

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

DATE: December 14, 2020

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: May 28, 2020

Appeal Meeting Date: July 20, 2020

Summary of Decision: Reason 2 of the appeal of this Clean Water Act (CWA) jurisdictional determination has merit. The District must reconsider and document its conclusion that the area delineated as a wetland is dominated by wetland vegetation. While the District documented, in the administrative record (AR) that the Appellant had denied the District access to the site at 930 San Miguel Road, Concord, California (Property) to reevaluate site conditions, the Appellant had provided the District with photographs and other information, suggesting the dominance of upland vegetation in the area delineated by the District as a wetland. As the District was required to consider information provided by the Appellant concerning vegetation, the District should not have provided the Appellant with an AJD, until it was able to document its consideration of that information. As part of its reconsideration, the District should consider whether access to the Property is necessary, in order to allow it to adequately evaluate the Appellant's information concerning potential changes to vegetation within the delineated feature on the Property.

The 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 rule in

place at the time the District responds to the remand (currently the Navigable Waters Protection Rule (NWPR)).

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 issued its first AJD for the Property on June 22, 2018, which identified a small jurisdictional wetland. That AJD was appealed on July 13, 2018. The Appellant's Request for Appeal (RFA) was found to have merit and the decision was remanded to the District on April 9, 2019. Following remand, the District issued another AJD on August 2, 2019, following the requirements of the 2015 Clean Water Rule. That AJD did not alter the decision that a wetland feature was present on the property, but the District concluded that the wetland feature was not subject to CWA jurisdiction. On October 2, 2019, the applicant requested that the District reconsider the August 2, 2019 AJD, because he disagreed with the District's conclusion that the wetland on the Property exists under normal conditions. The District reviewed the information provided by the Appellant with that request and concluded that the Appellant's information was insufficient to change the District's decision that a non-jurisdictional wetland exists on the Property. The District re-issued its AJD with its analysis, on November 29, 2019. On February 5, 2020, following the reinstatement of the Rapanos Guidance, the Appellant submitted a request for reconsideration. Following reconsideration, the District made its CWA jurisdictional determination for the Property, on April 3, 2020, concluding that a small non-jurisdictional wetland is present on the Property.

In making its CWA jurisdictional determination for 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 previous determinations for the property, dated, August 5, 2019 and November 29, 2019, 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, which has ephemeral flows to a non-RPW, which flows to an RPW. The District concluded that the wetland does not provide significant water quality or biological functions to the TNW. As a result of its analysis, the District determined that the wetland on the Property was not regulated under Section 404 of the Clean Water Act. The District's basis for its determination was detailed in its AJD Form, dated March 26, 2020.

The Appellant submitted his RFA on May 28, 2020. The Appellant disagreed with the District's conclusion that the feature on the Property is a wetland. The Appellant asserted that the District's delineation was not conducted in accordance with Corps guidelines for identification and determination of wetlands, as they were conducted during a period of abnormally high

precipitation, the feature on the property does not meet the definition of a wetland, and that, under normal circumstances, wetland hydrology is 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 April 3, 2020, the date of the AJD.

On June 22, 2020, the EPA and the Corps issued a final rule that redefined the definition of “waters of the United States”, known as the Navigable Waters Protection Rule (NWPR). This AJD was made prior to the NWPR 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 NWPR. 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 regulations in effect at the time the District issues its response to the remand. Currently, the NWPR is in effect. If the 1986 Regulations and the Rapanos Guidance are reinstated while the District is responding to this remand, a response by the District, pursuant to the 1986 Regulation and Rapanos Guidance, would become the final agency decision and would not be subject to administrative appeal.

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: Normal Circumstances: The SF District failed to identify and determine what the normal circumstances at the study site are, and based their delineation and determination strictly on the conditions they encountered which were abnormal.

FINDING: This reason for appeal does not have merit.

ACTION: No action is required.

DISCUSSION: In the RFA, the Appellant asserted that the District has failed to evaluate historical information in determining that normal circumstances exist and that the District made its decision that a wetland is present on the Property, based on a delineation conducted during a time when rainfall was significantly higher than normal and normal environmental conditions did not exist. The Appellant claimed that the District failed to identify and quantify hydrologic inputs and, therefore, cannot make any claims as to whether the local hydrology has changed, as a result of the neighbor’s corrective actions in removing the source of hydrology. The Appellant asserted that the District did not document that he conditions they encountered represent normal environmental conditions.

The Appellant cited page 50, of the 2018 Administrative Record, as stating that no specific studies have been completed on the project site to determine which of the above-mentioned functions and values are being performed on the project site. The Appellant noted that one of the functions listed is a documentation of how the site is receiving water. The Appellant argued that since the District stated that they conducted no study to determine the sources of hydrology or the contributions of each of those sources of hydrology, the District's conclusions as to whether there have been changes to hydrology or that a 30-acre watershed contributes hydrology to the wetland on the Property are not supported.

The Appellant references a 2017 letter from Sycamore Environmental Consultants, as referring to the wetland as marginally wet. The Appellant argues that, if the wetland was marginally wet in 2017, which the Appellant asserts was one of the wettest years on record, then, it would not be inundated, during a year with normal rainfall. The Appellant argues that, as a result, under "normal circumstances", the feature would not meet the definition of a wetland, as it would not be "inundated with water" at a frequency and duration to support wetland vegetation.

The Appellant asserts that the District failed to determine what the "normal circumstances" are of the site, and made their determination solely based on the conditions they encountered in 2016 into 2017, which the Appellant argues did not represent "normal circumstances" as a result of prolonged and above normal rainfall prior to and up to the date of the delineation.

The term "normal circumstances", in the preceding paragraph is being used to describe rainfall expected in a normal year. In his RFA, the Appellant uses the terms "normal circumstances" and "normal conditions" almost interchangeably. As used in the Arid West Supplement, "normal environmental conditions" refers to environmental variability. As used in the 1987 Manual, "normal circumstances" refers to the effect and relative permanence of physical changes. Each of these terms is discussed and further explained later in this document, where appropriate. Reason for appeal number one focuses on the Appellant's concerns, relative to normal environmental conditions. Normal circumstances, watershed size, and other hydrology inputs are addressed in response to reason for appeal number three, below.

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.

In its August 2, 2019 Memorandum for Record, supporting its decision following the April 9, 2018 remanded decision, the District stated that the unusual conditions commented on in the remarks section of the 2018 AJD form related to the above-normal rainfall following multiple years of drought. The District stated that it had reviewed climate data, using the U.S. climate

data website (www.usclimatedata.com) for the weather station Concord Buchanan field, Concord, CA - 94518 (Longitude: -122.055, Latitude: 37.9917), with normal period 1981-2010. The District concluded that the first four months of 2017 (Jan, Feb, March, and April) were all above average. The District found that approximately 0.39 inch of rainfall was measured on April 19, 7 days prior to the site visit, which had been the most recent precipitation event. However, the District concluded that the Property would still meet the Arid West Supplement's hydrology standard even were it not for the above-normal rainfall. The District determined that historical imagery available on Google Earth from the years 2009, 2010, 2012, 2014, and 2015, show the site as wet enough to support a Typha wetland on the eastern edge of the property and that the images show similar vegetation patterns during those years to what the District saw in 2017. The District also stated that the soil data observed during the wetland delineations provided evidence of hydric soils, which take years of anoxic conditions to develop. The District's datasheets, from both the 2006 and the 2017 delineations, showed evidence of hydric soil indicators (some pits showed gleyed soils, other soil pits in the 2017 delineation showed evidence of redox). As such features take time to develop the District concluded that wetland hydrology has been present for years. In addition, though the 2017 wetland delineation was conducted near the end of a wetter than average winter, the District conducted site visits prior to the start of the wet season and observed the presence of hydric soils, as described in the MFRs for the site visits (MFR for Nov 2016 site visit, dated Nov 21, 2016; subsequent MFR for December 2015 visit dated January 10, 2017).

It is clear, from the above analysis, that the District considered the effect of above normal rainfall on its conclusions regarding the presence of wetlands on the Property. The District's evaluation and consideration of rainfall over a period of years, aerial photography, and the presence of hydric soils, as described above is sufficient to support its conclusions, relative to normal environmental conditions.

Therefore, this reason for appeal does not have merit.

REASON 2: Vegetation: The District failed to accurately identify and log vegetation in the delineated areas resulting in errors in identifying actual conditions which has resulted in incorrect conclusions and determinations.

FINDING: This reason for appeal has merit.

ACTION: The District must reconsider and document its conclusion that the area delineated as a wetland is dominated by wetland vegetation. While the District documented, in the administrative record (AR) that the Appellant had denied the District access to the site to reevaluate site conditions, the Appellant had provided the District with photographs and other information, suggesting the presence of upland vegetation in the area, that the District had delineated as a wetland. As the District was required to consider information provided by the Appellant concerning vegetation, the District should not have provided the Appellant with an AJD, until it was able to document its consideration of that information. As part of its reconsideration, the District should consider whether access to the Property is necessary, in order

to allow it to adequately evaluate the Appellant's information concerning potential changes to vegetation within the delineated feature on the Property.

DISCUSSION: In the RFA, the Appellant asserts that the Districts data sheets contain incorrect information, which lead to an incorrect determination that the feature on the Property, delineated by the District as a wetland, is dominated by wetland vegetation. The Appellant asserts that the feature on the Property is dominated by upland vegetation and, in particular, the Appellant notes the presence of *Vinca major*, an upland plant, as evidence of his claim. The Appellant quoted his consultant, LSA, as stating that "the understory is comprised of non-native grassland species native with patches of periwinkle (*Vinca major*)".

In its March 19, 2020, MFR, evaluating the Appellant's February 5, 2020, request for reconsideration, the District stated that the Appellant submitted highlighted sections of the datasheets completed by the Corps (AR, pages 43-45) and by his consultant, LSA (AR, page 41), during separate delineations of the site. The sections were highlighted to emphasize the presence in some areas of the project site where the plant, *Vinca major*, a non-wetland plant species (indicator status Upland) was present as a dominant species. The LSA datasheets were from sites where the plant was present; the Corps datasheets were from sites where the plant was not present. The Corps' delineated wetland feature did not include the area dominated by *Vinca major*. The District concluded that MFR by stating that the information provided by the Appellant was insufficient to change the field verified determination of a 0.066-acre delineated wetland feature on the project site and that The Appellant had denied the District's February 13, 2020, request for access to the site, in order to conduct a site visit, to evaluate current conditions and determine whether the wetland feature still exhibited all three wetland parameters.

The District's April 3, 2020, AJD states that "This jurisdictional determination identified a 0.066-acre wetland on the property. The Corps delineated the wetland using the three-parameter approach of wetland vegetation, hydric soils and hydrology outlined in the 1987 Corps of Engineers Wetland Delineation Manual, WRP Technical Report Y-87-1 (1987 Manual) and the 2008 Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Arid West Region (Version 2.0). The data collected showed a dominance of facultative (FAC) plants within the delineated wetland area, which meets the criterion for wetland vegetation, and the presence of wetland soils and wetland hydrology.

This reason for appeal has merit. The District must reconsider and document its conclusion that the area delineated as a wetland is dominated by wetland vegetation. While the District documented, in the administrative record (AR) that the Appellant had denied the District access to the site to reevaluate site conditions, the Appellant had provided the District with photographs and other information, suggesting the presence of upland vegetation in the area, that the District had delineated as a wetland. As the District was required to consider information provided by the Appellant concerning vegetation, the District should not have provided the Appellant with an AJD, until it was able to document its consideration of that information. As part of its reconsideration, the District should consider whether access to the Property is necessary, in order to allow it to adequately evaluate the Appellant's information concerning potential changes to vegetation within the delineated feature on the Property.

REASON 3: Hydrology: The District failed to identify and prove the source of hydrology at the site per the Corps requirements in identifying wetlands.

a. In the District's determination letter Number 2006-400207S (dated April 1, 2020) the District is claiming that the source of hydrology is from a 30-acre watershed without providing any facts to support this claim and contrary to their delineation study that stated no studies were conducted to determine the source of hydrology.

b. The District dismissed the contribution of hydrology from the roof run-off and storm drains from the neighbor's property above the site, claiming that the input is negligible when compared to the 30-acre watershed; but again, the District provided no data, facts, or any information proving there is a 30-acre watershed or how much hydrology it provides if any; and therefore it is unscientific and irresponsible to make comparisons.

FINDING: This reason for appeal does not have merit.

ACTION: No further action is required.

DISCUSSION: The Appellant asserts that the hydrology, which supported the feature on the Property, is no longer present, as a neighbor was responsible for the hydrology entering onto the Property. The Appellant states that the neighbor has rerouted drainage from the Property into the City storm system. The Appellant also disagreed with the District's conclusion that the Property receives runoff from a 30-acre watershed. The Appellant submitted a number of pictures to support his assertion that the District's conclusion that a 30-acre watershed supplies hydrology to the feature, which the District delineated as a wetland.

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)

In this case, the District had the responsibility to evaluate the new normal circumstances resulting from the permanent rerouting of the runoff from the neighbor's property, so that it no longer supplied hydrology to the Property.

In its October 29, 2019, memorandum, the District stated that there are three sources of hydrology; direct precipitation, runoff from the surrounding upslope landscape, and previously the runoff from the drainage pipes placed by the neighbor.

The District's April 1, 2020, letter stated that "The wetland is situated within a low spot in the landscape, which receives drainage input from an approximately 30-acre watershed area. Given the small size of the roof in relation to the watershed, the information provided is insufficient to change the Corps' determination of the delineated wetland on this property".

In considering the Appellant's assertions, as to the contributions of hydrology, from the neighbor's property, the District stated in its March 20, 2020, memorandum that the drainage area flowing to the wetland, and to the ditch, is approximately 35 acres. (calculated using USGS StreamStats: Streamflow Statistics and Spatial Analysis Tools for Water-Resources Applications, found online at (<https://streamstats.usgs.gov/ss/>)). The District described the hydrology of the Property as a result of multiple interacting factors, including but not limited to inflow, outflow, site topography, soil porosity and annual climate conditions. The District described the feature on the Property as a 0.066-acre wetland, situated within a low spot in the landscape, with hills on three sides, which receives hydrology from both direct precipitation and runoff from the surrounding watershed. The District concluded that, given the small size of the roof in relation to the watershed, information provided by the Appellant is insufficient to change the District's conclusion that a 0.066-acre wetland feature is on the property.

It is clear that the District evaluated and documented its evaluation of watershed size, through the use of an accepted tool. The District was aware of the Appellant's concerns, relative to hydrology inputs and addressed those concerns in its evaluation. The District's evaluation sufficiently supports its conclusions that the new normal circumstances, resulting from the permanent rerouting of the runoff from the neighbor's property, do not sufficiently reduce hydrology input to the degree that the District should have altered its conclusion.

Therefore, this reason for appeal does not have merit.

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

The District must reconsider and document its conclusion that the area delineated as a wetland is dominated by wetland vegetation. While the District documented, in the administrative record (AR) that the Appellant had denied the District access to the site to reevaluate site conditions, the

Appellant had provided the District with photographs and other information, suggesting the presence of upland vegetation in the area, delineated by the District as a wetland. As the District was required to consider information provided by the Appellant concerning vegetation, the District should not have provided the Appellant with an AJD, until it was able to document its consideration of that information. As part of its reconsideration, the District should consider whether access to the Property is necessary, in order to allow it to adequately evaluate the Appellant's information concerning potential changes to vegetation within the delineated feature on the Property.

As the Rapanos Guidance has been superseded by the NWPR, the District must provide the Appellant an AJD in accordance with the standards and procedures set forth in the NWPR 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

Thomas J. Cavanaugh
Administrative Appeal Review Officer