

**ADMINISTRATIVE APPEAL DECISION
CLEAN WATER ACT
FRAZIER LAKE FARMS
SAN BENITO COUNTY, CALIFORNIA
SAN FRANCISCO District
FILE NUMBER SPN-2011-00146S**

DATE: October 22, 2014

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

Appellant: Michael Halperin, Frazier Lake Farms (Appellant)

District Representative: Katerina Galacatos, Army Corps of Engineers, San Francisco District (District)

Authority: Clean Water Act (33 USC 1344)

Receipt of Request for Appeal: 29 November 2013

Appeal Meeting and Site Visit Date: 22 April 2014

Summary of Decision: The reason for appeal of this Clean Water Act (CWA) Jurisdictional Determination (JD) does not have merit. The District's decision is upheld and no further action is required of the District.

Background Information: The Property is an approximately 10 acre site, located at 1090 Hudner Lane, in the City of Hollister, San Benito County, California (APN 014-010-0010, 36.90502° North, -121.47897° West).

On May 26, 2011, the District 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 (CFR) definitions of jurisdictional waters, and supporting guidance documents.

An AJD for the Property was completed by the District on September 27, 2013. The District's approved jurisdictional determination (AJD) form concluded that the Property contained 2,465 linear feet of non-wetland waters and 21.43 acres of wetlands.

On October 1, 2013, the District provided the Appellant with the JD for the Property. The District's October 1, 2013, JD letter referenced a map dated July 16, 2013, entitled

“Approved Jurisdictional Determination, SPN File Number 2011-00146S, 1090 Hudner Lane Hollister, San Benito, CA (0-140-100-010)”, as depicting the extent and location of waters of the United States on the site.

The Appellant disagreed with the District’s conclusion that waters on the Property were subject to CWA jurisdiction and appealed, citing the reasons for appeal addressed in this appeal decision.

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

REASON 1: The property is prior converted wetlands. The District determined that it wasn’t prior converted wetlands, but the property has a long history of ranching and farming.

FINDING: This appeal does not have merit.

ACTION: No action is required.

DISCUSSION: In the request for appeal (RFA), the Appellant argued that the property is prior converted wetlands (croplands). The Appellant asserted that the property has a long history of ranching and farming and the District was incorrect in determining that it wasn’t prior converted croplands.

In two memorandums for record (June 15, 2011, revised September 27, 2013) (AR, pages 0019 through 0023) attached to its September 27, 2013 “Approved Jurisdictional Determination,” (AR, pages 0010 through 0017) the District indicated that the Property is within the Pajaro River Watershed. The District stated that the USGS quad sheet shows that two streams used to be on the site. The western stream originated in the hills to the south of the property and is a tributary of the Pajaro River, which is located approximately three and half miles to the northwest. The District indicated that a second stream originated in the central portion of the Property and that it appeared to have been channelized to the northeast.

The District further indicated in its memos that the Property appears to have initially entered agricultural activity after 1998. The District asserted that the Google aerial photograph from August 20, 1998 (AR, first page 0189) shows the site still undeveloped. The District indicated that the western stream feature was still present on the Property, however, it had been channelized on the neighboring property and flowed northeast until the Southern Pacific railway and then flows parallel to the railway towards the Pajaro River. The District indicated the aerial photograph did not clearly show the second stream feature clearly, although some dendritic features that indicate surface water flow in the north central portion of the Property remained visible. In addition, the District stated that the aerial photograph showed a swale feature flowing into the Property in the southeastern corner and an analogous signature of a wetland feature in the northeastern corner of the Property.

The District stated that the July 30, 2004 photo (AR, second page 0189), showed agricultural activity on the Property. Further, the District stated that the photo indicated the stream in the southwestern portion of the Property had been diverted into a newly constructed roadside ditch. The District stated that this photo showed that the Property had a barn and a house, and the interior south to north ditch has been excavated. The District stated that photos, subsequent to that date, supported their conclusion that agricultural activity on the Property continued consistently until May 2009 (AR, pages 0190-0194). The District stated that those photos showed crop production throughout Property and the wetland area in the northeast corner. The District stated that the May 25, 2009, photograph (AR, page 0194) showed that there had been new agricultural development in the northeast corner and eastern portion of the Property and that Mr. Halperin had indicated that he placed compost piles in this area. The District stated that those compost piles are clearly visible in this photograph as well as in the September 29, 2009, aerial photograph (AR page 0195) and, additionally, the photo shows that two new ditches were constructed on the adjacent property to the north.

33 C.F.R. § 328.3(a)(8) states that, “Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area’s status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.”

The Food Security Act of 1985, as amended, requires the Natural Resources Conservation Service (NRCS) to delineate, determine, and certify wetlands located on land on a farm or ranch subject to wetland conservation (WC) provisions in order to establish a producer’s eligibility for certain USDA program benefits (16 U.S.C. Sec. 3822).

The National Food Security Act Manual (NFSAM), Fifth Edition, provides policy pertaining to the WC provisions. Subpart D, 514.30 A(1), defines Prior Converted Cropland (PC) as a converted wetland where the conversion occurred before December 23, 1985; an agricultural commodity had been produced at least once before December 23, 1985; and as of December 23, 1985, the area was capable of producing an agricultural commodity (i.e., did not support woody vegetation and was sufficiently drained to support production of an agricultural commodity). The conversion could have included draining, dredging, filling, leveling, or otherwise manipulating (including the removal of woody vegetation or any activity that results in impairing or reducing the flow and circulation of water) the wetland area. In addition, there are specific hydrologic criteria that must be met for a converted wetland to be labeled PC.

Subpart D, 514.30 D of the NFSAM provides procedures for identifying PC. That section states that aerial photographs, crop records, and other resources are consulted to determine if the area has hydric soils, was converted for production of an agricultural commodity before December 23, 1985, was capable of producing an agricultural commodity as of December 23, 1985, and fails to meet hydrologic criterion of Farmed Wetland (FW).

There is no indication in the administrative record that the Appellant requested or received a determination from NRCS that the Property was PC. Further, there is no indication that NRCS evaluated the cropping history or the hydrology of the Property. The District, in its review of aerial photography, noted that evidence of agricultural activity on the property was not present prior to 1998 and that it ceased in 2009. There was no evidence that wetlands were converted to upland before December 23, 1985 or that any agricultural commodity had been produced on the Property prior to December 23, 1985.

It is clear in the administrative record that the District, prior to making its decision, considered the history of agricultural production on the Property. In finding no evidence of agricultural activity on the Property, prior to 1998, there is nothing, provided by the Appellant or encountered by the District, that would have led the District to believe that the Property might be considered PC and cause it to engage in a more detailed evaluation of the possibility that the Property might be considered PC. It was, therefore, reasonable for the District to conclude, based on their consideration, that the Property contains waters, including wetlands, subject to CWA jurisdiction.

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

Conclusion: I, therefore, conclude that the reason for appeal does not have merit. The District's determination was not 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's decision is upheld and no further action is required.

A handwritten signature in dark ink, appearing to read 'Thomas J. Cavanaugh', is centered on the page.

Thomas J. Cavanaugh
Administrative Appeal Review Officer