supporting guidance.

The District's review included a field visit to the site on January 9, 2019. On June 18, 2019, the District issued its CWA jurisdictional determination for the Property at issue. The District concluded that the site contained approximately 0.663 acres of waters of the United States, including wetlands, within the survey area. The District determined that these waters are regulated under Section 404 of the Clean Water Act, as they are a tributary, or adjacent to a

tributary, of the San Joaquin River. The District's basis for its determination was detailed in its "Interim Approved Jurisdictional Determination Form" (AJD Form), dated June 18, 2019.

The Appellant submitted a Request for Appeal (RFA) on August 9, 2019. The Appellant disagreed with the District's conclusion that the 0.663 acres on the property are waters, subject to jurisdiction under Section 404 of the Clean Water Act. The Appellant asserted that the drainage on the property is a feature with ephemeral flow, which is not a relocated tributary. The Appellant also asserted that the drainage on the property was constructed, in dry land, as a stormwater control feature and that the ponds are artificially constructed ponds, created in dry land.

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

Information Received and its Disposal during the Appeal Review: The administrative appeal was evaluated based on the District's administrative record, the Appellant's Request for Appeal, and discussions at the appeal meeting with the Appellant and the District.

REASON 1: The Alluvial Drain is a non-jurisdictional ditch.

FINDING: This reason for appeal has merit.

ACTION: The District must reconsider its conclusion that the Alluvial Drain is a "tributary", under 33 CFR § 328.3(a)(5), rather than a ditch with ephemeral flow, which is not a relocated tributary.

DISCUSSION: In the RFA, the Appellant asserted that the Alluvial Drain is a non-jurisdictional ditch. The Appellant cited 33 CFR § 328.3(c)(3)(iii), as stating that "tributary" does not include "ditches" and that "ditches" are features with "ephemeral flow that are not a relocated tributary. The Appellant noted that the District's AJD Form characterized the Alluvial Drain as having ephemeral flow. The Appellant stated that the March 14, 2019, letter from their consultant, QK, had asserted that the feature is not a relocated tributary, but was artificially constructed.

In its June 18, 2019, jurisdictional determination for the Property, the District concluded that the approximately 0.048 acre of the Alluvial Drain on the Property is regulated under Section 404 of the Clean Water Act as it is a tributary, or adjacent to a tributary, of the San Joaquin River.

The District completed one AJD Form for the Property. In Section III of the AJD Form, "Summary Of Findings", under part B, the District checked the block, indicating that the review area contained tributaries, as defined in 33 CFR § 328.3, of waters identified in paragraphs (a)(1)-(a)(3) of 33 CFR § 328.3. In Table 5, of the AJD Form, the District described the flow path of the Alluvial Drain, from the Property, to the San Joaquin River, a Traditionally Navigable Water (TNW). The District concluded that the Alluvial Drain is jurisdictional, as it found it to be a "tributary", under 33 CFR § 328.3(a)(5).

33 CFR § 328.3(a)(5) states that all tributaries, as defined in paragraph (c)(3) of that section, of waters identified in paragraphs (a)(1) through (3) of this section are waters of the United States. Paragraph (c)(3), among other things, defines and describes characteristics of tributaries. 33 CFR § 328(b)(3)(i) indicates that ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary are not “waters of the United States”.

The March 14, 2019, letter from the Appellant’s consultant, QK, stated that the alluvial drain has been present in some form or another for several decades and appears to be a ditch constructed for the purposes of draining uplands. QK’s letter further stated that there were no apparent aquatic features on or adjacent to the Property, prior to the construction of the Alluvial Drain.

There is no indication in the administrative record that the District evaluated the assertion, by the Appellant’s consultant, that the Alluvial Drain is an ephemeral drainage that was excavated in uplands.

Therefore, the District must reconsider its jurisdictional determination. In doing so, it must document its evaluation, as to whether the Alluvial Drain is a ditch, with ephemeral flow, that is not a relocated tributary or excavated in a tributary, in making its determination, as to whether the Alluvial Drain is a “waters of the United States”.

REASON 2: The alluvial drain cannot be jurisdictional because its flow is ephemeral.

FINDING: This reason for appeal does not have merit.

ACTION: No action is required.

DISCUSSION: The Appellant cited the federal district court for the District of Oregon, in *Oregon Cattlemen’s Association v. EPA* (No. 3:19-cv-000564), as granting an injunction against the 2015 WOTUS Rule’s treatment of any ephemeral waters as tributaries, because no ephemeral waters would be jurisdictional under Justice Kennedy’s plurality opinion in *Rapanos*. The Appellant asserted therefore, that it would be illegal for the Corps to assert jurisdiction over a water it admits is ephemeral. The Appellant clarified, during the appeal meeting, that this reason for appeal is an objection to the 2015 rule’s inclusion of ephemeral features, as waters of the United States, rather than an objection to any decision made by the District.

The preamble to the 2015 rule states that the rule includes ephemeral streams that meet the definition of tributary as “waters of the United States”, because the agencies determined that such streams provide important functions for downstream waters and, in combination with other covered tributaries in a watershed, significantly affect the chemical, physical, and biological integrity of traditional navigable waters, interstate waters, and the territorial seas.

As stated above, 33 CFR § 328.3(a)(5) states that all tributaries, as defined in paragraph (c)(3) of that section, of waters identified in paragraphs (a)(1) through (3) of that section are waters of the United States. Paragraph (c)(3), among other things, defines and describes characteristics of tributaries. 33 CFR 328(b)(3)(i) indicates that ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary are not “waters of the United States”.

It is clear that, under the 2015 rule, the District would be expected to determine ephemeral drainages that meet the definition of tributary, that are not otherwise excluded from jurisdiction, are “waters of the United States”. Therefore, this reason for appeal does not have merit, as it is an objection to the regulation, itself. Objections to Corps regulations cannot be resolved through the administrative appeal process. Nor does this ruling by the District Court for the District of Oregon affect implementation of the 2015 rule in California.

REASON 3: The alluvial drain is a non-jurisdictional stormwater control feature created in dry land.

FINDING: This reason for appeal has merit.

ACTION: The District must evaluate the Appellant’s assertion that the Alluvial Drain is a stormwater control features constructed to convey, treat, or store stormwater, which was created in dry land.

DISCUSSION: In the RFA, the Appellant asserted that the Alluvial Drain is a non-jurisdictional “stormwater control feature”, constructed to convey, treat, or store stormwater, created in dry land”. The Appellant cites the March 14, 2019, letter from its consultant, QK, as concluding that the Alluvial Drain was constructed in uplands to drain storm water.

The March 14, 2019, letter from the Appellant’s consultant, QK, stated that the alluvial drain has been present in some form or another for several decades and appears to be a ditch constructed for the purposes of draining uplands. QK’s letter further stated that there were no apparent aquatic features on or adjacent to the Property, prior to the construction of the Alluvial Drain.

33 CFR 328.3(b)(6) states that stormwater control features constructed to convey, treat, or store stormwater that are created in dry land are not “waters of the United States”.

There is no indication in the administrative record that the District evaluated the assertion, by the Appellant’s consultant, March 14, 2019 letter, that the Alluvial Drain was a ditch constructed for the purposes of draining uplands.

Given that the March 14, 2019, letter from the Appellant’s consultant had asserted that the Alluvial Drain was constructed in uplands, to drain uplands, the district should have evaluated whether the Alluvial Drain was excluded from jurisdiction. In doing so, the District should have considered the history of the Alluvial Drain, including whether it had been utilized as a stormwater control feature.

Therefore, the District must reconsider its jurisdictional determination. In doing so, it must document its evaluation of whether the Alluvial Drain is excluded from jurisdiction as a stormwater control features constructed to convey, treat, or store stormwater that was created in dry land, in making its determination, as to whether the Alluvial Drain is a water of the United States.

REASON 4: Ponds 1, 2, and 3 are non-jurisdictional ponds created in dry land.

FINDING: This reason for appeal has merit.

ACTION: The District must reconsider its jurisdictional determination. In doing so, it must document its evaluation of whether Ponds 1, 2, and 3 are artificially constructed lakes or ponds created in dry land, artificial reflecting or swimming pools created in dry land, or small ornamental waters created in dry land.

DISCUSSION: In the RFA, the Appellant asserted that Ponds 1, 2, and 3 are non-jurisdictional under the various provisions of 33 CFR § 328.3(b)(4). The Appellant asserted that they were each artificially constructed lakes or ponds created in dry land, artificial reflecting or swimming pools created in dry land, or small ornamental waters created in dry land, within the meaning of the provisions of that subsection.

The March 14, 2019, letter from the Appellant's consultant, QK, described each of the 3 ponds as manmade and specifically describes Pond 1 as having been constructed where historic aerial imagery did not show an aquatic feature to be present. The letter further stated that Ponds 1, 2, and 3 were not represented in the National Hydrography Database (NHD) or the National Wetlands Inventory (NWI).

The District found Ponds 1, 2, and 3 to be jurisdictional because it found them to be adjacent to a water, under 33 CFR § 328.3(a)(6). In Section 3.B., of the AJD Form, the District checked the block, indicating that the ponds are adjacent to a water identified in paragraphs (a)(1)-(a)(5) of 33 CFR § 328.3, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters. The District subsequently checked the block indicating that the ponds are adjacent, because they are "neighboring", as they are located within the 100-year floodplain of a water identified in paragraphs (a)(1)-(a)(5) of 33 CFR § 328.3 and not more than 1,500 feet of the OHWM of such water.

In Table 6, of the District's AJD Form, the District stated that the limits of Ponds 1, 2, and 3 were determined by OHWM indicators. The District further stated that, according to the FEMA flood map, Ponds 1, 2, and 3 are within the 100-year flood zone, within 100, 400, and 500 feet, respectively, of the Alluvial Drain.

There is, however, no indication in the administrative record that the District evaluated the assertion, by the Appellant's consultant, that Ponds 1, 2, and 3 were excavated in uplands.

Therefore, the District must reconsider its determination that Ponds 1, 2, and 3 are waters of the United States. In doing so, it must document its evaluation of whether Ponds 1, 2, and 3 are artificially constructed lakes or ponds created in dry land, artificial reflecting or swimming pools created in dry land, or small ornamental waters created in dry land, within the meaning of the provisions of 33 CFR 328.3(b)(4), in making its determination, as to whether the Alluvial Drain is a "waters of the United States".

CONCLUSION:

I conclude that the Appellant's reasons for appeal 1, 3, and 4 have merit. The District must reconsider its determination that the Alluvial Drain and the three nearby ponds are waters of the United States. In doing so, the District must document its consideration of the Appellant's assertion that all of these features were excavated in uplands, as described above, and, therefore, not waters of the United States. This concludes the Administrative Appeal Process.



Thomas J. Cavanaugh
Administrative Appeal Review Officer