

**ADMINISTRATIVE APPEAL DECISION  
CLEAN WATER ACT  
FAIRFIELD-SUISUN UNIFIED SCHOOL DISTRICT PROPERTY  
SOLANO COUNTY, CALIFORNIA  
SAN FRANCISCO DISTRICT  
FILE NUMBER 201200301N**

**DATE: September 8, 2014**

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

**Appellant:** Kim VanGundy, Fairfield-Suisun Unified School District Director of Facilities & Construction (Appellant)

**District Representative:** Dominic MacCormack, Army Corps of Engineers, San Francisco District (District)

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

**Receipt of Request for Appeal:** 9 July 2013

**Appeal Meeting and Site Visit Date:** 14 November 2013

**Summary of Decision:** This Clean Water Act (CWA) jurisdictional determination (JD) is remanded to the District for further evaluation and explanation as described below, prior to making its final decision. The District must reevaluate its jurisdictional determination and include sufficient information to support its final determination. The District must clearly document the analysis which lead to its conclusion as to the jurisdictional status of the 0.495 acres of seasonal wetlands within the 1.4 acre detention basin. In making its final decision, the District must re-evaluate its conclusion that the basin is a water of the United States, rather than a settling basin, which falls into the category of features which generally are not considered to be “waters of the United States”. Should the District not conclude that the basin is exempt from jurisdiction under the CWA as a settling basin, the District must reconsider whether a significant nexus exists between the basin and the nearest downstream Traditionally Navigable Water (TNW). In doing so, the District must document data and observations that lead to its final decision, as well as the evaluation of such data and observations, as required by the joint Corps/EPA guidance, dated December 2, 2008, “Revised Guidance on Clean Water Act Jurisdiction Following the Supreme Court Decision in Rapanos v. U.S. and Carabell v. U.S.” (Revised Rapanos Guidance).

**Background Information:** The Laurel Creek Park Site (Site) is an approximately 8.6-acre study site (APN's 168-130-15 and 168-130-17), adjacent to the Laurel Creek Elementary School, within the City of Fairfield, at the intersection of Gulf Drive and Hickory Drive, Solano County, California, and is found within the Fairfield North USGS Quad at 38.282° N latitude and 122.016° W longitude.

The Appellant's consultant evaluated the site using the 1987 *Wetland Delineation Manual* (1987 WDM), the 2008 Regional Supplement to the *Wetland Delineation Manual*: Arid West Region (Version 2.0), and the Code of Federal Regulations (C.F.R.) definitions of jurisdictional waters and supporting guidance documents. With the May 31, 2012 submittal, the Appellant's consultant concluded that there are 0.495 acres of seasonal wetlands within the 1.4 acre detention basin. The consultant indicated that the Appellant had requested that the District evaluate whether these wetlands fit into a category of aquatic areas that are generally not protected by the CWA.

On May 17, 2013 the District provided the Appellant with a JD for the Property. The District stated that "the enclosed delineation map entitled, Laurel Creek Park Study Site, date certified May 9, 2013, accurately depicts the extent and location of wetlands within the boundary area of the site that are subject to U.S. Army Corps of Engineers regulatory authority under Section 404 of the Clean Water Act". The District's letter does not directly state the size of the study area or the area of waters of the U.S. present within the study area.

The Appellant disagreed with the District's determination that aquatic features on the Site were subject to CWA jurisdiction and appealed. The Appellant's reasons for appeal are identified below.

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

**REASON 1:** The determination fails to recognize that certain geological features are excluded from jurisdictional waters under the interagency guidance.

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

**ACTION:** The District must reevaluate its jurisdictional determination and include sufficient information to support its final determination. In particular, the District must reevaluate whether the basin is jurisdictional under the CWA or a settling basin, which falls into the category of features which generally are not considered to be "waters of the United States".

**DISCUSSION:** In the request for appeal (RFA), the Appellant asserts that the Site was excavated for draining uplands, as the drainage plans for the Dover subdivision No. 5 describes the Site as an existing stormwater basin. The Appellant also asserts that the basin does not carry a relatively permanent flow. The Appellant describes the flow of water into the culverts as being completely from surface runoff into drop inlets on the

streets in the Dover Subdivision No. 5, the subdivision to the north of the Site, and some minor runoff from the Laurel Creek Elementary School grounds. The Appellant further states that minor summer/dry season nuisance flow associated with overwatering of landscape and car washing enters the site, no groundwater enters the site, the bottom elevation of the site is above the groundwater table of Laurel Creek, and flow into the basin is not permanent. The Appellant asserts that flow into the site is ephemeral, plans for the nearby subdivision describe the aquatic feature on the site as an existing stormwater basin, and that the aquatic feature on the site is not similarly situated to Laurel Creek, because the aquatic feature on the site is not physically located in a like manner, it is a basin in a field, not lying adjacent to the tributary. The Appellant asserts that there is no evidence, beyond speculation, that there is a significant nexus with a downstream TNW. Finally, the Appellant asserts that the basin should not be subject to USACE jurisdiction, because it is excavated wholly in and drains only uplands.

In its May 1, 2013, Memorandum for Record, the District indicated that they had not found or obtained water quality-related authorizations from any state or federal agency, indicating that the basin was created for the purposes of treating waste, in order to meet requirements of the 1972 Clean Water Act. Further, the District concluded that there was no evidence that waste treatment was occurring at this site. The District, therefore, concluded that the basin was not excluded from the definition of “waters of the United States”, pursuant to 33 C.F.R. §328.3(a)(8), as a water body, which is part of a waste treatment system, designed to meet the requirements of the CWA.

However, given the proximity of the housing development with the timing of the basin construction, the District concluded that they could reasonably assume that the basin was constructed for the purpose of water quality management, to retain sediment, and to control storm water volumes given the close proximity to Laurel Creek. The District cited the preamble to the Final Rule for Regulatory Programs of the Corps of Engineers. The preamble to the 1986 regulations includes “artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing” as among those waters which the Corps does not generally consider to be “Waters of the United States.” Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986). However, the preamble also indicates that “the Corps reserves the right on a case-by-case basis to determine that a particular waterbody within these categories of waters is a water of the United States.” *Id.* Further, “EPA also has the right to determine on a case-by-case basis if any of these waters are ‘waters of the United States.’” *Id.* The District concluded that the detention basin at the site was constructed in dry land and is currently used as a settling basin.

The Memorandum for Record also indicated that, according to the Appellant’s consultant, flow both into and also out of the basin is ephemeral. Flow into the culverts feeding the basin is only from surface runoff (from rain events) into drop inlets on streets in the Dover Subdivision (the subdivision to the north) and possibly from the Laurel Creek school ground. According to the Memorandum for Record, the Appellant’s consultant also indicated that groundwater enters the basin and the bottom elevation of the basin is above the groundwater table of the adjacent Laurel Creek and that the only

water entering the basin is direct rainfall, inflow from the drainage culvert, and the rare instances of over-topping of the levee along Laurel Creek and/or backflow up the culverts from Laurel Creek during major floods (James Paluck, City of Fairfield, Department of Public Works, personal communication). The District stated in the Memorandum, that pre-urban development aerial photographs were also reviewed, and the storm drain did not and does not recapture any previous tributary streams. From 1970 aerial photos, the District concluded that fields that were in the areas where the subdivision now stands were under cultivation at the time. The District concluded that there was no evidence to contradict the assertion that flow is ephemeral. The District noted that little or no flow was observed leaving the basin, which supports evidence that the consultants had documented of lack of flow. In an effort to resolve this issue, the District took the project details to Rob Leidy at EPA in San Francisco for consultation and review. The following is his response, from the email included in the AR:

Thanks for sending this to me for review. I've read through the file and I have a couple of comments. First, it is my view that the wetlands associated with basin should be considered adjacent to Laurel Creek (the basin wetland is only 170 feet from Laurel Creek at its closest), regardless of the presence of a levee. Stormwater entering the basin would be retained and treated in the wetlands. As you know, wetlands can be found to have a significant nexus to the downstream TNW by removing or not allowing pollutants to reach the TNW. In my mind, this basin clearly functions in this way. Since the TNW is only 2.5 miles downstream it seems very reasonable to conclude that the basin/wetland would have a less than speculative water quality function for TNW receiving waters. In addition, it also seems reasonable that the basin regularly ponds at least shallow water during years of average (and above average) rainfall. Shallow, temporarily ponded (even for several weeks) wetlands are known to function as breeding habitat for western toads and Pacific chorus frogs, two species that are known to occur in this area. Use by of the wetland by amphibians and other animals that are linked through the food chain to the TNW would also strengthen a finding of a significant nexus. If the basin were several hundred feet from the RPW and/or further from the TNW, then I might concur with your assessment of no significant nexus. Given the close proximity (adjacency) of the basin wetlands to Laurel Creek and to the TNW, and given its likely nutrient/pollutant retention functions and probable biological connection, I think that is very reasonable make a determination that the wetland is jurisdictional.

After receiving the EPA email, the District, as indicated above, concluded that the basin is jurisdictional due to the findings of a significant nexus between the basin and downstream navigable waters. The District further concludes in Section III.B.1.c of its AJD form that there are many likely biological, chemical, and physical functions being performed by the seasonal wetlands on-site. The District states that the wetland likely provides value by performing the following functions: 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. macro invertebrates). The

District then states that no specific studies have been completed on the project site to determine the magnitude for which of the above mentioned functions and values are being performed. In Section III.C.3, the District states that 0.495 acres of wetlands on the project site lie directly inside of a sediment detention basin which is connected via a 36-inch subsurface pipe that flows southwest approximately 170 feet before it reaches Laurel Creek, an RPW. Section III.C.3 then states that Laurel Creek flows south for approximately two and a half miles before it drains into Suisun Slough, a TNW and that evidence of flow and proximity of seasonal wetlands to the RPW and TNW suggest that the nexus between them is more than speculative and is therefore indeed significant.

Pursuant to 33 C.F.R. § 328.3(a)(8), “[w]aste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 C.F.R. § 423.11(m) which also meet the criteria of this definition) are not waters of the United States.”

40 CFR § 122.26 is the regulation concerning Storm water discharges, as applicable to State NPDES programs. 40 CFR § 122.26(b)(13) defines Stormwater as “stormwater runoff, snow melt runoff, and surface runoff and drainage”. 40 C.F.R. § 122.26(b)(14) states that storm water discharge associated with industrial activity means the discharge from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant. The term does not include discharges from facilities or activities excluded from the NPDES program under part 122.

In 1989, the Department of the Army (DA) and the EPA signed the, “MOA between the DA and EPA Concerning the Determination of the Geographic Jurisdiction of the Section 404 Program and the Application of the Exemptions under Section 404 (f) of the CWA.” That MOA indicates that the Corps will make the majority of determinations of Section 404 geographic jurisdictions and exemptions. While EPA reserves the right to make calls on special cases and special 404(f) matters, that only rarely occurs.

The January 28, 2008, Memorandum from Corps Headquarters to the field, “Process for Coordinating Jurisdictional Determinations Conducted Pursuant to Section 404 of the Clean Water Act in Light of the Rapanos and SWANCC Supreme Court Decisions”, indicates that, for jurisdictional determinations involving significant nexus determinations, Corps districts will send copies of draft jurisdictional determinations via e-mail to appropriate EPA regional offices. The EPA regional office will have 15 calendar days to decide whether to take the draft jurisdictional determination as a special case under the January 19, 1989, “Memorandum of Agreement Between the Department of the Army and the USEPA Concerning the Determination of the Section 404 Program and the Application of the Exceptions under Section 404(f) of the Clean Water Act.” If the EPA regional office does not respond to the district within 15 days, the district will finalize the jurisdictional determination.

The Revised Rapanos Guidance requires Corps districts and EPA regions to ensure that the information in the record adequately supports any jurisdictional determination. The Revised Rapanos Guidance states that 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.

It is clear from the administrative record that the District, first, considered the potential that the basin on the Property might fall under the waste treatment system exemption. The District based its conclusion that the basin was not exempt as a waste treatment facility on the basin providing only passive treatment of stormwater runoff from the surrounding area. As exemptions from CWA jurisdiction are expected to be narrowly construed in order to achieve the purposes of the CWA, it was reasonable for the District to conclude, based on their consideration, that the basin on the Property is not exempt from CWA jurisdiction, pursuant to the waste treatment system exemption.

The District further indicated in its Memorandum that it considered whether the feature is a settling basin, a feature which is generally not considered to be a water of the United States. 51 Fed. Reg. at 41,217. Further, the District, prior to coordination with EPA, had concluded that the detention basin at the site was constructed in dry land and is currently used as a settling basin, which would support a conclusion that the basin is a feature which would generally not be considered to be "waters of the United States". *Id.* After receiving comments from EPA, the District, without apparent further consideration, concluded that the basin was a water of the United States. The AR does not contain a clear explanation of why, in spite of its original conclusion that the basin was a settling basin constructed in dry land, the District concluded that the basin was a water of the United States.

After receiving comments from EPA, the District, as indicated above, concluded that the basin is jurisdictional due to the findings of a significant nexus between the basin and downstream navigable waters. There is no evidence the District engaged in additional consideration or gathering of observations or data that would support the conclusions suggested by EPA and adopted by the District. As EPA did not take the draft jurisdictional determination as a special case under the January 19, 1989, "Memorandum of Agreement Between the Department of the Army and the USEPA Concerning the Determination of the Section 404 Program and the Application of the Exceptions under Section 404(f) of the Clean Water Act" and make the jurisdictional determination, the obligation remained with the District to support its determination.

Therefore, this reason for appeal has merit. While the AR supports the District's conclusion that the basin is not exempt from jurisdiction under the CWA as a waste treatment facility, the AR does not support the District's conclusion that the basin is not exempt from CWA jurisdiction as a settling basin excavated on dry land, nor does the AR contain any indication that either the District or EPA has made a case-by-case determination that the basin is a waterbody, which despite being a settling basin excavated on dry land, is a water of the United States. The District must therefore reevaluate its jurisdictional determination and include sufficient information to support its final determination. The District must clearly document the analysis which leads to its final

conclusion as to the jurisdictional status of the 0.495 acres of seasonal wetlands within the 1.4 acre detention basin. In making its final decision, the District must reevaluate its conclusion that the basin is not exempt from CWA jurisdiction as a settling basin excavated on dry land and a water of the United States. If the District's final decision is that the basin is not exempt from CWA jurisdiction as a settling basin excavated on dry land, it must also reconsider whether a significant nexus exists between the basin and the nearest downstream TNW.

**REASON 2:** The Army Corps' significant nexus finding is based on speculation, and fails to demonstrate that the site's effects on waters are more than insubstantial.

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

**ACTION:** In making its final decision, the District must re-evaluate its conclusion that the basin is a water of the United States. Should the District not conclude, as its final decision, that the basin is a settling basin, which falls into the category of features, which would generally not be considered to be "waters of the United States", at the end of its reconsideration, as required above in Reason 1, the District must reconsider whether a significant nexus exists between the basin and the nearest downstream TNW. In doing so, the District must document data and observations that lead to its final decision, as well as the evaluation of such data and observations, as required by the Revised Rapanos Guidance in making its JD.

**DISCUSSION:** In the RFA, the Appellant asserts that, because the site does not directly abut the non-navigable portion of Laurel Creek, an intermittent stream, and the site does not have a continuous surface connection with Laurel Creek, the District is obligated to make a fact-specific "significant nexus finding, in order to assert jurisdiction. The Appellant asserts that the District failed to make the required fact-specific significant nexus finding and that the District's determination merely describes the District's administration of the CWA, while failing to analyze factors pertinent to a significant nexus analysis. Further, the Appellant asserts that the effects of the aquatic feature on the site on water quality are speculative, at best, and there is no proof that the District's speculated effects are more than insubstantial. The Appellant asserts that the only significant nexus factor mentioned by the District's determination is a declaratory, speculative assessment, claiming "likely" nutrient/pollutant retention functions with no facts or evidence in support: "It is our assessment that the detention basin and wetlands onsite would have a water quality function for the Traditionally Navigable Water (Suisun Slough) downstream given the close proximity (adjacency) of the basin wetlands to Laurel Creek and to the TNW, and its likely nutrient/pollutant retention functions, the nexus between them is more than speculative and is significant." The Appellant asserts that significant nexus must be significant, not based on speculation, and not insubstantial. The Appellant further asserts that "likely" is speculative and that, furthermore, the District has no explanation of how the likely function is anything other than insubstantial. Additionally, the Appellant asserts that the District failed to explain its "basis for concluding whether or not the tributary and its adjacent wetlands, when considered

together, have more than a speculative or insubstantial effect on the chemical, physical, and biological integrity of a TNW. Finally, the Appellant asserted that the District must consider both the flow of Laurel Creek and the functions of the site together with Laurel Creek and that the District did not make those considerations.

The District completed one AJD form for the waters on the property. In Section I.C of the AJD form, the District identified Suisun Slough as the nearest downstream TNW. Section II.B.1.a of the AJD form indicates that the review area contains wetlands adjacent to, but not directly abutting RPWs that flow directly or indirectly into TNWs. Section III.B.2.i.a indicates that there are 0.495 acres of wetlands in the review area.

Section III.B.2.i.c indicates that wetlands are not directly abutting and that there is a discreet hydrologic connection into an underground pipe, through a levee, and then into Laurel Creek.

Section III.B.1 of the AJD form indicates that Laurel Creek is in parts totally natural, while in other stretches it has been straightened and levees added to its banks for flood prevention. The same section also indicates that no assessment was performed which would identify specific pollutants. The section further indicates that aquatic wildlife diversity includes Western Toads and Pacific Chorus Frogs (source: EPA) and various other aquatic-dependent species, including but not limited to migratory waterfowl, invertebrates, and other amphibians, but that no assessment was performed of numbers or densities of the aforementioned organisms. Section III.B.2 indicates that a trickle of water was observed in early August of 2012 between the basin and Laurel Creek; that the presence of any specific pollutants in the basin was unknown; that dominant plant species included *Festuca perennis*, *Rumex crispus*, and *Lepidium latifolium*; and that no assessment had been performed for chemical characteristics.

Section III.C indicates that the 0.495 acres of wetlands on the project site lie directly inside of a sediment detention basin, which is connected via a 36-inch subsurface pipe, that flows southwest approximately 170 feet, to Laurel Creek, an RPW, and that Laurel Creek then flows south for approximately two and a half miles before it drains into Suisun Slough, a TNW. The District's conclusion in the AJD form is that evidence of flow and the proximity of seasonal wetlands to the RPW and TNW suggest that the nexus between them is more than speculative and is, therefore, significant.

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. Classes of waters, which do not require a significant include TNWs, wetlands that are adjacent to TNWs, RPWs, and wetlands that are adjacent and abutting an RPW.

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).

Corps regulations, at 33 C.F.R. § 328.3(c), 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 Corps regulations, at 33 C.F.R. §§ 328 and 329, define “waters of the United States” and “navigable waters of the United States”, respectively, and prescribe policy, practice and procedures to be used in determining the extent of such jurisdiction. In addition, 33 C.F.R. § 331, Administrative Appeal Process, provides terms and definitions for JDs. The Corps regulations, at 33 C.F.R. § 329.4, indicates that, “waters that are subject to the ebb and flow of the tide” are by definition navigable waters of the U.S. The term “adjacent” is defined, at 33 C.F.R. § 328.3, as “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’”.

Procedures for making JDs for waters of the United States are described in the Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency Concerning the Determination of the Geographic Jurisdiction of the Section 404 Program and the Application of the Exemptions Under Section 404(f) of the Clean Water Act (MOA), dated 19 January 1989, later amended on 4 January 1993.

The Corps regulations at 33 C.F.R. § 328.3(c) define wetlands as follows: “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 Revised Rapanos Guidance directs the agencies to assert jurisdiction over wetlands “adjacent” to traditional navigable waters as defined in the agencies’ regulations. Under EPA and Corps regulations and as used in the Revised Rapanos Guidance, “adjacent” means “bordering, contiguous, or neighboring”. The Revised Rapanos Guidance further states that finding a continuous surface connection is not necessary to establish adjacency under this definition.

The Revised Rapanos Guidance states 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 criteria, the agencies consider wetlands adjacent if one of the following three criteria is satisfied. First, there is an unbroken surface connection 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.

In the case of this jurisdictional determination, coordination with EPA was required by the Revised Rapanos Guidance and other associated guidance. However, as EPA did not take the jurisdictional determination as a special case, but rather merely offered an opinion as to jurisdiction and speculated on potential functions and indicators that could potentially serve as the basis of a significant nexus determination, it remained incumbent on the District to document, evaluate, and support its determination as to whether a significant nexus exists between the basin and the nearest downstream TNW.

Therefore, this reason for appeal has merit. The District must reevaluate its conclusion that the basin is a water of the United States. If, after completing the reevaluation required in response to Reason 1, the District’s final decision is that the basin is not exempt from CWA jurisdiction as a settling basin excavated on dry land, it must also reconsider whether a significant nexus exists between the basin and the nearest

downstream TNW. In doing so, the District must document data and observations that lead to its final decision, as well as the evaluation of such data and observations.

**REASON 3:** The Army Corp's significant nexus analysis ignores essential factors.

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

**ACTION:** The District must document data and observations that support its final decision, as well as the evaluation of such data and observations.

**DISCUSSION:** The Appellant asserts that the physical characteristics of Laurel Creek do not meet traditional navigable water standards for at least 1.9 miles downstream of the basin. Given this distance, the Appellant asserts that the District must do more in its significant nexus analysis than speculate that an ecological function exists. The Appellant asserts that the District's determination failed to provide any evidence or analysis to support that the Site's effects on water quality are more than insubstantial. The Appellant asserts that "[p]rincipal considerations when evaluating significant nexus include volume, duration, and frequency of the flow of water in the tributary and the proximity of the tributary to traditional navigable water" and that there was no evidence that the District considered any of these factors in claiming jurisdiction of the Site.

The Appellant further asserts that the determination ignores the principal factors of a significant nexus analysis, basing its determination only on "proximity and speculated "nutrient/pollutant retention functions" and that the Site's 1.9 mile proximity to traditional navigable waters cannot replace the required evaluations of the volume, duration, and frequency of flow of water. Furthermore, the Appellant asserts that the determination's significant nexus analysis must include an analysis of Laurel Creek's impacts on traditional navigable waters and that without understanding Laurel Creek's impacts on traditional navigable waters, it cannot be determined whether a significant nexus with the Site exists, especially if the Site's only claimed effect on water quality is "nutrient/pollutant redetection functions." Finally, the Appellant asserts that whether the site's effects on water quality are Insubstantial or substantial must depend on a relative comparison with nutrients/pollutants in Laurel Creek and Suisun Slough, comparing concentration of pollutants upstream to the concentration of pollutants in the river near the waters in question.

The Appellant argues that the District's determination does not support the conclusion that that the Site reduces the amounts of nutrient or pollutants that would otherwise enter traditional navigable waters" and that without analyzing these essential factors, the District cannot determine whether or not the Site's speculative effects on water quality are more than insubstantial.

This reason for appeal has merit. As with Reason 2 above, Reason 3 questions the sufficiency of the District's significant nexus analysis. The response to Reason 2 addresses this reason, as well. If the District determines that the basin is a water of the

U.S., , the District must then reconsider whether a significant nexus exists between the basin and the nearest downstream TNW. In doing so, the District must document data and observations that lead to its final decision, as well as the evaluation of such data and observations, as described in response to Reason 2 above.

**Information Received and its Disposition during the Appeal Review:** The administrative appeal was evaluated based on the District's administrative record, the Appellant's Request for Appeal (RFA), discussions at the appeal meeting

**Conclusion:** The District must reevaluate its jurisdictional determination and include sufficient information to support its final determination. The District must clearly document the analysis which lead to its conclusion as to the jurisdictional status of the 0.495 acres of seasonal wetlands within the 1.4 acre detention basin. In making its final decision, the District must re-evaluate its conclusion that the basin is a water of the United States. In particular, the District must analyze whether the basin is a settling basin, which generally is not considered to be "waters of the United States". Should the District conclude, as its final decision, that the basin is not exempt from CWA jurisdiction as a settling basin excavated on dry land, it must also reconsider whether a significant nexus exists between the basin and the nearest downstream TNW. In doing so, the District must document data and observations that lead to its final decision, as well as the evaluation of such data and observations, as required by the Revised Rapanos Guidance.

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