ADMINISTRATIVE APPEAL DECISION
CLEAN WATER ACT
MORGAN RANCH PROPERTY
TEHEMA COUNTY, CALIFORNIA
SACRAMENTO DISTRICT
FILE NUMBER SPK-2007-00642

DATE: March 08, 2011

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

Appellant: Larry Netherton, Sage Community Group (Appellant)

District Representative: Mike Finan, U.S. Army Corps of Engineers, Sacramento District (District)

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

Receipt of Request for Appeal: November 19, 2011

Appeal Meeting and Site Visit Date: February 8, 2011

Summary of Decision: This Clean Water Act (CWA) jurisdictional determination is remanded to the District for further evaluation and consideration of information provided by the Appellant. The District must consider the Appellant's assertion that available data leads to a conclusion that feature EA-11would revert to upland if irrigation to the area were to cease and its own independent analysis of data provided by the Appellant. Additionally, should the District conclude that the area would meet wetland criteria absent the application of irrigation water, the District must consider whether, absent the application of irrigation water, there would continue to be a significant nexus between feature EA-11 and the nearest Traditional Navigable Water (TNW). Finally, the District must resolve the acreage discrepancy between the Appellant's delineation report and the District's jurisdictional determination letter.

Background Information: The Morgan Ranch property (Property) is an approximately 1308-acre property, located in Section 23, Township 29 North, Range 4 West, M.D.M.& B., on the Hooker, U.S.G.S. 7.5" quadrangle, north of State Route 36, south of the Shasta County Line, and west of Interstate 5, in an unincorporated portion of Tehama County, California, at Latitude 40.346851 North, Longitude -122.2870996 West.

For purposes of evaluation during the CWA jurisdictional determination, the Appellant's consultant evaluated the site using the 1987 Wetland Delineation Manual, the Code of Federal Regulations (CFR) definitions of jurisdictional waters, and supporting guidance

documents. On January 31, 2007, the Appellant's consultant submitted a request for a jurisdictional determination and verification of the delineation map for the Morgan Ranch property. The District's review included a field review of the submittal during a March 18, 2008, site visit.

Following the March 18, 2008, site visit, the Appellant's consultant provided the District with its November 20, 2008, revised delineation report, incorporating the District's requested changes. The November 20, 2008, submittal concluded that there are 44.24 acres of waters, including 13.097 acres of adjacent wetlands, potentially subject to jurisdiction under Section 404 of the Clean Water Act, within the 1308 acre property.

On September 29, 2010, the District issued its CWA jurisdictional determination for the Property. The District concluded that the site contained 29.24 acres of waters of the United States, including wetlands within CWA jurisdiction. The administrative record does not contain an explanation for the acreage discrepancy between the Appellant's delineation report and the District's jurisdictional determination. The Appellant submitted a Request for Appeal (RFA) on November 18, 2010. The Appellant disagreed solely with the District's determination that feature EA-11, a 1.327 acre irrigated wetland, is jurisdictional and appealed that determination, citing the reasons for appeal addressed in this appeal decision.

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 conference with the Appellant and the District.

REASON 1: The Sacramento District's determination that feature EA-11is jurisdictional lacks substantial evidence to support that determination and the determination that feature EA-11 is jurisdictional is contrary to Corps' guidance and on-site evidence. The feature (EA-11) exhibits wetland features only because of a leaky irrigation ditch and should not be characterized as a "water of the United States".

FINDING: This reason for appeal has merit.

ACTION: The District must further evaluate and consider its decision. In its final decision, the District must include its own analysis of available data, per the requirements of the District's RBMs 2004-03 and 2007-01, to support its final decision as to the jurisdictional status of feature EA-11. The District must consider the Appellant's assertion that available data leads to a conclusion that feature EA-11would revert to upland if irrigation to the area were to cease and its own independent analysis of data provided by the Appellant. Additionally, should the District conclude that the area would meet wetland criteria absent the application of irrigation water, the District must consider whether, absent the application of irrigation water, there would continue to be a significant nexus between feature EA-11 and the nearest TNW. Finally, the District must

resolve the acreage discrepancy between the Appellant's delineation report and the District's jurisdictional determination letter

DISCUSSION: In the RFA, the Appellant indicated that Feature EA-11 is described in the "Delineation of Jurisdictional Waters and Wetlands (Existing Conditions) Report for the Morgan Ranch Property", January 2007, Revised November 2008 (Delineation Report). The appellant pointed out that page 59 of the Delineation Report, section 4.13.8, describes EA-11, and notes that EA-11 is a "remarkably uniform polygonal shape" that connects the raised "check" points between the irrigation supply and return features. The Appellant stated that, in an August 2008 site visit, their consultant, Michael Brandman Associates (MBA), identified a leak in a concrete irrigation supply ditch, from which flow went directly into EA-11. The Appellant referred to Appendix D, Photograph 8 and notes thereto, of the Delineation Report, as documentation of that position. The Appellant pointed out that Appendix D, Photograph 10 illustrates that land to the left and right of the EA-11 checks supports non-wetland vegetation, as substantiated by site wetland mapping. The Appellant believes that the preceding information demonstrates that feature EA-11 is the product of a leaky ditch. The Appellant believes that the lack of wetland vegetation in an adjacent pasture into which no ditch leaks flow is evidence that the wetland vegetation in EA-11 is created solely by irrigation ditch leakage. The Appellant asserts that the Corps' September 29, 2010, letter confirming jurisdiction is silent regarding the basis, if any, for determining feature EA-11 to be jurisdictional. The Appellant points out that the Sacramento District has adopted a policy specific to "'Leaky Ditch' Wetlands", Regulatory Branch Memorandum (RBM) 2004-03, which references the preamble to the November 13, 1986, Corps Final Rule. The preamble, at Page 41217 of the Federal Register, addresses definitions, clarifying features generally not considered to be "waters of the United States." Among the categories are artificially irrigated wetlands which would revert to upland if the irrigation ceased. The Appellant asserted that the policy stated in RBM 2004-03 concludes that, "Wetlands created solely by leakage from irrigation ditches will be considered 'artificially irrigated wetlands.' Accordingly, such wetlands will not be considered waters of the United States." documentation included in the Delineation Report coupled with Corps policy provides ample evidence that EA-11 merely contains artificially irrigated wetlands. The Appellant concluded by asserting that the Corps has not established a credible basis for considering the feature jurisdictional and urges modification of the jurisdictional determination for EA-11.

The District completed a single jurisdictional determination (JD) Form for all waters on the property. The District's JD Form indicates that a site visit was completed on March 18, 2008, and that a Desktop determination was complete on September 29, 2010. The JD form and the District's September 29, 2010, delineation verification letter indicate that the 1308 acre site contains 29.24 acres of jurisdictional waters, 1.632 acres of non-jurisdictional isolated features within the leveled and irrigated hayfields within the northern portion of the site, and 0.148 acres of non-tidal drainage or irrigation ditches excavated on dry land. Feature EA-11 is not specifically mentioned on either the JD form or the District's September 29, 2010, delineation verification letter. The District's

conclusions relative to feature EA-11 are expressed in the administrative record on page 2 of the delineation report by MBA. MBA stated that the District representative observed algal matting on top of new hydrophytic vegetation in feature EA-11 and the abutment of the feature to Drainage 3. MBA indicated that, on the basis of observations made during its March 20, 2008, site visit, the District asserted jurisdiction over feature EA-11.

The Appellant's November 20, 2008, revised delineation report indicates, on page 2, that examination of feature EA-11, as compared to surrounding upland areas, historical aerial photography, hydrologic studies, and the unnatural shape of the feature, suggests that, but for the use of flood irrigation practices, the areas would revert to uplands once irrigation ceases. That same paragraph further indicates that the District, based on observations made during its March 20, 2008, site visit of algal matting on top of new hydrophytic vegetation and on the continuity/abutment of the feature to Drainage 3, asserted jurisdiction over feature EA-11. Page 59 of the delineation report indicates that feature EA-11 was identified during the District's site visit and that the feature begins at a concrete lined irrigation ditch and ends at Drainage 3. The report describes the feature as having a remarkably uniform polygonal shape and states that, during the site visit, the source of hydrology was not evident, but that during a subsequent August 2008, visit that it was evident that a concrete lined ditch was leaking substantially and resulting in significant flows through feature EA-11. Paragraph 4.13.10, on page 63 of the delineation report, concludes that there is no evidence that the physical character of the land has been substantially altered from its natural state in such a way that would facilitate the preservation of flood-irrigated wetlands once the artificial source of hydrology is terminated. The delineation report's conclusion is that the data establish that, under normal circumstances, the flood-irrigated areas would likely continue to exhibit wetland criteria only through the direct application of irrigation water. Paragraph 4.13.10 concludes by indicating that, according to the District representative, the observation of new growth of hydrophytes beneath algal matting suggests sufficient hydrology exists naturally to continually support the presence of wetlands without flood irrigation.

In response to questions at the appeal conference, the Appellant indicated that they believed that feature EA-11is artificial. The Appellant asserted that their conclusion is supported by the artificial shape of feature EA-11 and that feature EA-11 is supported by a constant flow of water from a broken concrete irrigation canal throughout the irrigation season. The Appellant referred to the District's leaky ditch guidance and indicated that they believe the area would revert to upland if they were to terminate irrigation. The Appellant further indicated that they believe the irrigation water affects the hydrology of the area outside of the irrigation season and that the algal matting observed by the District during the March 2008, site visit is partially the result of flood irrigation during the irrigation season.

In response to questions asked at the appeal conference, the District stated that feature EA-11 is a wetland that meets all 3 of the parameters required to determine that it is a wetland. The District also indicated that no data points were taken within the feature. The District stated that the feature contained algal matting on top of new hydrophytic

vegetation during its March 20, 2008, site visit. The District acknowledged the leakage from the canal, but asserted that, when they looked at the site in March, feature EA-11 was ponded, absent irrigation and in spite of precipitation that was below normal for that month, and that there had not been irrigation on the site since the previous irrigation season, which ended in October. The District stated that feature EA-11 is adjacent to a tributary, to a tributary, of navigable water, and is a water of the U.S. The District referenced RBM 2007-01 as describing the procedures for addressing irrigated wetlands. The District also indicated that the specific guidance for dealing with irrigated wetlands is that the area would not be jurisdictional if the area would revert to uplands absent the irrigation. Finally, the District stated that there was no specific written analysis of RBM 2007-01's implications relative to feature EA-11.

The preamble to 33 CFR 328.3, Definitions, at Page 41217 of the Federal Register, addresses definitions, and clarifies that features generally not considered to be "waters of the United States." Among the categories are artificially irrigated wetlands which would revert to upland if the irrigation ceased. The preamble further 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. EPA also has the right to determine on a case-by-case basis if any of these waters are 'waters of the United States'".

The Corps' 1987 Wetland Delineation Manual (WDM), in Part IV: "Methods", Section F: "Atypical Situations", Subsection 4: "Man-Induced Wetlands" (Subsection 4), on page 82, indicates that a man-induced wetland is an area that has developed at least some characteristics of naturally occurring wetlands due to either intentional or incidental human activities. Subsection 4 indicates that man-induced wetlands include irrigated wetlands. Subsection 4 indicates that some man-induced wetlands may be subject to Section 404. Subsection 4 states that, in virtually all cases, man-induced wetlands involve a significant change in the hydrologic regime, which may either increase or decrease the wetness of the area. The Subsection 4 indicates that delineators should determine whether the area represents a potential man-induced wetland, by considering whether a recent man-induced change in hydrology occurred that caused the area to become significantly wetter and whether the area been subjected to long-term irrigation practices. The subsection concludes with a caution that states that, if hydrophytic vegetation is being maintained only because of man-induced wetland hydrology that would no longer exist if the activity (e.g. irrigation) were to be terminated, the area should not be considered a wetland.

The "Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Arid West Region (Version 2.0)", September 2008 (Regional Supplement), on page 11, under the "Irrigated Wetlands" section of the introduction, indicates that:

> Irrigation has been practiced in some portions of the Arid West for more than 125 years and has changed the natural hydrologic regime over large areas. When practiced over many years, the application of irrigation water can alter soil characteristics (e.g., color, redox features, and salt content) and vegetation of

affected areas. Long-term irrigation has created new wetlands and altered existing wetlands throughout the region. Common types of irrigation include flood, sprinkler, and drip. Flood irrigation is the most common form in the Arid West and is often practiced on a very large scale. Streams are diverted by means of dams, weirs, or other structures into man-made delivery channels that convey the water by gravity to where it is needed. Excess water flows off the irrigated area and collects in a series of drainage or wastewater ditches to be used by downstream irrigators or returned to a tributary. Sprinkler and drip systems produce considerably less runoff than flood irrigation systems. Irrigation augments the natural hydrology of the affected areas in both intended and unintended ways, through leakage of water from delivery channels and ditches, direct application of irrigation water to pastures and fields, and overflow of unused or excess irrigation water into other areas down gradient. The added water, over time, may create new wetlands or augment and enlarge previously existing wetlands. For example, seep wetlands may develop in former uplands due to leakage from irrigation canals and ditches; prolonged flooding and soil saturation may induce the formation of redoximorphic features and establishment of hydrophytic vegetation in irrigated pastures; and the accumulation of excess irrigation water in basins and swales may augment previously existing wetlands, raising their water tables and expanding their margins. On the other hand, groundwater withdrawal for irrigation purposes may also depress water tables in the vicinity of a well. Indicators given in this Regional Supplement can be used to identify all wetlands, whether natural or created artificially by human activity. The appropriate Corps of Engineers District Regulatory Office should be consulted when it is necessary to distinguish between naturally occurring and irrigation-induced wetlands for Clean Water Act regulatory purposes.

The Sacramento District's policy specific to "'Leaky Ditch' Wetlands", RBM 2004-03, references the preamble to the November 13, 1986, Corps Final Rule. The policy stated in RBM 2004-03 indicates that, "Wetlands created solely by leakage from irrigation ditches will be considered 'artificially irrigated wetlands'." Accordingly, such wetlands will not be considered waters of the United States." RBM 2004-03 states that RMB 2003-04, "'Irrigated' Wetlands" identifies the procedures to be used in differentiating between natural and artificially irrigated wetlands. The reference to RBM 2003-04 is obsolete, as that RBM has since been replaced with RBM 2007-01. RBM 2004-03 concludes by indicating that, "where there is uncertainty regarding the source of hydrology for the wetland, we will assume that the wetland is supported, at least partially, by natural hydrology unless clearly demonstrated otherwise. In such cases, the wetland would be jurisdictional until shown to be solely due to a leaky ditch."

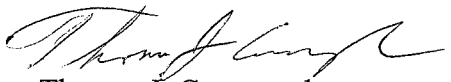
The Sacramento District's policy specific to "'Irrigated' Wetlands", RBM 2007-01, states that in order to determine whether an artificially irrigated wetland is jurisdictional, as a water of the United States, the Corps must first determine whether the irrigated area meets the criteria found in the WDM, as well as the regional supplement to the WDM, for identifying and delineating wetlands. RBM 2007-01 indicates that discontinuing the application of irrigation water may be the best way to verify whether or not wetland

characteristics are being sustained solely by the application of irrigation water. RBM 2007-01 recognizes that, in some cases, discontinuing the application of irrigation water may not be practical and, that that those cases, an alternate method for determining whether the irrigated wetland meets the definition of wetland from the WDM is needed. RBM 2007-1 indicates that, when the cessation of irrigation is not practical for the property owner, the procedure that will be followed in the Sacramento District will include review of aerial imagery, maps, and other land use information to ascertain whether wetlands existed on the property prior to its conversion to agriculture. RBM 2007-01 further indicates that there will be a review of information from the landowner, neighbors, agencies, and others who may have knowledge of hydrologic characteristics of the property and surrounding area, or knowledge of topographic modifications that may have altered the hydrologic regime of the site. RBM 2007-01 also indicates that soils information, groundwater records, irrigation information, and weather information will be reviewed and that an on-site delineation in accordance with the WDM will be completed. RBM 2007-01states that, if there are positive indicators for soils and vegetation, but the relative contribution of irrigation versus natural hydrology in maintaining these conditions cannot be determined, then a consideration must be given to whether the current condition reflects the "normal circumstances" of the area. RBM 2007-01 concludes by indicating that, if it is determined that the area would likely continue to meet wetland criteria absent application of irrigation water, that the irrigated wetland, in whole or in part, would meet the definition of a wetland under the manual and, if it is determined that the area would continue to exhibit wetland criteria only through the direct application of irrigation water, the irrigated wetland would generally not meet the definition under the WDM.

Features such as feature EA-11 were anticipated during the drafting of the Corps' regulations, the WDM, and the Regional Supplement. The "Irrigated Wetlands" section of the Regional Supplement concludes with the statement, "The appropriate Corps of Engineers District Regulatory Office should be consulted when it is necessary to distinguish between naturally occurring and irrigation-induced wetlands for Clean Water Act regulatory purposes". The implication of that statement is that the District, once it has determined that an area exhibits wetland characteristics and that hydrology from irrigation sources creates a question as to its jurisdictional status, will gather available information and conduct an analysis through which it determines whether hydrology from non-irrigation sources would be sufficient to maintain the wetland characteristics of the area, should hydrology from irrigation sources be removed from the area. The District has a clearly demonstrated awareness of this obligation and has developed two RBMs, RBM 2004-03 and RBM 2007-01, that are directly applicable to the reason for this RFA. RBM 2004-03 establishes a District policy for wetlands associated with leaky ditches, which are a subset of irrigated wetlands, and indicates that the determination of the jurisdictional status will be made, at least in part, following an attempt to determine whether the input of natural hydrology would be sufficient to maintain the wetland characteristics of the area in question. RBM 2004-03 indicates that RMB 2003-04, which has been replaced with RBM 2007-01, identifies the procedures to be used in differentiating between natural and artificially irrigated wetlands. RBM 2007-01 prescribes an extensive review of available resources and information and guides

conclusions, based on determinations made during that review. The conclusion in Appellant's delineation report, based on analysis by the Appellant's consultant, is that feature EA-11 would revert to upland, if irrigation to the property were to cease. The District's analysis of feature EA-11 is part of the administrative record only as stated by MBA in the delineation report. As stated by the MBA, the District's conclusion is supported by a single observation of hydrology and algal matting. There is no indication in the administrative record that the District considered the Appellant's assertion that the area would revert to upland should irrigation to the area cease or data provided by the Appellant, which the Appellant believes supports that conclusion.

CONCLUSION: I conclude the District must further evaluate and consider its decision. In its final decision, the District must include its own analysis of available data, per the requirements of the District's RBMs 2004-03 and 2007-01, to support its final decision as to the jurisdictional status of feature EA-11. The District must consider the Appellant's assertion that available data leads to a conclusion that feature EA-11would revert to upland if irrigation to the area were to cease and conduct its own independent analysis of data provided by the Appellant. Additionally, should the District conclude that the area would meet wetland criteria absent the application of irrigation water, the District must, in making its final jurisdictional determination, consider whether, absent the application of irrigation water, there would continue to be a significant nexus between feature EA-11 and the nearest TNW. Finally, the District must resolve the acreage discrepancy between the Appellant's delineation report and the District's jurisdictional determination letter. 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