ADMINISTRATIVE APPEAL DECISION
CLEAN WATER ACT
DENNIS DORANDO PROPERTY
CONCORD, CALIFORNIA
SAN FRANCISCO DISTRICT
FILE NUMBER SPN-2016-400207

DATE: April 9, 2018

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

Appellant Representative: Dennis Dorando (Appellant)

District Representative: Frances Malamud-Roam, U.S. Army Corps of Engineers, San Francisco District (District)

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

Receipt of Request for Appeal: July 13, 2018

Appeal Meeting and Site Visit Date: October 1, 2018

Summary of Decision: Reasons 1 and 2 of the appeal of this Clean Water Act (CWA) jurisdictional determination have merit.

The District must reconsider and document its consideration of the likelihood that wet conditions on the Property will occur at least every other year, as required by the September 2008, Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Arid West Region (Arid West Supplement), given the above-normal rain year, following several years of drought, as well as the efforts of the neighboring property owner to control runoff from his property.

The District must also document the evaluation and rationale that leads to its conclusion as to whether the wetland identified on the Property is jurisdictional, in accordance with the standards and procedures set forth in the June 29, 2015, final rule from the EPA and the Corps that modified the definition of "waters of the United States" (2015 Rule), and associated guidance.

The Approved Jurisdictional Determination (AJD) subject to this appeal was made following Rapanos v. United States and Carabell v. United States, 126 S. Ct. 2208 (2006) (Rapanos), after which the U.S. Army Corps of Engineers (USACE) and the United States Environmental Protection Agency (EPA) jointly developed the December 2, 2008, "Clean Water Act Jurisdiction Following the Supreme Court Decision in Rapanos v. U.S. and Carabell v. U.S." (Rapanos Guidance). The Appellant will be provided an opportunity to appeal the decision resulting from the District's reconsideration under the 2015 Rule.

Background Information: The Property is located at 930 San Miguel Road, Concord, Contra Costa County, California, Latitude 37.953293° North, Longitude -122.019467° West.

For purposes of making the CWA jurisdictional determination, the District evaluated the site, using the 1987 Corps of Engineers Wetland Delineation Manual (87 Manual); Arid West Supplement; Code of Federal Regulations (CFR) definitions of jurisdictional waters; and supporting guidance.

The District's review included a field visit to the site on April 26, 2017. On June 22, 2018, the District made its CWA jurisdictional determination for the feature on the Property. The District relied on data obtained, observations made, and photographs taken on the Property, as well as U.S. Geological Survey maps, a September 1977 soil survey of Contra Costa County, CA, aerial photography and photographs taken during field investigations, and a previous determination for the property, dated, September 24, 2007, listed as data sources on its "Approved Jurisdictional Determination Form" (AJD Form). The District concluded that the site contained a 0.066 acre palustrine wetland on-site, adjacent to but not directly abutting a Relatively Permanent Water (RPW) channel just offsite, which is tributary to Pine Creek and eventually to Suisun Bay. The District determined that potential functions and values provided by the wetland are translated into improved water quality delivered to Pine Creek and consequently Suisun Bay. The District determined that these waters are regulated under Section 404 of the Clean Water Act. The District's basis for its determination was detailed in its AJD Form, dated June 8, 2018. The District requested concurrence with its AJD from U.S. Army Corps of Engineers headquarters and the U.S. Environmental Protection Agency (EPA) via email and received concurrence by email, from EPA, on June 12, 2018. Though not required, the proposed AJD was also forwarded to U.S. Army Corps of Engineers headquarters, which did not comment. The review as determined to be complete on June 22, 2018.

The Appellant originally submitted a Request for Appeal (RFA) on July 13, 2018. That RFA was unsigned. The Appellant provided a signed RFA on July 18, 2018. The appellant provided a number of reasons for appeal. Several of the reasons for appeal contained in the original and subsequent signed RFA were not acceptable for review under the appeal program. The remaining reasons provided an acceptable basis for appeal, though some were overlapping or required clarification. Those issues were resolved through an exchange of emails, between the Appellant and the review officer. The final agenda for the appeal meeting and site visit, containing the final version of the reasons for appeal, was provided to the District and the Appellant on September 28, 2018.

The Appellant disagreed with the District's conclusion that the feature on the Property is a water of the United States, subject to jurisdiction under Section 404 of the Clean Water Act. The Appellant asserted that the delineations conducted in 2006 by Sycamore Consultants, which was relied upon by the District, and in 2017 by the District were not conducted in accordance with Corps guidelines for identification and determination of wetlands, as they were conducted during abnormal conditions, there is no significant nexus between the feature on the property and the

nearest downstream traditional navigable water (TNW), and that the feature on the property does not meet the definition of a wetland, as wetland vegetation, soils, hydrology are not present.

The AJD for the project site was made pursuant to regulations promulgated on November 13, 1986 at 33 C.F.R. § 328 (1986 Regulations), and consistent with Supreme Court decisions and longstanding practice, as informed by applicable guidance documents, training, and experience, as of June 22, 2018, the date of the AJD. On June 29, 2015, the EPA and the Corps issued a final rule that redefined the definition of "waters of the United States." While this final rule, more commonly known as the 2015 Rule, became effective on 28 August 2015, it was not implemented, due to a nationwide stay imposed by the U.S. Court of Appeals for the 6th Circuit. The 6th Circuit's stay was lifted on August 17, 2018, at which time the 2015 Rule went into effect in California and other states where the 2015 Rule was not enjoined through other litigation. This AJD was made prior to the 2015 Rule going into effect in California. As a result, an email was sent to the Appellant, explaining his option to have the appeal reviewed under regulations and guidance in place at the time the AJD was made or to request a new AJD, under the 2015 Rule. Following an exchange of emails and telephone conversations between the Appellant and the review officer, the Appellant chose to have the appeal reviewed under the regulations and guidance in place at the time the AJD was made. Therefore, while the District's AJD and this appeal decision resulted from an evaluation under the 1986 Regulations and the Rapanos Guidance, the District's final decision must be made in accordance with the 2015 Rule.

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 delineations conducted in 2006 by Sycamore Consultants and in 2017 by the Corps were not conducted in accordance with Corps guidelines for identification and determination of wetlands, as they were conducted during abnormal conditions.

FINDING: This reason for appeal has merit.

ACTION: The District must reconsider and document its consideration of the likelihood that wet conditions will occur on the site at least every other year, as required by the Arid West Supplement, given the above-normal rain year, following several years of drought, as well as the efforts of the neighboring property owner to control runoff from his property.

DISCUSSION: In the RFA, the Appellant asserted that delineations conducted in 2006 by Sycamore Consultants and in 2017 by the District were not conducted in accordance with Corps guidelines for identification and determination of wetlands, as they were conducted during abnormal conditions. The Appellant claimed that 2006 and 2017 were two of the rainiest years on record and only represent "snap shots" in time taken during abnormal conditions, which lead to gross errors in data gathering, analysis, and resulted in claims that are false and very misleading. Additionally, the Appellant indicated that hydrology of the Property had been

supplemented by runoff from a neighboring property, which has since been redirected away from the Property. The AR contains several emails from the Appellant to the District, provided prior to the completion of its AJD, claiming that hydrology of the Property had previously been supplemented by runoff from a neighboring property, which had been redirected away from the Property.

In its January 8, 2018 memorandum, the District concluded that "This delineation is not occurring during normal conditions in part because of the multi-year drought followed by an above-normal rain year. Further, the site has been disturbed by vegetation removal, digging, and grading activities by the current owner".

In the April 26, 2017, arid west region wetland determination sheets supporting its delineation and JD, the District indicated that climatic /hydrologic conditions on the site were not typical for that time of year. The District stated that there had been above normal rainfall, following a multi-year drought in that area. In the summary of findings sections, of the wetland determination sheets, the District relied on primary indicators, including A1, surface water, A2, high water table, and A3, saturation, as support for its conclusions that 0.066 acres of the Property were wetlands.

The Arid West Supplement, on page 64, states that care must be used in applying indicator A1, because surface water may be present in non-wetland areas immediately after a rainfall event or during periods of unusually high precipitation, runoff, tides, or river stages. It states that some non-wetlands flood frequently for brief periods. It also warns that surface water may be absent from a wetland during the normal dry season or during extended periods of drought, as even under normal rainfall conditions, some wetlands do not become inundated or saturated every year. For indicator A2, the Arid West Supplement states, on page 65, that care must be used, as water-table levels normally vary seasonally and are a function of both recent and long-term precipitation. Finally, under indicator A3, it states, on page 66, that recent rainfall events and the proximity of the water table at the time of sampling must be considered in applying an interpreting the indicator.

As indicated by the Appellant, the property was delineated in 2006 and an AJD was completed by the District in 2007. That AJD concluded that an approximately 0.164-acre wetland was present on the Property. However, while the District referenced the 2006 delineation and 2007 AJD and used information found therein to inform its decision, the 2007 AJD is no longer subject to appeal, has expired, and has been superseded by the 2018 AJD and associated 2017 delineation. The District's 2017 delineation, associated with its 2018 AJD, identified 0.066 acres of wetlands on the Property, approximately 40 percent of the area identified in the 2006 delineation, associated with its 2007 JD. It is only the District's 2018 AJD and associated 2017 delineation, which are subject to and the subject of this appeal review.

As described above, the District, in its April 26, 2017, arid west region wetland determination sheets supporting its delineation and JD, stated that climatic/hydrologic conditions on the site were not typical for that time of year. In the summary of findings sections, of the wetland determination sheets, the District stated that there had been above normal rainfall, following a multi-year drought in that area. The Arid West Supplement highlights the importance of

evaluating the normality of the current year's rainfall, in interpreting field results. Under "Wetland Hydrology Indicators", pages 58-59, it is stated that some indicators could be present on a non-wetland site immediately after a heavy rain or during a period of unusually high precipitation, river stages, runoff, or snowmelt. That section further states that it is important to consider weather conditions prior to the site visit to minimize both false-positive and false-negative wetland hydrology decisions. Finally, that section cautions that an understanding of normal seasonal and annual variations in rainfall, temperature, and other climatic conditions is essential in interpreting hydrology indicators in the Arid West.

It is not clear, within the administrative record, that the District considered above normal rainfall, following a multi-year drought, or the Appellant's assertion that the wetland had been, but no longer is, supported by runoff from a neighboring property. Therefore the District must reconsider and document its consideration of the likelihood that wet conditions on the Property will meet the hydrology standard of 14 or more consecutive days of flooding or ponding, or a water table 12 in. (30 cm) or less below the soil surface, during the growing season at a minimum frequency of 5 years in 10 (50 percent or higher probability), as described on page 59 of the Arid West Supplement, given the above-normal rain year, following several years of drought, as well as the efforts of the neighboring property owner to control runoff from his property.

REASON 2: There is no significant nexus to waters of the United States.

FINDING: This reason for appeal has merit.

ACTION: The District must also document the evaluation and rationale that leads to its conclusion as to whether the wetland identified on the Property is jurisdictional in accordance with the standards and procedures set forth in the 2015 Rule and associated guidance.

DISCUSSION: In the RFA, the Appellant asserted that there is no significant nexus to waters of the United States, flow is ephemeral, and that there is no measurable or greater than insubstantial effect on Waters of the United States.

In Section I.C of its AJD Form, the District described the location of the Property, indicated the nearest waterbody is Pine Creek. The District did not identify the nearest TNW in the allotted space.

In Section II.B.1, the District indicated that wetlands on the Property are adjacent to but not directly abutting RPWs that flow directly or indirectly into TNWs.

In Section III.B.2, Characteristics of wetlands adjacent to non-TNW that flow directly or indirectly into TNW, the District stated that evidence of frequent inundation during the wet-winter months is apparent and noted the presence of hydrophytic vegetation, hydric soil characteristics, and hydrologic indicators. The District stated that overland sheet flow from nearby ridges gathers in this topographic depression. The District described the wetland as not directly abutting the RPW and indicated that the seasonal wetland ends 20 to 30 feet before the inlet of the 140 foot long culvert.

Section III.C, Significant nexus findings for wetlands adjacent to an RPW but that do not directly abut the RPW, includes the requirement to explain findings of presence or absence of significant nexus, based on the tributary in combination with all of its adjacent wetlands. The District stated that there is a significant nexus between the palustrine wetland on-site and an RPW channel just offsite, which is tributary to Pine Creek and eventually to Suisun Bay. The District stated that, based on information provided in 2006 by Sycamore Associates, who was the consultant to the former applicant and observations made in multiple site visits conducted by Corps personnel (Frances Malamud-Roam, Greg Brown, Mark D'Avignon, Katerina Galacatos and Keith Hess) on 11/15/2016, 12/14/2016, and 4/26/2017, and a site visit conducted by Corps personnel (Robert Kirby) on 1/8/07, it was determined that based on limited information, potential functions and values provided by the wetland are translated into improved water quality delivered to Pine Creek and consequently Suisun Bay.

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

In response to Rapanos, USACE and EPA jointly developed the Rapanos Guidance. As agency staff does not directly implement results of court cases, but rather adheres to the requirements of resulting regulation and implementing guidance, the Rapanos Guidance details the requirements which agency staff at USACE Districts and EPA Regions were required to meet, following Rapanos.

The Rapanos Guidance states that the agencies will assert jurisdiction over the following types of waters when they have a significant nexus with a traditional navigable water: (1) non-navigable tributaries that are not relatively permanent, (2) wetlands adjacent to non-navigable tributaries that are not relatively permanent, and (3) wetlands adjacent to, but not directly abutting, a relatively permanent tributary (e. a., separated from it by uplands, a berm, dike or similar feature).

The Rapanos Guidance further indicates that the regulations define "adjacent" as follows: "The term adjacent means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are adjacent wetlands". Under this definition, the agencies consider wetlands adjacent if one of following three criteria is satisfied. First, there is an unbroken surface or shallow sub-

surface connection to jurisdictional waters. This hydrologic connection may be intermittent. Second, they are physically separated from jurisdictional waters by man-made dikes or barriers, natural river berms, beach dunes, and the like. Or third, their proximity to a jurisdictional water is reasonably close, supporting the science-based inference that such wetlands have an ecological interconnection with jurisdictional waters. Due to the scientific basis for this inference, determining whether a wetland is reasonably close to a jurisdictional water does not generally require a case specific demonstration of an ecologic interconnection. In the case of a jurisdictional water and a reasonably close wetland, such implied ecological interconnectivity is neither speculative nor insubstantial. For example, species, such as amphibians or anadramous and catadramous 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.

Additionally the Rapanos Guidance states that, in considering how to apply the significant nexus standard, the agencies have focused on the integral relationship between the ecological characteristics of tributaries and those of their adjacent wetlands, which determines in part their contribution to restoring and maintaining the chemical, physical and biological integrity of the Nation's traditional navigable waters. The ecological relationship between tributaries and their adjacent wetlands is well documented in the scientific literature and reflects their physical proximity as well as shared hydrological and biological characteristics. The flow parameters and ecological functions that Justice Kennedy describes as most relevant to an evaluation of significant nexus result from the ecological inter-relationship between tributaries and their adjacent wetlands. For example, the duration, frequency, and volume of flow in a tributary, and subsequently the flow in downstream navigable waters, is directly affected by the presence of adjacent wetlands that hold floodwaters, intercept sheet flow from uplands, and then release waters to tributaries in a more even and constant manner. Wetlands may also help to maintain more consistent water temperature in tributaries, which is important for some aquatic species. Adjacent wetlands trap and hold pollutants that may otherwise reach tributaries (and downstream navigable waters) including sediments, chemicals, and other pollutants.

The District's conclusion, in its June 22, 2018 AJD Form, that the wetland onsite is adjacent to an RPW is not supported by the administrative record. The District did not provide a basis for its conclusion that the wetland on the Property is adjacent to an RPW. Specifically, the District did not explain which of the three criteria in the definition of "adjacent" has been met.

The District stated that there is a significant nexus between the palustrine wetland on-site and an RPW channel just offsite, which is tributary to Pine Creek and eventually to Suisun Bay. The requirement, established by the Rapanos Guidance, as described above, is that the District must evaluate whether a significant nexus exists with a TNW, rather than with an RPW.

As described above, the District stated the wetland likely provides value by performing the following functions: flood flow alteration (i.e. storage and flow desynchronization), sediment/toxicant/pathogen retention, biogeochemical cycling (i.e. biologic, physical, chemical

transformations of various nutrients within the soil and water), and wildlife habitat (i.e., wetland macroinvertebrates). Of these functions, the District stated that sediment retention was observed during the site visit. The District concluded that, based on limited information, potential and observed functions and values provided by the wetlands on site are translated into increased food web production, flood retention, and improved water quality delivered to the North Slough and the Napa River. The District also concluded that, therefore, it is likely that the aquatic features on the subject property have the ability to significantly affect the chemical, physical, and biological integrity of a downstream TNW.

While the District has summarized a number of biological, chemical, and physical functions that are likely being performed by wetlands on the property, the District indicates, in the same paragraph that no specific studies have been completed on the project site to determine the magnitude at which the above functions are being performed. The statement, in Section III.C, that wetlands on the Property likely provide value by performing the functions listed by the District is not supported. The statement, in that section, that sediment retention was observed during the site visit does not include any indication of what was observed that led to the conclusion that sediment retention is occurring. The District's statements that the wetland on the Property likely performs functions and that, based on limited information, a lack of specific studies, and an undescribed observation of sediment retention that it is likely that the wetland affects the downstream TNW are uncertain, vague, and speculative.

The District has not included sufficient data, explanation, or analysis in the AR to sufficiently support its conclusions. As the Rapanos Guidance has been superseded by the 2015 Rule, the District must document the evaluation and rationale that leads to its conclusion as to whether the wetland identified on the Property is jurisdictional in accordance with the standards and procedures set forth in the 2015 Rule and associated guidance.

REASON 3: The feature on the property does not meet the definition of a wetland, as wetland vegetation, soils, and hydrology are not present.

FINDING: This reason for appeal does not have merit.

ACTION: No further action is required.

DISCUSSION: The Appellant asserted that the feature on the property does not meet the definition of a wetland, as wetland vegetation, soils, hydrology are not present.

The 87 Manual defines, page 9, wetlands as those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

The definition of wetlands includes the phrase "under normal circumstances," 87 Manual, page 4, because there are instances in which the vegetation in a wetland has been inadvertently or purposely removed or altered as a result of recent natural events or human activities. Other examples of human alterations that may affect wetlands are draining, ditching, levees, deposition

of fill, irrigation, and impoundments. When such activities occur, an area may fail to meet the diagnostic criteria for a wetland. In those cases, the 87 Manual provides alternative methods to be employed in making wetland determinations. The manual also describes (Part IV, Section F, Atypical Situations) methods for delineating wetlands in which the vegetation, soils, and/or hydrology have been altered by recent human activities or natural events. In cases where vegetation may have been removed from the area in question, this section lists potential sources for determining the plant community that existed prior to the disturbance. Those include aerial photography, onsite inspection, previous site inspections that described the plant community, and evaluation of adjacent plant communities.

It is important to note that "normal circumstances" is not the same as normal environmental conditions, discussed above under reason one. The 87 Manual, page 4, states that "Normal circumstances" is defined as "the soil and hydrologic conditions that are normally present, without regard to whether the vegetation has been removed." The determination of whether normal circumstances exist in a disturbed area "involves an evaluation of the extent and relative permanence of the physical alteration of wetlands hydrology and hydrophytic vegetation" and consideration of the "purpose and cause of the physical alterations to hydrology and vegetation." (RGL 90-7, 26 Sep 90; HQUSACE, 7 Oct 91)

The District completed a wetland determination sheet, dated April 26, 2017, for each of the data points it evaluated as part of its delineation of the wetland on the Property. The District concluded that 5 of those data points occurred within a wetland. Data points 4, 6, and 9, were documented, as being dominated by hydrophytic vegetation, having hydric soils, and having wetland hydrology. In the wetland determination sheets for sampling points 1 and 2, it is indicated that 2 factors, wetland hydrology and soils, are met, with the absence of hydrophytic vegetation explained by description of disturbance that resulted in the removal of vegetation and an altered plant community. The District's conclusion, for sampling points 1 and 2, was that, absent the removal of vegetation, hydrophytic vegetation would be present. The District, therefore, determined that sampling points 1 and 2 occurred within a wetland. In both cases the District indicated climatic/hydrologic conditions were not typical and that normal circumstances were not present, which was explained in the remarks section as resulting from soil disturbance and soil removal.

There are several emails from in the AR from the Appellant that suggest *Lolium perene*, while designated Facultative (FAC) on the National Wetland Plant List, should be excluded from consideration, because it also grows in the uplands and has some upland plants growing with it in the area on the Property delineated as wetland. Plant species designated as FAC are equally likely to occur in wetlands (estimated probability 34% – 66%) or non-wetlands. As such, when an area is dominated by plant species designated as FAC also has hydric soils and demonstrates wetland hydrology, that area is properly delineated as a wetland, per the 87 Manual and the Arid West Supplement. The District was correct in delineating areas dominated by FAC species, including *Lolium perene* that contained hydric soils and demonstrated wetland hydrology as wetland.

In its January 8, 2018, Memorandum for Record, the District described the history of their interaction with the property and the Appellant. That memorandum acknowledged the 2007 AJD

and the associated wetland delineation. The District concluded that the wetland on the Property had decreased in size in the intervening years, potentially in response to a number of drought years and apparent activity on the Property. The District discussed its three site visits, its evaluation of the data collected on its wetland determination sheets, and discussions with the Appellant. The District also described its consideration and non-concurrence with a wetland delineation, prepared by the Appellant's consultant, based on the time of year the consultant conducted his delineation, the difficult nature of the site, and data accumulated by the District during its three site visits. As a result of its considerations, the District concluded that a 0.066 acre wetland had persisted, rather than the 0.164 acre wetland delineated in 2007.

While the District must further consider normal environmental conditions, as detailed above under reason 1, it has included sufficient information and documentation of its consideration of available information in the AR to conclude that 0.066 acres of the Property exhibited all three wetland factors.

CONCLUSION: This decision is remanded to the District for further evaluation.

The District must reconsider and document its consideration of the likelihood that wet conditions on the Property will occur at least every other year, as required by the Arid West Supplement, given the above-normal rain year, following several years of drought, as well as the efforts of the neighboring property owner to control runoff from his property.

As the Rapanos Guidance has been superseded by the 2015 Rule, the District must document the evaluation and rationale that leads to its conclusion as to whether the wetland identified on the Property is jurisdictional in accordance with the standards and procedures set forth in the 2015 Rule and associated guidance.

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

Thomas J. Cavanaugh
Administrative Appeal Review Officer