

**ADMINISTRATIVE APPEAL DECISION  
CLEAN WATER ACT  
Mendenhall PROPERTY  
Tenedor, LLC  
Utah County, Utah  
SACRAMENTO DISTRICT  
FILE NUMBER SPK-2006-50413**

**DATE:** March 28, 2008\_\_\_\_\_

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

**Appellant:** David Dearing, attorney representing Tenedor, LLC

**District Representative:** James McMillian, Army Corps of Engineers, Sacramento District (District)

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

**Receipt of Request for Appeal:** 7 November 2007

**Appeal Meeting and Site Visit Date:** 13 November 2007

**Summary of Decision:** This CWA jurisdictional determination is remanded to the District for further evaluation and consideration of information provided by the appellant, its significant nexus determination, and its determination that wetlands on the Mendenhall property are subject to jurisdiction under Section 404 of the Clean Water Act.

**Background Information:** The Mendenhall property is an approximately 21 acre site located, in Spanish Fork, Utah County, Utah. The property is south of the intersection of Interstate 15 and Highway 6, in Section 18, Township 8 South, Range 3 East, SLB&M, Latitude 40 07' 30.69', Longitude 111 38' 56.30".

The site consists of three separate parcels separated by the existing Spanish Fork City North Park and other developed properties. One parcel borders the existing city park on its east side and extends west to 200 East Street and extends north from 1000 North Street to Highway 6. The second parcel borders the city park on the east side and extends east to Highway 6 and northward from Chapel Drive to Highway 6. The third parcel is located east of 600 East Street and extends east to Highway 6 and from approximately 850 North northward to Chapel Drive. The site is bordered to the north and east by

Highway 6 and west and south by existing residential developments. The topography of the site was generally flat. The majority of the site consists of open fields; however, existing residential structures are located east of the city park. Vegetation generally consists of grasses, brushes, and some trees. An existing storm detention pond was observed on the northeast portion of the parcel located west of the city park. Several ponds and frequent areas of other surface water occur on the parcel located west of the city park. The ponds are located on the north portion of the parcel and the standing water occurs near the center and south portions of the parcel. Historical photos indicate the ponds have been present on the property since the 1970's.

For purposes of evaluation during the CWA jurisdictional determination, the Appellant's consultant delineated the site using the *1987 Wetland Delineation Manual* (1987 WDM). Wetlands identified on the property are 10.76 acres in size consisting of 9.67 acres of wet meadow, 1.02 acres of seasonal ponds, and 0.06 acres of spring. The appellant's consultant concluded that these areas meet the three criteria to be considered wetlands. The consultant concluded that there is no outlet from the property and that everything drains toward the middle of the site. The consultant's ultimate assertion was that these are isolated, non jurisdictional wetlands.

The District reviewed the Appellant's December 6, 2006, proposed CWA jurisdictional determination map. On May 2, 2007, the District issued its CWA jurisdictional determination for the Mendenhall property. On September 10, 2007, the District re-issued its CWA jurisdictional determination for the Mendenhall property after reconsidering jurisdiction in light of the Rapanos guidance. The District concluded that the 10.76 acres of waters, including wetlands on the Mendenhall property are waters of the United States within CWA jurisdiction. The Appellant disagreed and appealed citing the reasons for appeal addressed in this appeal decision.

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

**Reason 1:** As a matter of law, Utah Lake is neither a navigable water of the United States nor a tributary of such a water. Therefore, under Rapanos v. United States, 126 S.Ct. 2208 (2006), it is not subject to the Clean Water Act ("CWA"). In addition, none of its "tributaries" or their adjacent wetlands are subject to the CWA.

**FINDING:** This reason for appeal did not have merit.

**ACTION:** No action is required.

**DISCUSSION:** APPENDIX D, "Legal Definition of "Traditional Navigable Waters", of the "U.S. ARMY CORPS OF ENGINEERS JURISDICTIONAL DETERMINATION FORM INSTRUCTIONAL GUIDEBOOK" states that:

“The Environmental Protection Agency (EPA) and United States Army Corps of Engineers (Corps) “Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in *Rapanos v. United States* and *Carabell v. United States*” guidance (Rapanos guidance) affirms that EPA and the Corps will continue to assert jurisdiction over “[a]ll waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide.” 33 C.F.R. 328.3(a)(1); 40 C.F.R. 230.3(s)(1). The guidance also states that, for purposes of the guidance, these “(a)(1) waters” are the “traditional navigable waters.” These (a)(1) waters include all of the “navigable waters of the United States,” defined in 33 C.F.R. Part 329 and by numerous decisions of the federal courts, plus all other waters that are navigable-in-fact (e.g., the Great Salt Lake, UT and Lake Minnetonka, MN).”;

“If the federal courts have determined that a water body is navigable-in-fact under federal law for any purpose, that water body qualifies as a “traditional navigable water” subject to CWA jurisdiction under 33 C.F.R. 328.3(a)(1) and 40 C.F.R. 230.3(s)(1). Corps districts and EPA regions should be guided by the relevant opinions of the federal courts in determining whether waterbodies are “currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce” (33 C.F.R. 328.3(a)(1); 40 C.F.R. 230.3(s)(1)) or “navigable-in-fact.””, and:

“In summary, when determining whether a water body qualifies as a “traditional navigable water” (i.e., an (a)(1) water), relevant considerations include whether a Corps District has determined that the water body is a navigable water of the United States pursuant to 33 C.F.R. 329.14, or the water body qualifies as a navigable water of the United States under any of the tests set forth in 33 C.F.R. 329, or a federal court has determined that the water body is navigable-in-fact under federal law for any purpose, or the water body is “navigable-in-fact” under the standards that have been used by the federal courts.”

Corps and EPA headquarters have made it clear through this guidance that “traditional navigable water” include waters that are “navigable-in-fact”. While the appellant cites and relies on the “the continued highway” requirement from “The Daniel Ball, 77 U.S. (10 Wall.) 557 (1879)” and references to it by Justice Kennedy and reaffirmations in several other court cases, this does not represent the standard by which Corps Districts have been directed to evaluate “traditional navigable waters”. 33 C.F.R. Part 329 did not adopt the referenced standard from The Daniel Ball as a limitation on the scope of jurisdiction for Sections 9 and 10 of the Rivers and Harbors Act of 1899. Consequently, the position taken by Appendix D regarding Clean Water Act jurisdiction is that TNW’s include some isolated lakes that do not constitute part of a continuous highway for the transportation by water of interstate water borne commerce. The Sacramento District has appropriately applied the standard for determining a water to be a “traditional navigable water”. In its November 9, 2007, “Traditional Navigable Waterways, Federally Navigable Determination for Utah Lake (SPK-2007-01601)”, Sacramento District documented current and historic navigation and cited the “Utah Division of State Lands v. United States, 482 U.S. 193 (1987), which specifically determined that “Utah Lake is a

navigable body of freshwater”. I have, therefore, determined that the Sacramento District has sufficiently documented that Utah Lake is a “traditional navigable water”.

**Reason 2:** As a matter of law, the “channel” to which the subject wetlands are adjacent (according to the JD) is not a water of the United States, but merely a manmade drainage ditch that carries only stormwater from the Spanish Fork City stormwater drainage system. Under the plurality opinion in *Rapanos*, this feature is not a water of the United States. In addition, this feature does not meet the test set forth for jurisdiction in Justice Kennedy’s opinion in *Rapanos*, because it does not have a significant nexus to Utah Lake.

**FINDING:** Portions of this reason for appeal had merit

**ACTION:** The District should consider whether there is additional information available to support its conclusion that channel was constructed in wetlands and that the channel to which the subject wetlands are adjacent is not a ditch which was constructed wholly in uplands and would generally not be considered to be “Waters of the United States”, as the appellant has asserted, and if so, whether a case specific determination should be made that it is a water of the United States. The District should consider whether there is any additional available information that documents the existence of a significant nexus between the channel and Utah Lake. Additionally, the District must also consider whether its final determination as to the jurisdictional nature of the channel has an affect on its conclusion as to its role in providing a significant nexus to a traditional navigable water for the wetlands on the Mendenhall property.

**DISCUSSION:** The flows approximately 2 miles to Dry Creek, a perennial, relatively permanent waterway, which is tributary to Utah Lake. This channel drains Spanish Fork City's Main Street stormwater catchment area, and the District concluded that it receives shallow subsurface water from adjacent wetlands.

Information provided by the appellant concludes that the channel was constructed in uplands. The appellant asserted that the District had not suggested that the channel was constructed in wetlands until the appeal conference; however the District’s memo to the file dated September 10, 2007, references an attached data sheet which indicates that the channel appears to have been constructed in wetlands. The District concluded that, based on aerial photography from 1966, the entire area surrounding the unnamed channel contained pockets of wetlands, and it appears that wetlands within the relevant reach were bisected by the unnamed channel. The District also indicated that further downstream the ditch appears to bisect wetland areas.

The District’s conclusion, from the data sheet attached to the above memo, concludes that the channel is relatively permanent water largely based upon observation of flow. The appellant has asserted that the Corps has not established that the ditch has a significant nexus to Utah Lake. The guidance Corps and EPA headquarters indicates that relatively

permanent waters (RPWs) are jurisdictional under the CWA. It further states that, as a matter of policy, field staff will include in the record any available information that documents the existence of a significant nexus between a TNW and an RPW that is not perennial. Therefore, the District should consider what additional data may be available which would document a significant nexus between the seasonal RPW and Utah Lake in order to insure compliance with this guidance.

**Reason 3:** Under the standards set forth in Rapanos, the wetlands are not “adjacent”. They do not meet the test set forth in the plurality opinion because they do not have a continuous surface connection to a relatively permanent, standing or flowing body of water. They do not meet the test set forth in Justice Kennedy’s opinion because they do not have a “significant nexus” to a navigable water of the United States, even if Utah Lake is considered as such.

**FINDING:** Portions of this reason for appeal had merit.

**ACTION:** The District should further consider the appellant’s data concerning a subsurface connection and its effect on the District’s determination that there is a significant nexus between wetlands on the Mendenhall property and Utah Lake.

**DISCUSSION:** The guidance from Corps and EPA headquarters indicates that Wetlands separated from other waters of the U.S. by man-made dikes or barriers, natural river berms, beach dunes, and the like are adjacent and that a continuous surface connection does not require surface water to be continuously present between the wetland and the tributary. It goes on to say that Wetlands adjacent to but not directly abutting RPWs that flow directly or indirectly into TNWs are jurisdictional under the CWA where there is a “significant nexus” with a TNW. While the District has documented the existence of a significant nexus to Utah Lake, it is not clear to what degree the determination relies on the District’s conclusion that there is a subsurface connection between the wetlands on the Mendenhall property and the channel. The District should consider the appellant’s conclusions and consider whether there is additional information that would further substantiate its determination of a significant nexus prior to making its final jurisdictional determination.

**Reason 4:** Under the Rapanos Guidance, neither the drainage ditch nor the subject wetlands are waters of the United States. The ditch was dug in uplands and carries only upland drainage, if anything. The ditch does not have a significant nexus to Utah Lake. The wetlands do not abut the ditch and do not have a significant nexus to Utah Lake.

**FINDING:** Portions of this reason for appeal had merit.

**ACTION:** The District should carry out the actions described under reasons 2 and 3 prior to making its final jurisdictional determination.

**DISCUSSION:** This reason would be completely addressed by carrying out the actions listed under reasons 2 and 3. The discussion under reasons 2 and 3 address this reason as well. The considerations and conclusions under reasons 2 and 3 are sufficient to address this reason for appeal.

**Reason 5:** Because the CWA does not regulate groundwater, an adjacency determination cannot rely on a groundwater connection as a matter of law.

**FINDING:** This reason for appeal did not have merit.

**ACTION:** No action is required.

**DISCUSSION:** The District did not attempt to regulate groundwater in this case. The District's conclusion that there is a subsurface connection between the wetlands on the Mendenhall property and the adjacent channel was part of the consideration in concluding that there was a significant nexus between the wetlands in question and the adjacent channel. Corps and EPA headquarters have recently jointly provided direction to at least one District and Region that a subsurface connection, considered with other factors is sufficient to determine that wetlands are adjacent to a particular channel.

**Reason 6:** The JD relies on incorrect data concerning elevations in concluding that a subsurface connection exists between the wetlands and the drainage ditch.

**FINDING:** This reason for appeal did not have merit.

**ACTION:** No action is required.

**DISCUSSION:** The written response from the appellant concludes that, "The elevation data used by the District is not incorrect, but it is misleading. Although the wetlands lie at an elevation above the flow line of the ditch, there is no subsurface communication." While there appears to be a small discrepancy between the ditch elevation used by the appellant and the ditch elevation used by the District, the pertinent conclusion remains the same. The ditch sits at an elevation that is lower than the wetlands on the Mendenhall property. The issue of a subsurface connection is discussed under reasons for appeal numbers 3 and 5.

**Reason 7:** The JD relies on incorrect data in asserting that a dye test showed the existence of a subsurface connection.

**FINDING:** This reason for appeal may have merit.

**ACTION:** The District should give further consideration to information that the appellant has provided concerning the results of the uranine dye test prior to making its final jurisdictional determination for the wetlands on the Mendenhall property.

**DISCUSSION:** The District has indicated that the dye test was proposed by the applicant and served only as secondary confirmation of the subsurface connection. The District indicated that it relied primarily on its soil investigations and supporting literature to make the determination that a shallow subsurface hydrological connection exists between the wetlands and the ditch. The District should, however, reconsider its conclusions as to the results of the dye test and any implications that reconsideration may have on its determination as to the jurisdictional nature of the wetlands on the Mendenhall property.

**Reason 8:** The JD willfully ignores material facts by failing to acknowledge that a black light test showed that the Corps' representative incorrectly identified a substance that he saw in the ditch as uranine dye.

**FINDING:** This reason for appeal did not have merit.

**ACTION:** No action is required.

**DISCUSSION:** The substantive implication of this reason for appeal is discussed above in "Reason 7", that being that the substance in the ditch was potentially incorrectly identified as uranine dye. The appellant's assertion that the "JD willfully ignores material facts" is not substantiated by the administrative record and, while there may be additional information to gather and consider prior to the District making its final decision on this JD, the administrative record suggests that the District considered available information prior to rendering its decision.

**Reason 9:** The JD does not set forth substantial evidence to support its conclusions that the ditch and the wetlands are waters of the United States.

**FINDING:** This reason for appeal did not have merit.

**ACTION:** No action is required.

**DISCUSSION:** While the District is directed to consider whether additional information may be available and to give some additional consideration to information and conclusions suggested by the appellant, the District's conclusions are supported.

**Reason 10:** The JD is arbitrary and capricious because it represents a reflex decision to assert jurisdiction regardless of the facts.

**FINDING:** This reason for appeal did not have merit.

**ACTION:** No action is required.

**DISCUSSION:** There is nothing in the administrative record which would suggest validity to this reason for appeal. While I am directing the Sacramento District to further consider this jurisdictional determination, the administrative record does not suggest a reflexive decision.

**Information Received and its Disposition During the Appeal Review:** The administrative appeal was evaluated based on the District's 471 page administrative record, the Appellant's Request for Appeal, and the Appellant's and District's written responses to the appeal agenda items, and discussions at the appeal meeting.

**Conclusion:** I conclude the District must further evaluate whether there is additional information available to support its conclusions relative to the origins and jurisdictional status of the channel, the existence of a significant nexus between the channel and Utah Lake, and whether its final determination as to the jurisdictional nature of the channel has an affect on its conclusion as to its role in providing a significant nexus to a traditional navigable water for the wetlands on the Mendenhall property. Additionally, the District should further consider the appellant's data concerning a subsurface connection, including the results of the uranine dye test, and whether it affects the District's determination that there is a significant nexus between wetlands on the Mendenhall property and Utah Lake.

Original Signed

John R. McMahon  
Brigadier General, U. S Army  
Commanding