

**ADMINISTRATIVE APPEAL DECISION
CLEAN WATER ACT
WARREN PROPERTY, SAN DIEGO COUNTY, CALIFORNIA
LOS ANGELES DISTRICT
File Number SPL-2017-00209-RJV**

DATE: May 9, 2018

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

Appellant Representative: Paul Warren (Appellant)

District Representative: Kyle Dahl, U.S. Army Corps of Engineers, Los Angeles District (District)

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

Receipt of Request for Appeal: October 2, 2017

Appeal Meeting and Site Visit Date: February 13, 2018

Summary of Decision: The reasons for appeal of this Clean Water Act (CWA) jurisdictional determination do not have merit. The District has supported its determination that the unnamed tributary on the Warren property (Property) is a Non-Relatively Permanent Water (non-RPW) that has a significant nexus with the nearest downstream Traditionally Navigable Water (TNW). The District's jurisdictional determination is, therefore, consistent with the joint Corps/EPA guidance, dated 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 District's decision is upheld and no further action is required.

Background Information: The Property is located 25777 Willow Lane, Escondido, California, Latitude 33.17996°, Longitude -117.10998°, San Diego County, California.

For purposes of making the CWA jurisdictional determination, the District evaluated the site on March 20, 2017, using the Code of Federal Regulations (CFR) definitions of jurisdictional waters and supporting guidance.

The District's review included a field visit to the site on March 20, 2017. On June 5 and 6, 2017, the District reviewed Google Earth photography, in the office, and determined the flow path from the drainage on the Property, to Elijo Lagoon, and ultimately the Pacific Ocean. On June 8, 2017, the District made its CWA jurisdictional determination for the drainage on the Property. The District relied on data obtained and observations made on the Property, described below, as well as U.S. Geological Survey maps, the National Wetland Inventory map, and aerial

photography, listed as data sources on its AJD form. The District concluded that the site contained a tributary to an unnamed tributary, that is a tributary to Reidy Creek, and that Reidy Creek is a tributary to Escondido Creek, which is tributary to San Elijo Lagoon and the Pacific Ocean. The District determined that these waters are regulated under Section 404 of the Clean Water Act. The District's basis for its determination was detailed in its "Approved Jurisdictional Determination Form" (AJD), dated June 8, 2017. The District requested concurrence with its AJD from U.S. Army Corps of Engineers headquarters and the Environmental Protection Agency via email and received concurrence from both by email on June 8, 2017.

The Appellant submitted a Request for Appeal (RFA) on October 2, 2017. The Appellant disagreed with the District's conclusion that the unnamed tributary on the Property is a waters of the United States, subject to jurisdiction under Section 404 of the Clean Water Act. The Appellant asserted that the drainage ditch only has septic flow, only flows after heavy rain, is not navigable, does not fit 404 or 401 definitions, and is exempt from jurisdiction, based on agricultural use.

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: Incorrect application of law, regulation or policy. The drainage ditch only has septic flow and only flows after heavy rain and/or when neighbor county employee made aware of USACE visit sump pumps liquid excrement downhill. The flow is artificial in an irrigated southern California desert. It is not navigable, does not fit 404 or 401 definitions, as agriculture is expressly exempted. The land is zoned for agricultural use and is, therefore, exempt.

FINDING: This reason for appeal does not have merit.

ACTION: The District's decision is upheld and no further action is required.

DISCUSSION: In the RFA, the Appellant asserted that the drainage ditch only has septic flow and only flows after heavy rain and/or when neighbor county employee made aware of USACE visit sump pumps sewage effluent downhill. The Appellant asserted that flow is artificial in an irrigated southern California desert. The Appellant further asserted that the drainage is not navigable, does not fit 404 or 401 definitions, as the land is zoned for agricultural use and is, therefore, exempt.

The District completed one AJD form for the Property.

In Section II.B.1.a of its AJD form, the District indicated that the Property contained Non-RPWs that flow directly or indirectly into TNWs.

In Section 111.B.1.(ii)(b) of its AJD form, the District determined that the tributary is manipulated and stated that the tributary has likely been relocated and re-aligned slightly from historic conditions due to construction of nearby roads and homes. The District indicated that non-native vegetation has been introduced in to the tributary and the flow regime has been altered due to increased impervious surface in the watershed as well as run-off from landscaping irrigation. Further, the District stated that the subject tributary appears generally stable or slightly eroding, primarily from increased levels of run-off, due to increased impervious surface. The District stated that tributary in the project review area has been recently modified by property owner, nearly all vegetation has been removed, and the banks and invert of the channel have been disturbed.

In Section 111.B.1.(ii)(c) of its AJD form, the District stated that the tributary likely has subsurface flow only after rain events or during times of urban runoff. The District concluded that, because the flow regime is ephemeral and the tributary is a headwater stream, there is not likely a continuous or even semi continuous subsurface flow, but that the sediment in the tributary consist of sand and silts and, as a result, stream flow likely infiltrates the ground during rain events. The District documented the presence of bed and banks and an ordinary high water mark, characterized by: vegetation, matted down, bent, or absent; leaf litter, disturbed or washed away; and scour.

In Section 111.C of its AJD form, the District described its significant nexus findings for a non-RPW that has no adjacent wetlands and flows directly or indirectly into TNWs. The District stated that, during the March 20, 2017 site visit, surface water was seen flowing continuously in the subject tributary. In addition, the District indicated that two culverts are located immediately downstream of the review area under Willow Lane, and concluded that this demonstrates that flow occurs often enough that a mechanism to transport that flow under the road is necessary. Based on the site observations, the District concluded that the subject tributary contributes surface flows to downstream waterbodies, which lead to San Elijo Lagoon, the nearest TNW.

The District indicated that, based on aerial imagery from 2017 (Google Earth), the subject tributary is located downstream of agricultural and/or orchard lands. These District stated that lands are often associated with fertilizers, herbicides and pesticides which can be over applied and/or run off lands during storm events. The District noted that fertilizers contain high yields of nitrogen and phosphorus that can be detrimental to aquatic species and result in eutrophication of aquatic habitats and that herbicides and pesticides can also be detrimental to aquatic species and species who utilize aquatic habitats, including causing developmental issues. The District concluded that the subject tributary has the capacity to carry these pollutants to downstream waters, including Escondido Creek, an RPW (which is listed as a 303(d) impaired waterbody for Phosphate and Nitrogen, among others (www.projectcleanwater.org)) and the nearest TNW (San Elijo Lagoon/Pacific Ocean), which is listed as a 303(d) impaired waterbody for nutrients (2010 water quality assessment report, accessed via EPA My Waters Google Earth KML). In addition to carrying these pollutants, the District stated that the subject tributary and its associated aquatic vegetation, although not a wetland, has some capacity to collect and filter these same pollutants.

The District stated that headwater streams provide essential sediments and nutrients to downstream waters via the River Continuum Concept (Vannote et al 1980) and that insects,

particularly "shredders", tear apart and break down leaf litter and detritus to small pieces, which are used by "collectors" and "grazers" further downstream. The District further stated that these nutrients and organic carbon are essential for downstream aquatic area food web production and survival, including the downstream TNW. The District stated that, in addition to providing nutrients, sediment transport in headwater streams is important, particularly for maintaining a balance between erosion and sedimentation in downstream waters. The District indicated that, without headwater streams providing a source of sediment, rivers and streams would begin to erode and degrade causing a reduction in floodplain interaction which can cause a reduction in flood attenuation, nutrient cycling, maintenance of aquatic plants and animal communities, and regulation of surface waters and ground water inflow and outflow. The District concluded that a reduction in these processes would transfer to the downstream TNW resulting in an overall decrease in ecological function.

The District stated that San Elijo Lagoon, the nearest TNW in terms of river miles, is home to several federally and state listed species, as well as sensitive species, including the California least tern, western snowy plover, Ridgway's rail, coastal California gnatcatcher, least Bell's vireo, and Belding's Savannah sparrow (www.sanelijo.org). The District stated that populations of these species have been severely reduced and habitats altered over the last century, due to habitat loss and degradation from urban development as well as degradation in water quality, leading to very few areas the species survive. The District concluded that subject tributary provides vital nutrients, such as organic matter, to the lagoon and sediment to downstream waters tributary to the lagoon, to ensure the TNWs continued health and that it provides productive habitat for sensitive species.

The District concluded, based on the above analysis, that the subject tributary has more than an insubstantial or speculative effect on the chemical, physical, and biological integrity of San Elijo Lagoon, the nearest TNW.

The District included the following list of references to support its analysis:

Environmental Protection Agency. My Waters Google Earth KML file.
Project Clean Water. www.projectcleanwater.org/carlsbad-wma/. Accessed June 7, 2017.

San Elijo Lagoon Conservancy. www.sanelijo.org. Accessed June 7, 2017.

Vannote, R.L., Minshall, G.W., Cummins, K.W., Sedell, J.R., and Cushing, C.E. 1980. The river continuum concept. *Can. J. Fish. Aquat. Sci.* 37: 130–137.

The 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.*" (Rapanos Guidance), states that the agencies will assert jurisdiction over non-navigable tributaries that are not relatively permanent (non-RPWs), when they have a significant nexus with a traditional navigable water

33 C.F.R. § 328.3(a)(8) states that, "Waters of the United States do not include prior converted cropland." However, determination that a property is prior converted cropland must be made by

the Natural Resources Conservation Service (NRCS). See id. Absent such a determination from NRCS, there would not be a basis to conclude that a property is not subject to jurisdiction under Section 404 of the Clean Water Act, based on on-going agricultural use. There is no indication in the AR that the Appellant requested or received a determination from NRCS that the Property was PCC. Further, there is no indication that NRCS evaluated the cropping history or the hydrology of the Property. Additionally, the Appellant clarified, during the appeal meeting, that the agricultural use referenced in the RFA was a recent planting of corn on the Property. During the site visit, the Appellant pointed out a small number of young corn plants, growing in the vicinity of the drainage on the Property. There was no other indication of current or past agricultural activity. There is therefore nothing in the AR that supports a conclusion that the Property has a designation that would exempt it from jurisdiction. An alleged agricultural activity, in itself, does not affect jurisdictional status of aquatic features, even if the particular agricultural activity might not require a Department of the Army permit.

Finally, there was no documentation or other support in the AR for the Appellant's assertion that effluent was being pumped into the drainage by an upstream neighbor. The Appellant did not provide additional or new information, to support that assertion. However, given that the District did consider increases in flow, resulting from irrigation and increases in the area of impervious surfaces in coming to the conclusion that the drainage is a non-RPW, removing any such temporary additional flow would not have resulted in a different designation for the drainage, as there is not a designation, in terms of flow, less than non-RPW.

In this case, the District documented that drainage on the Property is a non-RPW that flows indirectly to and has a significant nexus with a TNW. The District's analysis supports its conclusion that a significant nexus exists with the nearest downstream TNW. As described above and in its AJD form, the District evaluated the characteristics of the drainage, described its ephemeral nature, considered the additional flow resulting from road and agricultural runoff and the contaminants resulting from both of these sources. The District's significant nexus analysis, described above, properly demonstrated and concluded that the drainage on the property has a significant nexus with a downstream TNW and is a water of the United States, subject to regulation under Section 404 of the Clean Water Act. The District's jurisdictional determination is, therefore, consistent with the Rapanos Guidance.

REASON 2: Section 404 does not apply. The ditch is not waters of the United States. The USGS map changed and USACE did not realize that flow was septic waste pumped downhill by county employee.

FINDING: This reason for appeal does not have merit.

ACTION: The District's decision is upheld and no further action is required.

DISCUSSION: In the RFA, the Appellant asserted that Section 404 does not apply, the ditch is not waters of the United States, that the USGS map changed, and USACE did not realize that flow was septic waste pumped downhill by an upstream neighbor, who he claimed was a county employee.

In Section 111.B.1.(ii)(b) of its AJD form, the District indicated the drainage on the Property is manipulated (man altered) and stated that the tributary has likely been relocated and re-aligned slightly from historic conditions due to construction of nearby roads and homes. Non-native vegetation has also been introduced to the tributary and the flow regime has been altered due to increased impervious surface in the watershed as well as run-off from landscaping irrigation.

As required by the Rapanos Guidance, the District documented that drainage on the Property is a non-RPW that flows indirectly to and has a significant nexus with a TNW. The District's analysis supports its conclusion that a significant nexus exists with the nearest downstream TNW. It is also clear in the AR that the District considered the relocation of the channel and the effect of road runoff and irrigation in its determination. As indicated above, there is no information in the AR or otherwise provided to substantiate the Appellant's assertion that sewage is being pumped into the drainage on the Property. Therefore, the District has supported its determination that the drainage on the Property is waters of the United States, subject to jurisdiction under Section 404 of the Clean Water Act.

CONCLUSION:

The District documented that drainage on the Property is a non-RPW that flows indirectly to a TNW. The District's analysis supports its conclusion that a significant nexus exists with the nearest downstream TNW. The District's jurisdictional determination is, therefore, consistent with the Rapanos Guidance and applicable laws and regulations, which supports its determination that the drainage on the Property is waters of the United States, subject to jurisdiction under Section 404 of the Clean Water Act.

I conclude, therefore, that the Appellant's reasons for appeal do not have merit. The District's decision is upheld. No further action is required. The District's determination was not arbitrary, capricious or an abuse of discretion, and was not contrary to applicable law or policy. This concludes the Administrative Appeal Process.



Thomas J. Cavanaugh
Administrative Appeal Review Officer