

**ADMINISTRATIVE APPEAL DECISION  
CLEAN WATER ACT  
MISSION GORGE QUARRY MINING POND  
SAN DIEGO COUNTY, CALIFORNIA  
LOS ANGELES DISTRICT  
FILE NUMBER SPL-2010-00223**

**DATE: August 2, 2012**

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

**Appellant:** Arnold Veldkamp, Superior Ready Mix Concrete (Appellant)

**District Representative:** Peggy Bartels, U.S. Army Corps of Engineers, Los Angeles District (District)

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

**Receipt of Request for Appeal:** December 27, 2011

**Appeal Meeting and Site Visit Date:** April 25, 2012

**Summary of Decision:** This Clean Water Act (CWA) jurisdictional determination is remanded to the District for further evaluation and consideration of information provided by the Appellant. The District must further evaluate and consider its decision. In its final decision, the District must evaluate whether there is a significant nexus between the Mining Pond on the property and the nearest downstream traditional navigable water (TNW). The District must document its consideration of information provided by the Appellant and any other data and observations that support its conclusions as required by 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) in its analysis of whether the Mission Gorge Quarry mining pond (Mining Pond) on the property has more than a speculative or insubstantial effect on the chemical, physical, and or biological integrity of the nearest downstream TNW. The District must correct or explain inconsistencies between information in the AJD forms and information in the AR, which was supplied by the Appellant. As the San Diego River is referred to as a TNW in at least one instance in the administrative record (AR), the District must, in its final decision, clearly and consistently name the nearest TNW. The District must clearly document its evaluation of whether the pond was abandoned or, if not, whether a case-specific finding of jurisdiction is otherwise appropriate. The District must also document its consideration of how the functions, interactions, and characteristics of the San Diego River and the Mining Pond support its conclusion as to whether the wetlands in the Mining Pond are adjacent to the San Diego River.

**Background Information:** The Mining Pond is located on an approximately 420-acre property, in the Grantville area of the City of San Diego, San Diego County, California, at Latitude 32.80889 North, Longitude -117.866111 West. The Mining Pond is located approximately 205 feet from the San Diego River and 8.5 aerial miles (11.5 river miles) from the Pacific Ocean.

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. On February 16, 2010, the Appellant's attorney submitted a request for a jurisdictional determination for the Mining Pond. The Appellant's consultant subsequently provided a delineation report for the Mining Pond, dated February 17, 2010. The District's review included several field visits between April 28, 2010 and August 10, 2011.

Following the June 21 2010, site visit, the Appellant's consultant provided the District with its August 5, 2010, revised delineation report for the Mining Pond, incorporating the District's requested changes. The August 5, 2010, submittal concluded that, within the 13.85 acre survey area, there are 10.48 acres of waters, including 3.60 acres of wetlands, adjacent to, but isolated from, the San Diego River, which do not appear to have a significant nexus with the nearest downstream TNW.

On October 27, 2011, the District issued its CWA jurisdictional determination for the Property. The District concluded that the site contained 10.29 acres of waters of the United States, consisting of 6.66 acres of open waters and 3.63 acres of wetlands, within CWA jurisdiction. The Appellant submitted a Request for Appeal (RFA) on December 27, 2011. The Appellant disagreed with the District's determination that the Mining Pond is jurisdictional and appealed that determination, citing the reasons for appeal addressed in this appeal decision.

#### **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 AR, the Appellant's Request for Appeal, and discussions at the appeal meeting with the Appellant and the District. The Appellant provided a number of printed emails with attachments during the appeal meeting which they believed to be part of the AR. The District, however, indicated that it did not use those documents in making its decision. Those documents were not considered during the evaluation of the appeal.

**REASON 1:** The District's determination relies on incorrect data and insufficient evidence.

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

**ACTION:** The District must further evaluate and consider its decision. In its final decision, the District must document its analysis of available data to support its final decision as to the jurisdictional status of the Mining Pond. The District must, also, resolve or explain the discrepancies between the Appellant's delineation report and other submitted information and the District's AJD forms. In its final decision, the District must evaluate whether there is a significant nexus between the mining pond on the property and the nearest downstream TNW. In doing so, the District must document its consideration of the relationship of the mining pond and the nearest downstream TNW, as opposed to the relationship between the mining pond and the San Diego River. As required by the Revised Rapanos Guidance, the District must clearly document its consideration of information provided by the Appellant and other data and observations that support its conclusions as to whether the Mining Pond has a more than a speculative or insubstantial effect on the chemical, physical, and or biological integrity of the nearest downstream TNW.

**DISCUSSION:** In the RFA, the Appellant indicated that the District has not met its burden of showing that the Mining Pond Area is subject to jurisdiction. The Appellant asserted that the District relied on incorrect data, that the District's statements are internally inconsistent, and that the District failed to properly complete the AJD forms. The Appellant suggested that errors in the AJD forms may have resulted from the District starting with an AJD form filled out for another project and failing to update the AJD form to reflect the correct information for the current project. In addition, the Appellant asserted the District's Determination is arbitrary and capricious because it failed to provide a reasoned explanation why the Corps reached its conclusion, ignored pertinent information in the AR regarding the Property, and otherwise has failed to sufficiently document both the factors contributing to its determination and its application of Corps' regulation to these factors as required by 33 C.F.R. §§ 331.5(a)(2) and 331.9(b). The Appellant suggested that the District's actions, errors, and omissions were particularly egregious because of how long it took to make the decision and the extensive information that the Corps asked for and that the Appellant provided.

The District completed two AJD Forms for the waters on the property. One was done for the San Diego River and directly abutting wetlands (AJD 1). The second was done for wetlands which were adjacent to, but not abutting, the San Diego River (AJD 2).

In Section I.C of AJD 2, the District identified the Pacific Ocean as the nearest downstream TNW. Section I.C of AJD 2 also refers to the San Diego River as a TNW. Section II.B.1.a of AJD 2 indicates that the review area contains wetlands adjacent to, but not directly abutting RPWs that flow directly or indirectly into TNWs. Section II.B.1.b indicates that there are 10.29 acres of waters, consisting of 6.66 acres of open water and 3.63 acres of wetlands in the review area.

Section III.B.2.i.a indicates that the adjacent wetlands within the review area parallel the north boundary of the San Diego River for approximately 900 feet and that the distance between the river's edge and the adjacent wetlands edge varies between approximately

140 and 250 feet. The District also stated in this section that these wetlands play a role in the wetland habitat and biological functions of the lower San Diego River's watershed. The District indicated that the adjacent wetlands provide biological functions such as wildlife corridor and habitat for sheltering, breeding, and foraging. The District stated that these wetlands form a portion of a west to east wildlife corridor in this watershed, composed of freshwater marshes and marine tidal marshes typically used by great blue heron and egret and that the adjacent wetlands comprise approximately 0.006 percent of all National Wetland Index (NWI) in the Lower San Diego Watershed. In Section III.B.2.i.b, the District stated that flows are conveyed between the San Diego River and the adjacent wetlands intermittently. The District indicates that there is only episodic flow from the San Diego River to the adjacent wetlands, but that there is water in the adjacent wetlands year round. The District estimated that, under existing conditions, the 7 to 10-year flow event flows from the San Diego River, into the abutting wetlands, over the road and into the adjacent wetlands. During the 100-year or greater event, flow exits the adjacent wetlands and returns to the San Diego River. Flow events occur 2-15 times a year. The District concluded that, but for the part man-made, part natural formed berm between the maintained road and the adjacent wetlands, the 7-30 year flows would flow from the San Diego River into the adjacent wetlands and back into the San Diego River.

In Section III.B.2.i.c indicates that those 7-30 year flows would return to the San Diego River and then flow downstream to the Pacific Ocean. In Section III.B.2.i.d, the District indicates that the TNW is 11.55 river and 8.55 aerial miles from the TNW. Section III.B.3 of AJD 2 describes transfer of chemicals and nutrients between the adjacent wetland and the San Diego River, the conveyance of water from impaired upstream waters, and some of the various activities that contribute to the degradation of the San Diego River system. Section III.C of AJD 2 contains the District's significant nexus determination. This section contains information similar to that contained in Section III.B.2.i.a of AJD 2 and lists the functions the adjacent wetlands provide the San Diego River Watershed.

In response to questions at the appeal conference, the Appellant asserted that the District included information, acreages, and data in the AR that are inconsistent with what had been provided to the District by the Appellant and its consultants and that, in section IV.A of AJD 2, the District indicated that information had been provided by an applicant and consultant who are not related to the project. The Appellant asserted that the AR contains insufficient evidence to support the District's determination. The Appellant believes that the District's determination can't be supported by referring to the Appellant's data and suggests that the District would have had to separately generate or obtain data to support a conclusion that the Mining Pond is jurisdictional.

In response to questions asked at the appeal conference, the District described its documentation of the physical and chemical relationship between the mining pond and the San Diego River, an RPW, and that the San Diego River ultimately flows to the Pacific Ocean, a TNW. The District responded that the Corps is directed to conduct a fact-specific analysis to determine whether wetlands have a significant nexus with a

TNW, including wetlands adjacent to, but that do not directly abut a relatively permanent non-navigable tributary.

The 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.

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 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).

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. 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.

The Revised Rapanos Guidance requires that, in considering how to apply the significant nexus standard, the agencies must focus 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 TNWs. The ecological relationship between tributaries and their adjacent wetlands is well documented in 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. Tributaries and their adjacent wetlands provide habitat (e.g., feeding, nesting, spawning, or rearing young) for many aquatic species that also live in traditional navigable waters.

Principal considerations when evaluating significant nexus include the volume, duration, and frequency of the flow of water in the tributary and the proximity of the tributary to traditional navigable water. In addition to any available hydrologic information (e.g., gauge data, flood predictions, historic records of water flow, statistical data, personal observations/records, etc.), the agencies may reasonably consider certain physical characteristics of the tributary to characterize its flow, and thus help to inform the determination of whether or not a significant nexus is present between the tributary and downstream traditional navigable waters. Physical indicators of flow may include the presence and characteristics of a reliable ordinary high water mark (OHWM) with a channel defined by bed and banks. Other physical indicators of flow may include helving, wracking, water staining, sediment sorting, and scour. Consideration will also be given to certain relevant contextual factors that directly influence the hydrology of tributaries including the size of the tributary's watershed, average annual rainfall, average annual winter snow pack, slope, and channel dimensions.

In addition, the agencies will consider other relevant factors, including the functions performed by the tributary together with the 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 traditional navigable waters, or to reduce the amount of pollutants or flood waters that would otherwise enter traditional navigable waters. The agencies will also evaluate ecological functions performed by the tributary and any adjacent wetlands which affect downstream traditional navigable waters, such as the capacity to transfer nutrients and organic carbon vital to support downstream food webs (e.g., macroinvertebrates present in headwater streams convert carbon in leaf litter making it available to species downstream), habitat services such as providing spawning areas for recreationally or commercially important species in downstream waters, and the extent to which the tributary and adjacent wetlands perform functions related to maintenance of downstream water quality such as sediment trapping. After assessing the flow characteristics and functions of the tributary and its adjacent wetlands, the agencies will evaluate whether the tributary and its adjacent wetlands are likely to have an effect that is more than speculative or insubstantial on the chemical, physical, and biological integrity of a traditional navigable water. As the distance from the tributary to the navigable water increases, it will become increasingly important to document whether the tributary and its adjacent wetlands have a significant nexus rather than a speculative or insubstantial nexus

with a traditional navigable water. Accordingly, Corps districts and EPA regions shall document in the AR the available information regarding whether a tributary and its adjacent wetlands have a significant nexus with a traditional navigable water, including the physical indicators of flow in a particular case and available information regarding the functions of the tributary and any adjacent wetlands. The agencies will explain their basis for concluding whether or not the tributary and its adjacent wetlands, when considered together, have a more than speculative or insubstantial effect on the chemical, physical, and biological integrity of a traditional navigable water.

The agencies will also decide CWA jurisdiction over other non-navigable tributaries and over other wetlands adjacent to non-navigable tributaries based on a fact-specific analysis to determine whether they have a significant nexus with traditional navigable waters.

Corps districts and EPA regions will ensure that the information in the record adequately supports any jurisdictional determination. The record shall, to the maximum extent practicable, explain the rationale for the determination, disclose the data and information relied upon, and, if applicable, explain what data or information received greater or lesser weight, and what professional judgment or assumptions were used in reaching the determination. The Corps districts and EPA regions will also 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 districts 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. All pertinent documentation and analyses for a given jurisdictional determination (including the revised form) shall be adequately reflected in the record and clearly demonstrate the basis for asserting or declining CWA jurisdiction. Maps, aerial photography, soil surveys, watershed studies, local development plans, literature citations, and references from studies pertinent to the parameters being reviewed are examples of information that will assist staff in completing accurate jurisdictional determinations. The level of documentation may vary among projects. For example, jurisdictional determinations for complex projects may require additional documentation by the project manager.

The District concluded that the drainages on the property are wetlands adjacent to, but not directly abutting, a RPW. The District is required by the Revised Rapanos Guidance to complete a significant nexus evaluation for wetlands that are adjacent, but not abutting. The District is also required by the Revised Rapanos Guidance to demonstrate that these wetlands have a significant nexus with a TNW.

While the District has described physical and chemical relationships between the mining pond and the San Diego River, an RPW, it is unclear from the AR what data and observations led the District to the conclusions that those interactions were occurring or how they support the existence of a significant nexus between the Mining Pond and the Pacific Ocean. Given that there are unexplained inconsistencies between information in

the AJD forms and information supplied by the Appellant, which is included in the AR, it is unclear if the District relied on the Appellant's data in generating data and acreages. Additionally, the District stated that the San Diego River flows to the Pacific Ocean, which is predominantly referred to as the nearest TNW throughout the AR. The San Diego River is referred to as a TNW in at least one instance. Further, the Corps is directed to conduct a fact-specific analysis to determine whether wetlands adjacent to, but not directly abutting an RPW have a significant nexus with a TNW. There is, however, no clear statement contained in the AR that there is a significant nexus between the mining pond and the Pacific Ocean contained within the District's analysis in AJD 2.

**REASON 2:** The District's conclusion that the Mining Pond is not exempt from jurisdiction is contrary to Corps legal and regulatory requirements.

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

**ACTION:** The District must further evaluate and consider its decision. In its final decision, the District must clearly document its evaluation of whether the Mining Pond is abandoned. That documentation must explain the District's consideration of whether the pond was abandoned or whether a case-specific finding of jurisdiction is otherwise appropriate. In considering whether or not the Mining Pond is abandoned, the District must document its consideration of the apparent on-going use of the Mining Pond for water storage and supply for the mining operation. If, after reconsideration, the District determines that the Mining Pond is not abandoned, it must then document its consideration of whether a case-specific finding of jurisdiction is appropriate.

**DISCUSSION:** In the RFA, the Appellant indicated that the District arbitrarily and capriciously failed to provide a reasoned analysis or substantial evidence that improperly applied Corps regulations, guidance, including the 1999 Standard Operating Procedures (SOP), and case law in concluding that open waters and abutting wetlands in the Mining Pond Area are jurisdictional. The Appellant asserted that Corps regulations state that Corps generally considers waters that are artificially created in dry land and used for ongoing commercial activity to be non-jurisdictional. The District provided no evidence demonstrating why this general rule should not apply to the Mining Pond Area. The Appellant asserted that the evidence in the AR demonstrates that the mining pond is not abandoned and is exempt from Corps jurisdiction because it was excavated out of uplands for the purpose of enabling quarrying operations on the property and that the District failed to apply the relevant regulations, guidelines, and case law.

The Appellant asserted that there is no indication that the District considered the preamble to the 1986 regulations that expressed the Corps power to assert jurisdiction over artificially created waters unless they are currently being used for commercial purposes. The Appellant asserted that the facts establish that the Mining Pond was constructed in uplands, is under a management plan, and has been continuously used as a water supply and water storage area for the mining and excavation operations of the Mission Gorge Quarry.



In Section III.C.3. of AJD 2, the District referred to the *Northern California River Watch v. City of Healdsburg* (Healdsburg) and indicated among the findings that stopping excavation operations in a mining pond means that it is abandoned.

In response to questions at the appeal conference, the Appellant asserted that the Mining Pond had not been abandoned and is exempt from jurisdiction because it was excavated in uplands for the purpose of enabling quarrying activities on the property. The Appellant asserted that the District's conclusion is based on erroneous facts and is not supported by any evidence found in the AR. The Appellant asserted that the District failed to apply the correct regulations, guidelines, and case law to the Mining Pond, including the preamble of the 1986 regulations and the 1999 SOP. The Appellant stated that the Mining Pond was constructed in uplands, is covered by a master reclamation plan, and has been continuously used as a water supply and water storage area for mining and excavation operations.

In response to questions asked at the appeal conference, the District indicated that the mining pond is identified as man-made waters in AJD 2 and that the Corps reserves the right on a case-by-case basis to determine that a particular waterbody is a water of the U.S. The District asserted that the Appellant's February 16, 2010, letter indicating an intention to fill the pond as part of its planned mixed-use River-Park Development. The District also stated that neither sand, nor gravel, had been excavated from the mining pond since 1991 and that currently water removed from the pond is used to process aggregate and to abate dust from the mining road. The District asserted that plans to convert the Mining Pond during reclamation for development trigger the recapture provision described in 404(f)(2), 33 CFR 323.4(c), and RGL-87-07. The District also asserted that the Healdsburg case, referenced above, supported its determination that the Mining Pond had been abandoned.

The preamble to the 1986 regulations (51 FR 41206, 41217) states that, "water filled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation activity is abandoned and the resulting body of water meets the definition of waters of the United States (see 33 CFR 328.3(a))." 33 CFR 323.4 (c) states that "any discharge of dredged or fill material into waters of the United States incidental to any of the activities identified in paragraphs (a) (1) through (6) of this section must have a permit if it is part of an activity whose purpose is to convert an area of the waters of the United States into a use to which it was not previously subject, where the flow or circulation of waters of the United States may be impaired or the reach of such waters reduced." The 1999 SOP stated that, "Gravel pits excavated from uplands are not considered jurisdictional, so long as the areas in question have not been abandoned (i.e., the area is under some sort of management plan related to the gravel operation, including use as a water supply or water storage area)", as indicated by the Appellant. The 1999 SOP, however, was subsequently replaced by the 2009 SOP and is no longer in effect. The Healdsburg case, referenced by the District, was decided in January 2004. It is focused on a pond along the Russian River. Mining activity had ceased in the pond in

1984 and the only on-going activity in the pond was very gradual filling of the pond with silt, delivered by long pipe from a different property, pursuant to a local order to reclaim the pond.

The statement in the preamble to the 1986 regulations provides flexibility for Corps and EPA staff to determine whether the water body that results from the aggregate mining activity is abandoned or not. The paragraph, however, doesn't specify what constitutes abandonment, but it would be reasonable to determine that if the resulting water body is not being actively managed or used somehow, that it would be considered abandoned. As long as the water body is not abandoned, though, it is generally not a water of the United States unless there is a case-specific finding of jurisdiction as stated in the 1986 preamble. The recapture provision described in 404(f)(2), 33 CFR 323.4(c), and RGL-87-07 is not relevant to determining jurisdiction, but is rather a provision that describes the conditions under which the Corps would regulate otherwise exempt activities in jurisdictional waters of the United States. The specific language referenced by the Appellant from the 1999 SOP does not occur in the 2009 SOP, and is, therefore, no longer in effect. An important difference between the pond in the Healdsburg case and the Mining Pond is on-going use of the Mining Pond for water storage and supply for the mining operation surrounding it.

**REASON 3:** The District's conclusion that the Mining Pond is adjacent to a water of the United States is contrary to Corps legal and regulatory requirements.

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

**ACTION:** The District must further evaluate and consider its decision. In its final decision, the District must document its consideration of the functions, interactions, and characteristics of the San Diego River and the Mining Pond, which it has listed, and provide a rationale of how that consideration supports its conclusion as to whether the wetlands in the Mining Pond are adjacent to the San Diego River.

**DISCUSSION:** In the RFA, the Appellant indicated that even if the District's determination was correct that the Mining Pond is not exempt under the ongoing commercial activity and artificial waters exemptions, the District has not provided sufficient evidence to establish that the Mining Pond Area is an adjacent wetlands. Rather, the evidence establishes that the Mining Pond Area is an isolated wetlands without CWA jurisdiction. The Appellant asserted that the District, in its AJD form, simply assumed that the Mining Pond is an adjacent wetland and then proceeded in an attempt to establish jurisdiction under the significant nexus test.

In Section III.B.2 of AJD 2, the District indicates that the adjacent and abutting wetlands are composed of similar biological attributes and support similar wildlife and wetland species. The adjacent and abutting wetland attributes have similar processes that support natural degradation and treatment of pollutants found in the San Diego River. Additionally, the District describes the berm that separates the Mining Pond from the San Diego River, the frequency with which flows are exchanged between the Mining Pond

and the San Diego River, and that flows returning from the Mining Pond would flow downstream to the San Diego River. In Section III.B.3 of AJD 2, the District indicates the Mining Pond provides surface water storage and surface water conveyance that decreases the effects of downstream flooding, that pollutants are trapped during 7-10 year flows, that those pollutants are returned to the San Diego River during 100-year flows, that the Mining Pond provides habitat for various species, and that the Mining Pond contains 0.006 percent of all cumulative NWI wetland acres in the Lower San Diego River Watershed.

In response to questions at the appeal conference, the Appellant asserted that the District had not provided any details in its determination as to why the Mining Pond was considered adjacent wetlands, rather than isolated wetlands. The Appellant asserted that the District provided absolutely no supporting reason or evidence that the Mining Pond is not an isolated wetland.

In response to questions asked at the appeal conference, the District asserted that AJD 1, AJD 2, and the associated specified figures, attachments, and photographs show that the Mining Pond meets the criteria for adjacency. The District stated that, during 7-year flows or greater, that the Mining Pond is bordering to contiguous with the San Diego River and that during less than 7-year flows the Mining Pond is neighboring the San Diego River because the two features do not join on the surface. The District also asserted that the requirement to identify the rationale that a wetland is adjacent, but not directly abutting an RPW, that flows directly into a TNW is met in the AJD forms, which identify the Mining Pond wetlands as adjacent to an RPW that conveys flows directly into a TNW, discuss the ability of the tributary to carry pollutants and flood waters to the TNW, discuss the ability of the Mining Pond to provide habitat, and discuss the Mining Ponds ability to store floodwaters.

The 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.

The Revised Rapanos Guidance 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. 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.

While the District has listed several functions, interactions, and characteristics of the San Diego River and the Mining Pond, it has not provided an explanation of how those functions, interactions, and characteristics support a conclusion that the Mining Pond contains wetlands adjacent to the San Diego River. Additionally, the District has not indicated that it considers the wetlands in the Mining Pond to be reasonably close to the San Diego River, which would not generally require a case specific demonstration of an ecologic interconnection.

**REASON 4:** The District failed to establish a substantial nexus between the Mining Pond and the nearest TNW.

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

**ACTION:** The District must further evaluate and consider its decision. In its final decision, the District must clearly identify what it considers to be the nearest TNW. The District must then clearly state whether the Mining Pond has a significant nexus with that TNW. The District must then document the fact-specific analysis it uses to determine whether there is a significant nexus between the Mining Pond and the TNW. The District must provide the basis and support for any assumptions used to support its conclusions. If the District uses data or observations beyond that provided by the Appellant, it must make that clear in its final decision. Finally, as part of its fact-specific analysis, the District must explain how the characteristics and interactions of the Mining Pond and the San Diego River support its conclusion as to whether there is a significant nexus between the Mining Pond and the nearest TNW.

**DISCUSSION:** In the RFA, the Appellant asserted that there is no CWA jurisdiction over the Mining Pond because the District improperly applied the significant nexus test in reaching its Determination. The District failed to provide evidence and data that is conclusive, not speculative or insubstantial, that the Mining Pond has a physical, chemical, and biological effect on the Pacific Ocean, the nearest TNW. Moreover, the District made an error in applying the significant nexus test to the San Diego River, which is an RPW, rather than the Pacific Ocean, which is the nearest TNW and is approximately 11.5 river miles from the Mining Pond. The Appellant asserted that, even if the significant nexus test were applied to the San Diego River, the District failed to meet its burden to provide conclusive evidence of a significant nexus to the Mining Pond Area.

In Section III.C of AJD 2, the District indicated that the determination that the conclusion that there is a significant nexus is supported by flow patterns, the active floodplain specification, and the similar chemical and biological functions and services between the abutting and adjacent wetlands. The District stated that the San Diego River overbank flows during two-year flow events. The District further indicated that 7 – 10-year flow event flows from the San Diego River into the adjacent wetlands. During the 100-year or greater event, flow exits the adjacent wetlands and returns to the San Diego River. Flow events occur 2-15 times a year. The District concluded that, but for the part man-made, part natural formed berm between the maintained road and the adjacent wetlands, the 7-30 year flows would flow from the San Diego River into the adjacent wetlands and back into the San Diego River. The District stated that these wetlands slow water flows in the San Diego River Watershed, allowing sediment and organic deposition, and thus provide natural biodegradation of pollutants.

In response to questions at the appeal conference, the Appellant asserted that the District failed to provide evidence and data that is conclusive, not speculative or insubstantial, that the Mining Pond has a physical, chemical, and biological effect on the Pacific Ocean, the nearest TNW. The Appellant also asserted that the District made an error in applying the significant nexus to the San Diego River, which is an RPW, rather than to the Pacific Ocean, which is the nearest TNW and is approximately 11.5 river miles from the Mining Pond area. Additionally, the Appellant asserted that even if the significant nexus test were applied to the San Diego River, the District failed to meet its burden to provide conclusive evidence of a significant nexus to the Mining Pond area and that all of the rationale cited by the District is merely speculative or insubstantial, and cannot form the basis of a significant nexus finding. The Appellant asserted that the District relied on unsupported assumptions, failed to document sources, and failed to explain how the characteristics it documented are connected to the functions and services of a TNW.

In response to questions asked at the appeal conference, the District stated that a significant nexus can be found where waters, including adjacent wetlands, affect the chemical, physical, or biological integrity of TNWs and that the significant nexus findings include a discussion documenting the characteristics and underlying rationale for the conclusions regarding the presence or absences of a significant nexus with a TNW. The District indicated that AJD 1 and AJD 2, along with information in other parts of the AR are the formal documentation of this evaluation and determination. The District indicated that the characteristics of flows in the San Diego River are described in AJD 1 and AJD 2, that AJD 2 describes the significant nexus for the RPW and the adjacent wetlands, and that AJD 2 describes the relationship of the adjacent wetlands to the San Diego River, which flows into the Pacific Ocean. The District stated that the adjacent wetlands have an intermittent hydrologic surface connection to the San Diego River, that without the Mining Pond berm present, the San Diego River and the Mining Pond waters join during 7- year and greater events, and that even with the Mining Pond berm present, water permeates the Mining Pond berm and the San Diego River and the Mining Pond waters join.

The 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 indicated above, the Revised Rapanos Guidance further states that the agencies will assert jurisdiction over wetlands adjacent to, but not directly abutting, a relatively permanent tributary (e.g., separated from it by uplands, a berm, dike or similar feature) when they have a significant nexus with a TNW based on a fact-specific analysis.

The Revised Rapanos Guidance requires that, in considering how to apply the significant nexus standard, the agencies must focus 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 TNWs. The ecological relationship between tributaries and their adjacent wetlands is well documented in 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. Tributaries and their adjacent wetlands provide habitat (e.g., feeding, nesting, spawning, or rearing young) for many aquatic species that also live in traditional navigable waters.

Principal considerations when evaluating significant nexus include the volume, duration, and frequency of the flow of water in the tributary and the proximity of the tributary to traditional navigable water. In addition to any available hydrologic information (e.g., gauge data, flood predictions, historic records of water flow, statistical data, personal observations/records, etc.), the agencies may reasonably consider certain physical characteristics of the tributary to characterize its flow, and thus help to inform the determination of whether or not a significant nexus is present between the tributary and downstream traditional navigable waters. Physical indicators of flow may include the presence and characteristics of a reliable ordinary high water mark (OHWM) with a channel defined by bed and banks. Other physical indicators of flow may include helving, wracking, water staining, sediment sorting, and scour. Consideration will also be given to certain relevant contextual factors that directly influence the hydrology of tributaries including the size of the tributary's watershed, average annual rainfall, average annual winter snow pack, slope, and channel dimensions.

In addition, the agencies will consider other relevant factors, including the functions performed by the tributary together with the functions performed by any adjacent

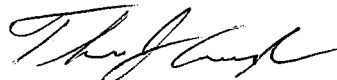
wetlands. One such factor is the extent to which the tributary and adjacent wetlands have the capacity to carry pollutants (e.g., petroleum wastes, toxic wastes, sediment) or flood waters to traditional navigable waters, or to reduce the amount of pollutants or flood waters that would otherwise enter traditional navigable waters. The agencies will also evaluate ecological functions performed by the tributary and any adjacent wetlands which affect downstream traditional navigable waters, such as the capacity to transfer nutrients and organic carbon vital to support downstream food webs (e.g., macroinvertebrates present in headwater streams convert carbon in leaf litter making it available to species downstream), habitat services such as providing spawning areas for recreationally or commercially important species in downstream waters, and the extent to which the tributary and adjacent wetlands perform functions related to maintenance of downstream water quality such as sediment trapping. After assessing the flow characteristics and functions of the tributary and its adjacent wetlands, the agencies will evaluate whether the tributary and its adjacent wetlands are likely to have an effect that is more than speculative or insubstantial on the chemical, physical, and biological integrity of a traditional navigable water. As the distance from the tributary to the navigable water increases, it will become increasingly important to document whether the tributary and its adjacent wetlands have a significant nexus rather than a speculative or insubstantial nexus with a traditional navigable water. Accordingly, Corps districts and EPA regions shall document in the AR the available information regarding whether a tributary and its adjacent wetlands have a significant nexus with a traditional navigable water, including the physical indicators of flow in a particular case and available information regarding the functions of the tributary and any adjacent wetlands. The agencies will explain their basis for concluding whether or not the tributary and its adjacent wetlands, when considered together, have a more than speculative or insubstantial effect on the chemical, physical, and biological integrity of a traditional navigable water.

The agencies will also decide CWA jurisdiction over other non-navigable tributaries and over other wetlands adjacent to non-navigable tributaries based on a fact-specific analysis to determine whether they have a significant nexus with traditional navigable waters.

As asserted by the Appellant, the District, in the AR, described interactions between the Mining Pond and the San Diego River, an RPW. While the Pacific Ocean is predominantly referenced as the nearest TNW, there is no discussion of the degree to which there is a significant nexus between the Mining Pond and the Pacific Ocean. The District relied on apparently unverified assumptions as support for its conclusions. For example, the District stated that “adjacent water quality was not tested in Section III.B.1.iii of AJD 1, but then concludes that “pollutants in the adjacent wetlands are anticipated to be the same as those in the San Diego River.” The District has also used information that conflicts with that provided by the Appellant, without indicating the source of that information. For example, the District indicates that there are 3.63 acres of wetlands in the Mining Pond, in Section II.B.1.b of AJD 2, while the Appellant’s delineation report indicates that there are 3.60 acres of wetlands in the Mining Pond. Finally, while District lists a number of characteristics and interactions of the Mining Pond and the San Diego River, it failed to include any discussion or analysis of how the

listed characteristics support its conclusion that there is a significant nexus between the Mining Pond and the Pacific Ocean.

**CONCLUSION:** I conclude the District must further evaluate and consider its decision. In its final decision, the District must further evaluate and consider its decision. In its final decision, the District must evaluate whether there is a significant nexus between the Mining Pond on the property and the nearest downstream traditional navigable water (TNW). The District must document its consideration of information provided by the Appellant and any other data and observations that support its conclusions as required by 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) in its analysis of whether the Mining Pond on the property has more than a speculative or insubstantial effect on the chemical, physical, and or biological integrity of the nearest downstream TNW. The District must correct or explain inconsistencies between information in the AJD forms and information supplied by the Appellant, which is included in the AR. As the San Diego River is referred to as a TNW in at least one instance in the AR, the District must clearly and consistently name the nearest TNW. The District must also clearly document its evaluation of whether the pond was abandoned or whether a case-specific finding of jurisdiction is otherwise appropriate and of whether the wetlands in the Mining Pond are adjacent to the San Diego River. The District's determination was not otherwise arbitrary, capricious or an abuse of discretion, and was not plainly contrary to applicable law or policy. This concludes the Administrative Appeal Process. The District shall, upon completion of these tasks, provide its final decision to the Division Engineer and Appellant.



Thomas J. Cavanaugh  
Administrative Appeal Review Officer