

**ADMINISTRATIVE APPEAL DECISION FOR  
APPROVED JURISDICTIONAL DETERMINATION  
FOR THE KATIR PROPERTY**

**OLIVEHURST, CA**

**ARMY CORPS OF ENGINEERS SACRAMENTO DISTRICT FILE # 200200601**

**March 26, 2004**

**Review Officer:** Douglas R. Pomeroy, U.S. Army Corps of Engineers, South Pacific Division, San Francisco, California

**District Representatives:** Laura Whitney and Tom Cavanaugh, Sacramento District Regulatory Office, Sacramento, California

**Appellant Representative:** Demar Hooper, Sacramento, California

**Authority:** Clean Water Act (CWA), Section 404 (33 U.S.C. 1344)

**Receipt of Request For Appeal (RFA):** September 9, 2003

**Appeal Conference Date:** November 5, 2003      **Site Visit Date:** November 5, 2003

**Summary of Decision:** I have found that portions of the District's decision on the CWA approved jurisdictional determination for this action are not supported by substantial evidence in the administrative record. The District should reconsider its CWA jurisdictional determination for the Katir Property as described in this administrative appeal decision.

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

**Background Information:** The 71-acre, roughly rectangular Katir Property is located in Olivehurst, California, just northwest of the intersection of Olivehurst Avenue and McGowan Parkway. The Clark Lateral forms the western boundary of the property. The Clark Lateral is a tributary to Algodon Slough and eventually the Bear River and both parties consider the Clark Lateral to be within Clean Water Act (CWA) jurisdiction as a tributary to areas within CWA jurisdiction. The District and the Appellant also agree on the extent of wetlands on the property. The District and the Appellant disagree regarding whether the wetlands on the property are within CWA jurisdiction as adjacent wetlands, or whether they are isolated wetlands with an insufficient connection to interstate commerce to be within CWA jurisdiction. Development is proceeding on the southern portion of the property where the District and the Appellant agree no areas within CWA jurisdiction are present.

**Reason 1:** The Appellant asserts the District had insufficient evidence to establish that the wetlands on the Katir property were within CWA jurisdiction as adjacent wetlands. The Appellant asserts that the wetlands on the Katir property are isolated, intrastate wetlands with an insufficient connection to interstate commerce to be within CWA jurisdiction.

**FINDING:** The appeal has merit.

**ACTION:** The District must reconsider its prior conclusion that the wetlands on the Katir property are within CWA jurisdiction as adjacent wetlands as described in more detail in this administrative appeal decision.

**DISCUSSION:** The Appellant's May 30, 2003 submittal identified 7 discretely mapped wetland areas on the Katir property with a total acreage of approximately 3.537 acres. These include Wetland Feature 1 consisting of 2.422 acres, Wetland Features 2 – 5 totaling 0.164 acre, and two wetland areas said to be associated with leaky water wells. These two areas consist of 0.139 and 0.812 acres respectively. Using the aerial photograph in the administrative record, the Review Officer estimated that the 7 wetland features were located between approximately 50 - 700 feet east of the Clark Lateral. The District and the Appellant recognized that irrigation and well water had provided additional water sources for the wetlands on the Katir property in the past. The District and the Appellant agreed that the 7 wetland areas identified in the Appellant's May 30, 2003 submittal, and the District's subsequent July 30, 2003 CWA jurisdictional determination, met the criteria to be considered wetlands as defined by the Corps 1987 Wetland Delineation Manual.

The Katir property is approximately 6 feet higher in elevation than the Clark Lateral. The District and the Appellant agreed that no water flows from the Clark Lateral to the Katir property under typical conditions. The Appellant also asserts that no water flows from the Katir property to the Clark Lateral under any circumstances and that there is no

hydrological relationship between the Katir property and the Clark Lateral. The District stated it did not establish whether hydrological connection existed between the wetlands on the Katir property and the Clark Lateral.

The 1995 aerial photograph used in the wetland delineation shows that a small projection of wetland area extends from the southwest corner of Wetland Feature 1 to within approximately 50 feet of the Clark Lateral (based on the Review Officer's measurements from the aerial photograph). The shape and position of this feature on the Katir property suggests that a surface water route from the Katir property to the Clark Lateral may be present. There is no detailed discussion of this area in the administrative record. The District did not base its CWA jurisdictional determination on the existence of such a feature, and the Appellant, using only general recollections of the property owner, asserts that water never drains from the property to the Clark Lateral.

The District's July 7, 2003 CWA jurisdictional determination (JD) stated that the wetlands on the Katir property were within CWA jurisdiction because they were adjacent to the Clark Lateral. The District confirmed at the appeal meeting that it believed that all the wetlands on the Katir property were located in sufficiently close proximity to the Clark Lateral to be considered adjacent wetlands and within CWA jurisdiction. The Corps regulations define adjacent wetlands within CWA jurisdiction under 33 Code of Federal Regulations (CFR) 328.3 (a) (7) as:

“(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) (1) through (6) of this section.”

(Note: paragraphs (a) (1) through (6) refers to 33 CFR 328.3 (a) (1) to 33 CFR 328.3 (a) (6)).

The Corps regulations also defines the term adjacent at 33 CFR 328.3 (c) as:

“(c) 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.” “

The adjacency concept was further discussed in the Preamble to the Corps 1977 regulations 42 Federal Register page 37129 (1977), which stated:

“...we have defined the term “adjacent” to mean “bordering, contiguous, or neighboring.” The term would include wetlands that directly connect to other waters of the United States, or *that are in reasonable proximity* to these waters but physically separated from them by man-made dikes or barriers, natural river berms, beach dunes, *and similar obstructions.*” [Emphasis added]

In this case the District has not claimed that the wetland areas are either bordering or contiguous with the Clark Lateral, so the District's determination that the wetlands are “neighboring” the Clark Lateral is at issue. The District stated at the appeal meeting that

it concluded that the wetlands were in reasonable proximity to the Clark Lateral to be within CWA jurisdiction, but did not provide specific reasons for why it believed that was the case.

The Corps has previously acknowledged the difficulty of identifying a distance limit for adjacent wetlands in the Preamble to the Final Rule to issue the Nationwide Permits in 1991, 56 Federal Register Page 59113 (1991) that stated:

“Two commenters recommended that we establish a distance limit for adjacency. We believe that this would be an unreasonable approach due to the potential variability of the factors utilized in establishing adjacency for each individual project such as man-made barriers and natural berms.”

This suggests that Corps Headquarters envisioned that a number of factors might be used to establish adjacency, and that those factors would vary by location. The District’s administrative record does not have a detailed discussion of such factors.

The Appellant stated that he inferred from the language of the CWA, its implementing regulations and guidance, and associated federal court decisions that a hydrological connection must exist between any wetland area and the water it is adjacent to for that wetland to be within CWA jurisdiction as an adjacent wetland. The Appellant believes that no such connection exists between the wetlands on the Katir property and the Clark Lateral, and so the Appellant concludes that those wetlands cannot be within CWA jurisdiction under 33 CFR 328.3 (a) (7) as adjacent wetlands.

In particular, the Appellant referenced a section from the U.S. Supreme Court’s decision in *United States v. Riverside Bayside* 474 U.S. 121 (1985) that states:

“...the court found that the wetland located on the respondent’s property was adjacent to a body of navigable water, since the area characterized by saturated soil conditions and wetland vegetation extended beyond the boundary of respondent’s property to Black Creek, a navigable waterway.”

as evidence that a hydrological connection is *required* for an area to be within CWA jurisdiction as an adjacent wetland.

However, the section of the *United States v. Riverside Bayview* decision that the Appellant referenced refers to the specific conditions that were present on that particular property. The U.S. Supreme Court concluded that those site-specific conditions present in *U.S. v. Riverside Bayview* fit *within* the Corps regulatory definition of adjacent wetlands. The U.S. Supreme Court then reviewed the validity of the Corps regulations regarding adjacent wetlands, and concluded that the regulation was valid. In doing so the U.S. Supreme Court further stated in *United States v. Riverside Bayview* that:

“In view of the breadth of federal regulatory authority contemplated by the Act (CWA) itself and the inherent difficulties of defining precise bounds to regulate

waters, the Corps' ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act.... This holds true even for wetlands that are not the result of flooding or permeation by water having its source in adjacent bodies of open water.... For example, wetlands that are not flooded by adjacent waters tend to drain to those waters...In addition, adjacent wetlands may "serve significant natural biological functions, including food chain production, general habitat, and nesting, spawning, rearing, and resting sites for aquatic species..."

and additionally:

"Of course, it may well be that not every adjacent wetland is of great importance to the environment of adjoining bodies of water. But the existence of such cases does not seriously undermine the Corps' decision to define all adjacent wetlands as "waters." If it is reasonable for the Corps to conclude that in the majority of cases, adjacent wetlands have significant effects on water quality and the aquatic ecosystem, its definition can stand. That the definition may include some wetlands that are not significantly intertwined with the ecosystem of adjacent waterways is of little moment, for where it appears that a wetland covered by the Corps' definition is in fact lacking in importance to the aquatic environment--or where its importance is outweighed by other values--the Corps may always allow development of the wetland for other uses simply by issuing a permit."

The Environmental Protection Agency/Department of the Army Joint Memorandum of January 15, 2003 (Appendix A to the Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States" – Federal Register Vol 68, pages 1995 – 1998) (hereafter referred to as the Joint Memorandum) provided further guidance to the Corps field personnel regarding adjacent wetlands in light of the U.S. Supreme Court's decision in *Solid Waste Agency of Northern Cook County v. United States*, 531 U.S. 159 (2001) (*SWANCC Decision*). The Joint Memorandum concluded that:

"The Supreme Court has not itself defined the term "adjacent," nor stated whether the basis for adjacency is geographic proximity or hydrology."

The Appellant also asserts a hydrological connection is necessary to establish the CWA jurisdiction over adjacent wetlands because any other approach would result in absurd conclusions, such as regulating ornamental fountains or swimming pools near jurisdictional areas. However, the Preamble to the November 13, 1986, "Regulatory Program of the Corps of Engineers, Final Rule" FR Vol 51, pg 41217, identified that areas such as artificial bodies of water constructed from dry land, swimming pools, and similar ornamental water bodies are not generally considered within CWA jurisdiction. So the Appellant's assertion that the Corps regulations must be interpreted as requiring a hydrologic connection between all waterbodies and adjacent wetlands to avoid absurd CWA jurisdictional conclusions is groundless. Also, for any areas to be considered

adjacent wetlands they must meet both the Corps regulatory definition of a wetland area and the Corps regulatory definition of an adjacent wetland.

The Corps regulations require that each approved jurisdictional determination include a “basis of jurisdictional determination” statement. The Corps regulation at 33 CFR 331.2 defines a basis of jurisdiction statement as:

“Basis of Jurisdictional determination is a summary of the indicators that support the Corps approved JD. Indicators supporting the Corps approved JD can include, but are not limited to: ...indicators of adjacency to navigable or interstate waters; indicators that the wetland or waterbody is of part of a tributary system; or indicators of linkages between isolated water bodies and interstate or foreign commerce.”

The District used its best professional judgment to conclude that the wetlands on the Katir property were within reasonable proximity to the Clark Lateral and therefore within CWA jurisdiction as adjacent wetlands under 33 CFR 328.3 (a) (7). However, the District did not identify in the administrative record the factors it considered or indicators it identified in reaching its CWA jurisdictional decision nor did provide a summary of those factors and indicators to the Appellant as required by 33 CFR 331.2.

Corps regulatory personnel must often use of best professional judgment to reach timely regulatory decisions in the absence of detailed information. However, even when the available information is limited, the District is still required to document and provide to Appellant the District’s basis of CWA jurisdiction as described at 33 CFR 331.2. The District’s administrative record must also include sufficient documentation supporting its conclusion.

I conclude the District insufficiently documented its conclusion that adjacent wetlands within CWA jurisdiction were present on the Katir property. The District must reconsider that conclusion. This reconsideration must include, but is not limited to, evaluation and documentation of (a) consideration of typical distances between wetlands and neighboring channels in any similar nearby channels, particularly areas that have been left relatively undisturbed by agricultural or other development, (b) evaluation of whether the wetlands present should be considered as part of a complex or continuum of wetlands, (c) consideration of whether wetlands on the property may be adjacent to other wetlands on the property rather than the Clark Lateral, and (d) individual evaluation and documentation of the indicators of adjacency for each discretely mapped wetland area on the Katir property. In addition, the District should review the existing administrative record, and if necessary conduct additional site investigations, regarding whether any tributary connections between the Katir property and the Clark Lateral, or any other areas within CWA jurisdiction, are present.

If as a result of this reconsideration the District concludes that any isolated waters are present on the Katir property, the District must then evaluate whether any of those areas may be within CWA jurisdiction as isolated wetlands with a sufficient connection to

interstate commerce to be regulated under 33 CFR 328.3 (a) (3). Should the District identify any such areas, in accordance with the Joint Memorandum, the District must seek formal project-specific Corps Headquarters approval via the standard chain-of-command prior to asserting CWA jurisdiction under 33 CFR 328.3 (a) (3).

At the conclusion of the District's reconsideration, the District must provide the Appellant its determination of the extent of CWA jurisdiction on the property and include a description of District's basis of CWA jurisdictional determination as required by 33 CFR 331.2.

**Information Received and its Disposition During the Appeal Review:** The administrative record and the request for appeal were the only information submitted for this administrative appeal.

**Conclusion:** I have found the District's decision did not sufficiently document that the wetlands on the Katir property were adjacent to the Clark Lateral. The District must reconsider its CWA jurisdictional determination for the Katir property as described in this administrative appeal decision.

original signed by

Leonardo V. Flor  
COL, EN  
Acting Commander