

**ADMINISTRATIVE APPEAL DECISION FOR  
APPROVED JURISDICTIONAL DETERMINATION  
FOR THE RIVER RIDGE TERRACE SUBDIVISION  
REDDING, CALIFORNIA**

**ARMY CORPS OF ENGINEERS SACRAMENTO DISTRICT FILE # 200200349**

**May 4, 2004**

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

**District Representatives:** Will Ness and Tom Cavanaugh, Sacramento District Regulatory Office, Sacramento, California

**Appellant and Representatives:** Robert Loring – Property Owner; Brent Owen – Environmental Consultant, and Don Burk – Wetland Scientist

**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:** The administrative record supports the District's conclusions regarding the CWA jurisdictional status. However, the District's administrative record does not provide sufficient documentation for its conclusions that regarding Drainage Segements 30, 33, 34, and 35. This action is remanded to the Sacramento District for reconsideration of those Drainage Segments and nearby areas.

**Background Information:** The District’s August 4, 2003 approved jurisdictional determination (JD) for the approximately 51 acre, irregularly shaped, River Ridge Terrace Subdivision property (River Ridge property), concluded that approximately 0.919 acres of waters on the property were within Clean Water Act (CWA) jurisdiction as tributaries to waters of the United States or adjacent wetlands. This administrative appeal concerns the appropriate upstream CWA jurisdictional boundaries of small tributaries and associated wetlands on the upstream portion of the property.

The River Ridge property is located near the intersection of Americana Way and Spinnaker Drive in Redding, California. The property slopes from northeast to southwest toward the Sacramento River. A residential subdivision of single-family homes is located upslope of the property to the northeast. The District and the Appellant agree that the nearby Sacramento River is within CWA jurisdiction in accordance with the Corps regulations at 33 Code of Federal Regulations (CFR) 328.3 (a) (1). The District and the Appellant also agree the property contains drainages that are within CWA jurisdiction as tributaries of the Sacramento River in accordance with 33 CFR 328.3 (a) (5), and wetlands adjacent to those tributaries that are within CWA jurisdiction in accordance with 33 CFR 328.3 (a) (7). The Appellant and the District disagree regarding the upstream extent of CWA jurisdiction in several locations.

An intermittent stream extends roughly northwest to southeast, and from upstream to downstream, across the property. Approximately 750 feet north of the southern property boundary this intermittent stream separates in 3 distinct channels. The Appellant and the District disagree regarding the extent of CWA jurisdiction in portions of each of those 3 channels. These 3 channels subdivide into smaller channels further upstream. The Appellant’s August 2002 “Prejurisdictional Delineation Report” and August 12, 2002 map (Delineation Report) identified different linear sections of each channel and I will refer to these different segments as “Drainage Segments” and include the specific identifiers of each segment from the Delineation Report.

The District and the Appellant agree that runoff water that originates in the residential area upslope of the property has increased the amount of water entering the River Ridge property, but disagree how the presence of such water should be considered in relation to the extent of CWA jurisdiction on the property. The District and the Appellant also disagree regarding the sufficiency of evidence regarding the appropriate CWA jurisdictional status of some drainages on the River Ridge property. The District’s CWA jurisdictional determination was based on the District’s interpretation of materials submitted by the Appellant supplemented by a very brief District site visit to the property.

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

**Reason 1:** The Appellant asserts the District had insufficient evidence to conclude that the extent of the tributaries on the River Ridge property within CWA jurisdiction as identified by the ordinary high water mark (OHWM) was different than that proposed by

the Appellant. The Appellant therefore asserted that the District's determination of CWA jurisdiction on the property was incorrect and not supported by the administrative record.

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

**ACTION:** The District must reevaluate the CWA jurisdictional status of Drainage Segments 30, 33, 34, and 35 identified in the Appellant's Delineation Report for this action.

**DISCUSSION:** The District and the Appellant agree that the nearby Sacramento River is within CWA jurisdiction and that the River Ridge property contains drainages that are tributaries of the Sacramento River within CWA jurisdiction.

The Corps regulations at 33 CFR 328.4 (c) define the limits of CWA jurisdiction in non-tidal waters as the following:

33 CFR 328.4 (c) (1) states that:

"In the absence of adjacent wetlands, the jurisdiction extends to the ordinary high water mark"

33 CFR 328.4 (c) (2) states that:

"When adjacent wetlands are present, the jurisdiction extends beyond the ordinary high water mark to the limit of the adjacent wetlands"

and 33 CFR 328.4 (c) (3) states that:

"When the water of the United States consists only of wetlands the jurisdiction extends to the limit of the wetland."

The Preamble to the Corps 1986 Regulatory Program of the Corps of Engineers; Final Rule, (Fed. Reg Vol. 51. page 41217) states that:

"Section 328.4 (c) (1) defines the lateral limit of jurisdiction in non-tidal waters as the ordinary high water mark provided the jurisdiction is not extended by the presence of wetlands. Therefore, it should be concluded that in the absence of wetlands the upstream limit of Corps jurisdiction also stops when the ordinary high water mark is no longer perceptible."

The Corps definition of the OHWM at 33 CFR 328.3 (e) states that:

"The term ordinary high water mark means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas."

The CWA jurisdictional status of portions of 3 branches of an intermittent stream on the upslope, or northern portion of the River Ridge property is at issue. The Appellant identified, labeled and described the different segments of the streams and/or drainages on the property in his Delineation Report. This report also included the Appellant's position regarding the CWA jurisdictional status of the drainages on the property. The Appellant also provided aerial photographs of the property, but the District and the Appellant agreed that these photographs were not sufficiently detailed to establish the presence, absence, or extent to the OHWM on the River Ridge property.

The August 12, 2002 map accompanying the Delineation Report labels the drainages on the River Ridge property in a series of segments including Intermittent Streams, Ephemeral Streams, Wet Swales, Seeps (not at issue so not discussed further), Riparian Scrub areas, non-jurisdictional areas, culverts, or some combination thereof. The District and the Appellant disagree regarding the CWA jurisdictional status of portions of 3 upstream drainage segments that branch off of a segment the Delineation Report identified as Drainage Segment 7 - Intermittent Stream, about 750 feet north of the southern boundary of the River Ridge property. These 3 drainage segments are:

- a) Drainage Segment 5 – Ephemeral Stream, a side channel segment off the western upstream fork of Drainage Segment 7 – Intermittent Stream
- b) Drainage Segment 28 – Intermittent Stream/Riparian Scrub, the central fork off of Drainage Segment 7 – Intermittent Stream.
- c) Drainage Segment 21 – Intermittent Stream, the eastern fork off of Drainage Segment 7 – Intermittent Stream.

The District stated at the appeal meeting that they used the presence of an OHWM and the boundaries of adjacent wetlands to establish the extent of CWA jurisdiction for this property. The Appellant's Delineation Report defines those areas he identified as Intermittent Streams and Ephemeral Streams as having "apparent bed and bank features" (Delineation Report page 5). The administrative record shows that the District concluded CWA jurisdiction extended to all areas the Appellant defined as having "apparent bed and bank features" and that the District used these "apparent bed and bank features" as evidence of the presence of an OHWM.

Regarding the areas in dispute, the Appellant asserts that Drainage Segment 5 – Ephemeral Stream is not within CWA jurisdiction. However, the Appellant's Delineation Report identifies Drainage Segment 5 – Ephemeral Stream as connecting directly to Drainage Segment 6 – Intermittent Stream, and subsequently to Drainage Segment 7 – Intermittent Stream, and continuing to the Sacramento River. The Appellant's Delineation Report defined all intermittent and ephemeral stream drainage segments as having "apparent bed and bank features." The District reasonably concluded such "apparent bed and bank features" could reasonably be considered as evidence of an OHWM. The administrative record supports the District's conclusion that a continuous OHWM extended from Drainage Segment 5 - Ephemeral Stream to the Sacramento River and that this represented a tributary connection to the Sacramento River within CWA jurisdiction.

Similarly, the Appellant asserts that there are no areas of the River Ridge property within CWA jurisdiction upslope of Drainage Segment 28 – Intermittent Stream/Riparian Scrub. However, the Appellant’s Delineation Report identifies westerly branch and easterly branches of Drainage Segment 28 – Intermittent Stream/Riparian Scrub that continue as ephemeral streams.

The westerly drainage channel upstream of Drainage Segment 28 – Intermittent Stream/Riparian Scrub continues as Drainage Segment 29 – Ephemeral Stream. The Appellant’s Delineation Report shows that Drainage Segment 29 – Ephemeral Stream is connected to the Sacramento River by a series of drainage segments the Appellant identified as intermittent or ephemeral streams. The Appellant’s Delineation Report defined intermittent and ephemeral streams as having “apparent bed and bank” features. The District reasonably concluded that this definition provided sufficient evidence to conclude that Drainage Segments 28 and 29 had an OHWM. The administrative record provides sufficient evidence that a continuous OHWM extended from Drainage Segment 29 – Ephemeral Stream to the Sacramento River. Therefore the District reasonably concluded that CWA jurisdiction extended to the upstream end of Drainage Segment 29 – Ephemeral Stream.

The District concluded that additional areas within CWA jurisdiction were present upstream of Drainage Segment 29 - Ephemeral Stream. However, these areas were upstream of an unnamed, approximately 75 linear foot stretch without an OHWM that the District and the Appellant identified as outside of CWA jurisdiction. The District’s administrative record did not explain its reasons for including within CWA jurisdiction any area beyond the upstream end of the non-jurisdictional 75 linear foot segment.

The District stated that based on the appeal meeting site visit they now believed that they had underestimated the extent of waters within CWA jurisdiction on the property. The District stated that it now believed that several small linear channels that it had previously been considered non-jurisdictional, including the approximately 75 foot linear stretch upstream from Drainage Segment 29 – Ephemeral Stream, were actually within CWA jurisdiction. However, the District’s observations during the appeal meeting site visit are new information, and those observations cannot be considered as part of this administrative appeal.

I conclude the District did not sufficiently document its basis for asserting CWA jurisdiction for the Drainage Segments upstream of Drainage Segment 29 – Ephemeral Stream including Drainage Segment 33 – Intermittent Stream/Wetland Swale/Riparian Scrub, and Drainage Segment 30 – Ephemeral Stream. The District must reconsider the CWA jurisdictional status of these areas.

The easterly branch of Drainage Segment 28 – Intermittent Stream/Riparian Scrub continues upstream as Drainage Segment 32 – Ephemeral Stream, Drainage Segment 31 – Ephemeral Stream, and Drainage Segment 36 – Ephemeral Stream/Wetland Swale. The Appellant’s Delineation Report showed that Drainage Segment 32 – Ephemeral

Stream, Drainage Segment 31 – Intermittent Stream, and Drainage Segment 36 – Ephemeral Stream/Wetland Swale flow to the Sacramento River through a series of drainage segments the Delineation Report identified as intermittent or ephemeral streams.

The Appellant’s Delineation Report defined of intermittent and ephemeral streams as having “apparent bed and bank” features. The District reasonably concluded that this definition provided sufficient evidence to conclude that Drainage Segments 31, 32, and 36 had an OHWM. This provides sufficient evidence that a continuous OHWM extends from Drainage Segments 31, 32, and 36 to the Sacramento River and that these drainage segments are within CWA jurisdiction as tributaries to the Sacramento River.

The District concluded that additional areas within CWA jurisdiction were present upstream of Drainage Segment 36 - Ephemeral Stream/Wetland Swale. However, these areas are upstream of Drainage Segment 36 – Ephemeral Stream/Wetland Swale, and upstream of two unnamed, approximately 50-linear foot stretches without an OHWM, that the District and the Appellant identified as outside of CWA jurisdiction. The District’s administrative record did not explain its reasons for any including area upstream of the two 50 linear foot segments within CWA jurisdiction.

I conclude the District did not sufficiently document its basis for asserting CWA jurisdiction for the Drainage Segments upstream of Drainage Segment 36 – Ephemeral Stream/Wetland Swale including Drainage Segment 34 – Ephemeral Stream/Wetland Swale/Riparian Scrub, and Drainage Segment 35 – Riparian Scrub. The District must reconsider the CWA jurisdictional status of these areas.

The Appellant disagreed with the District’s determination of CWA jurisdiction of areas upstream of the eastern fork off of Drainage Segment 7 – Intermittent Stream upstream of Drainage Segment 21 – Intermittent Stream. Regarding the areas in dispute, the Appellant asserts that Drainage Segment 23 – Intermittent Stream, Drainage Segment 24 – Ephemeral Stream, Drainage Segment 25 – Intermittent Stream/Riparian Scrub, Drainage Segment 26 – Ephemeral Stream, and Drainage Segment 22 – Riparian Scrub are not within CWA jurisdiction. However, the Appellant’s Delineation Report defined Drainage Segments 23, 24, 25, and 26 as intermittent or ephemeral streams, and defined all intermittent and ephemeral streams as having apparent bed and bank characteristics. The District reasonably concluded that Drainage Segments 23, 24, 25, and 26 had an OHWM. The administrative record supports the District’s conclusion that a continuous OHWM extended from Drainage Segments 23, 24, 25, and 26 to the Sacramento River and that provided sufficient evidence that a tributary connection within CWA jurisdiction to the Sacramento River.

Based on the Appellant’s Delineation Report, the District reasonably concluded that Drainage Segment 22 – Riparian Scrub, was a wetland area. The District also reasonably concluded that this area was within CWA jurisdiction in accordance with 33 CFR 328.3 (a) (7) as an adjacent wetland because it abutted Drainage Segment 21 – Intermittent Stream, which as discussed above is within CWA jurisdiction.

In summary, the District must reconsider the CWA jurisdictional status of Drainage Segments 30, 33, 34, and 35, and the small channels in the vicinity of those drainage segments described above as outside of CWA jurisdiction in the Appellant's Delineation Report (i.e. those channels identified in orange as outside CWA jurisdiction on the Appellant's August 12, 2002 delineation map). The District must reconsider the extent, if any, of these areas that are within CWA jurisdiction as tributaries to the Sacramento River. The District must consider the importance of the presence or absence of a continuous OHWM in reaching that conclusion. If the District extends CWA jurisdiction based on a tributary connection upslope of areas without an OHWM, the District must explain its basis for doing so.

If the District concludes that the areas to be considered are not within CWA jurisdiction as tributaries to the Sacramento River, the District must then consider whether the areas may be within CWA jurisdiction as adjacent wetlands or isolated waters. During that process the District must consider 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) (Joint Memorandum) which provides guidance to the Corps on implementation of the Supreme Court's decision in *Solid Waste Agency of Northern Cook County v. United States*, 531 U.S. 159 (2001). In accordance with Appendix A the District must seek Corps Headquarters approval prior to asserting CWA jurisdiction using 33 CFR 328.3 (a) (3) of the Corps regulations. The District should coordinate with the Appellant regarding any new information the District may collect prior to finalizing its reconsideration of this action, and consider any new information the Appellant may choose to provide before the District completes its reconsideration of this action.

The Appellant inquired as to whether there was a minimum width of a drainage channel with an OHWM that is regulated by the Corps. No such specific minimum lateral width has been established in the Corps regulations, but any area defined as a tributary must meet the requirements of the Corps regulations.

**Reason 2:** The Appellant asserts the administrative record of evidence is silent as to why a drainage swale without an ordinary high water mark (OHWM) that supports man-induced wetlands on upland ground without hydric soil, is considered a tributary stream to the Sacramento River. The Appellant asserts the District incorrectly assumed that because hydrophytic vegetation is currently present that the District, by some theory unknown to the appellant, acquired jurisdictional status without properly following its own published policy (Sacramento District Office Memorandum #1145-2-4 titled "Regulatory Jurisdiction in Irrigated Areas" regarding irrigation dated June 1, 1996.).

**Finding:** The appeal does not have merit.

**Action:** None required.

**Discussion:** As discussed under Reason 1, I have concluded that the District reasonably determined that CWA jurisdiction should extend to the Drainage Segment 29 – Ephemeral

Stream and 36 – Ephemeral Stream/Wetland Swale, but that the District must reconsider the CWA jurisdictional status of areas upstream of those points. Therefore, this reason for appeal addresses whether or not the District reasonably concluded that wetlands as defined by the Corps regulations are present on Drainage Segment 33 – Intermittent Stream/Wetland Swale/Riparian Scrub, Drainage Segment 36 – Ephemeral Stream/Wetland Swale, Drainage Segment 34 – Ephemeral Stream/Wetland Swale/Riparian Scrub, and Drainage Segment 35- Riparian Scrub.

The District and the Appellant agree that the wetlands on the property should be evaluated in accordance with the Corps 1987 Wetland Delineation Manual (on-line edition), Part IV, Section F, Atypical Situations, Subsection 4, Man-Induced Wetlands, but disagreed on the correct results of such an evaluation. Section F of the Wetland Delineation Manual, Atypical Situations states that:

“Methods described in this section should be used only when a determination has already been made in Section D (Routine Determinations) or E (Comprehensive Determinations) that positive indicators of hydrophytic vegetation, hydric soils, and/or wetland hydrology could not be found due to the effects of recent human activities or natural events. This section is applicable to delineations made in the following types of situations including:

....d. *Man-induced wetlands.* Procedures described in Subsection 4 are for use in delineating wetlands that have been purposely or incidentally created by human activities, but in which wetlands indicators of one or more parameters are absent. For example, road construction may have resulted in impoundment of water in an area that previously was nonwetland, thereby effecting hydrophytic vegetation and wetland hydrology in the area. However, the area may lack hydric soil indicators. *NOTE: Subsection D is not intended to bring into CE jurisdiction those manmade wetlands that are exempted under CE regulations or policy.* It is also important to consider whether the man-induced changes are now “normal circumstances” for the area. both the relative permanence of the change and the functioning of the area as a wetland are implied.

(NOTE: text in parentheses added for clarity).

The administrative record supports the District’s interpretation of the Corps Wetland Delineation Manual, Part IV, Section F, Atypical Situations, Subsection 4, Man-Induced Wetlands evaluation. The steps in the Section F, Atypical Situations, Subsection 4 analysis as they relate to the District’s administrative record are described below.

Step 1 of the procedure states: “Determine whether the area represents a potential man-induced wetland.”

The District and the Appellant agreed that water originating in the residential single-family housing development upslope of the River Ridge property is the source of the additional water that supports wetlands on the River Ridge property



and that this water comes both from the increase in impervious surfaces upslope of the River Ridge property and from runoff from residential landscape irrigation. The District and the Appellant agree that much of the additional water is from runoff associated with irrigation of residential landscaping. The upslope property was developed in the early 1990's.

Step 2 of the procedure states: "Determine whether a permit will be needed if the area is found to be a wetland."

The District and the Appellant disagreed on this factor as described under reason 1. The District reasonably concluded that the water entering the property from upslope as runoff from the upslope residential area was now the normal circumstance for the property. Water runoff from the upslope residential development to the River Ridge property has increased over predevelopment levels as a result of the increase in impervious surfaces such as roads and buildings upslope of the River Ridge property. Water runoff has also increased as individual homeowners in the residential development individually decide how much to irrigate their residential landscaping, and this in turn determines how much additional water the River Ridge development receives from that source. The District and the Appellant agreed that runoff from the upslope development, including residential landscape watering, would continue to flow onto the property for the indefinite future. The District believes these conditions now represent normal circumstances. The Appellant argued that summer watering of residential landscaping should be considered as irrigation that would eventually cease over time as local water supplies diminished, water became more expensive, or water rationing was eventually implemented to conserve area water supplies.

Step 3 of the procedure states: "Characterize the area vegetation, soils, and hydrology."

The administrative record supports the District's conclusions that hydrophytic vegetation and wetland hydrology are present. Hydric soil indicators were generally not present.

Step 4 of the procedure states: "Wetland determination."

As discussed at the appeal meeting, the District concluded that the wetland hydrology for this site had developed with the establishment of the upslope residential development in the 1990's and that there had not been sufficient time for hydric soil indicators to develop. The District then concluded, consistent with the Wetland Delineation Manual, Section F, Subsection 4, that the wetlands on the River Ridge property should be considered as man-induced wetlands that cannot be readily changed or reversed. This step of Subsection 4 includes a cautionary note stating: "*CAUTION: 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 Appellant asserted that the runoff from the River Ridge property should be considered irrigation water, and the wetlands on the property should be considered non-jurisdictional in accordance with the “CAUTION” note above. The Appellant also asserted that areas on the property the District considered wetlands were exempt in accordance with Sacramento District Office Memorandum CESPCK-1145-2-4, “Regulatory Jurisdiction in Irrigated Areas” dated 1 June 1996.

The District’s position is that the water entering the River Ridge property is not irrigation water in the sense that the term is used in the “CAUTION” note or District Office Memorandum CESPCK-1145-2-4. The District stated that water from the upslope development originated from multiple sources including landscape irrigation runoff from many individual residential homes and well as increased runoff from the upslope development. The District considered the current conditions on the River Ridge property to be normal circumstances because there was not a single source providing additional water to the River Ridge property and no one entity had the ability to turn off the source of the additional water. The Corps does not have a specific regulatory definition of irrigation, and the District’s Office Memorandum CESPCK-1145-2-4 relates to situations where a single property owner can eliminate the water source on the property without a discharge of dredged or fill material, a situation that is not applicable here. Therefore, I and I find the District’s determination that irrigation water was not present to be reasonable, as was the District’s conclusion that wetlands were present in Drainage Segment 33 – Intermittent Stream/Wetland Swale/Riparian Scrub, Drainage Segment 36 – Ephemeral Stream/Wetland Swale, Drainage Segment 34 – Ephemeral Stream/Wetland Swale/Riparian Scrub, and Drainage Segment 35 – Riparian Swale.

This is also consistent with the Corps now-expired Regulatory Guidance Letters (RGL) 82-2 “Clarification of “Normal Circumstances” in the Wetland Definition” and 86-09 regarding “Clarification of “Normal Circumstances” in the Wetland Definition. RGL 86-09 (The guidance provided in Corps RGLs generally remains valid after the expiration date unless superceded by specific provisions of subsequently issued regulations or RGLs (Federal Register, Vol. 64, pg 13783, March 22, 1999). RGL 82-02 states that:

“Many areas of wetlands converted in the past to other uses would, if left unattended for a sufficient period of time, revert to wetlands solely through the devices of nature. However, such "natural circumstances" are not what is meant by "normal circumstances" .... "Normal circumstances" is determined on the basis of actual, present use of an area. Thus, it is the Corps' policy that once a wetland area has been converted to another use which alters its wetland characteristics to where it is no longer a "water of the United States," that area will no longer come under the Corps' regulatory jurisdiction. However, if the area is abandoned and over time in fact reverts to "wetlands" meeting our definition.... then the Corps' regulatory jurisdiction has been restored.”

and RGL 86-09 states that:

“As was stated in RGL 82-2, it is our intent under Section 404 to regulation discharges of dredged or fill material into the aquatic system as it exists and not as it may have existed over a record period of time.”

The wetland areas at issue in this administrative appeal are “unattended” and have become wetlands due to man-induced changes (increased water entering the site from the upslope development). Unlike irrigation water controlled by a single entity, this increase in water entering the property originates from multiple sources. This additional source of water is not likely to disappear for the foreseeable future.

Therefore, the District reasonably concluded that the normal circumstances for the River Ridge property currently include sufficient water runoff from upstream to support wetland vegetation and hydrology on the property. The District also reasonably concluded that the in accordance with the procedures in the Corps Wetland Delineation Manual, Part IV, Section F, Atypical Situations, Subsection 4, Man-Induced Wetlands, that the areas in question should be considered wetlands even with no or minimal hydric soils indicators because there wetlands are so new that hydric soils indicators have had a limited opportunity to develop. Although, the Appellant asserted that the district’s position was inconsistent with RGLs 82-2 and 86-02, I found the District’s conclusions to be a reasonable application of those RGLs. The Appellant also asserted that the District’s position was inconsistent with RGL-90-07 “Clarification of the Phrase “Normal Circumstances” as it Pertains to Cropped Wetlands, but there are no cropped wetlands on the River Ridge property and so RGL-90-07 does not provide guidance applicable to this property.

The administrative record supports the conclusion that portions of Drainage Segment 33 – Intermittent Stream/Wetland Swale/Riparian Scrub, Drainage Segment 36 – Ephemeral Stream/Wetland Swale, Drainage Segment 34 – Ephemeral Stream/Wetland Swale/Riparian Scrub, and Drainage Segment 35- Riparian Scrub are wetlands within CWA. However, as discussed under Reason 1 the District must reconsider whether these wetlands meet the requirements to be within CWA jurisdiction.

**Reason 3:** The District’s position of considering only current conditions in reaching its CWA jurisdictional determination is inconsistent with the Corps Wetland Delineation Manual, Section F, Subsection 4, Man-Induced Wetlands.

**Finding:** The appeal does not have merit.

**Action:** None required.

**Discussion:** As discussed under Reason 2 above, the District recognized and appropriately applied the Corps Wetland Delineation Manual, Section F, Subsection 4 Man-Induced Wetlands' to analyze the current conditions on the River Ridge property. That evaluation also took into consideration prior conditions on the property to the extent they were relevant to a determination of CWA jurisdiction under current conditions.

**Reason 4:** The Appellant asserts that the District should have considered the historical CWA jurisdictional status of the upslope property prior to construction of the residential development there in the early 1990's. In particular, the Appellant asserts that the upslope property was considered outside of CWA jurisdiction in the early 1990's, and that this provides evidence to support the Appellant's position that portions of the River Ridge property are outside of CWA jurisdiction. .

**Finding:** The appeal does not have merit.

**Action:** None required.

**Discussion:** As discussed under Reason 2 above, the District appropriately based its jurisdictional determination on the current conditions of the property. The Appellant asserted that the residential development upslope of the River Ridge property was constructed without Corps permit authorization and that this shows the Corps had previously concluded that area was outside of CWA. The Appellant asserted this was evidence that the areas in dispute in the CWA jurisdictional determination should also be outside of CWA jurisdiction.

The District explained at the appeal meeting that it appears the upslope residential development was constructed prior the establishment of the Corps Nationwide Permit notification requirements initiated in 1992. Therefore, whether or not the District had information on file regarding that action did not provide any information as to whether or not the District might have considered the upslope area within CWA jurisdiction in the past. In any case that determination is not germane to the current determination of CWA jurisdiction for the River Ridge property.

**Reason 5:** The District misinterpreted the Appellant's Delineation Report addressing CWA jurisdiction on the River Ridge property and is proposing CWA jurisdictional boundaries that are contradictory and mutually exclusive.

**Finding:** This reason for appeal was addressed under Reason 1.

**Action:** This reason for appeal was addressed under Reason 1.

**Discussion:** This reason for appeal was addressed under Reason 1.

**Reason 6:** The District’s determination of CWA jurisdiction is inconsistent with Corps regulatory guidance and is inconsistent with the legislative and rulemaking intent of the Corps regulations.

**Finding:** The appeal does not have merit.

**Action:** None required.

**Discussion:** The Corps regulations at 33 CFR 331.3 (b) (2) state the extent of review to be conducted by the review officer during an administrative appeal as:

“Review. The review officer will conduct an independent review of the administrative record to address the reasons for the appeal cited by the applicant in the request for appeal. In addition, to the extent that it is practicable and feasible, the review officer will also conduct an independent review of the administrative record to verify that the record provides an adequate and reasonable basis supporting the district engineer's decision, that facts or analysis essential to the district engineer's decision have not been omitted from the administrative record, and that all relevant requirements of law, regulations, and officially promulgated Corps policy guidance have been satisfied.”

The questions of whether the Corps current regulations and the District’s interpretation of those regulations are consistent with the legislative intent of Congress when it passed the CWA and its amendments are beyond the scope of review of this administrative appeal process.

**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 conclude that the District must reconsider its CWA jurisdictional determination for several upstream areas of the River Ridge property as described in Reason 1.

/original signed by/  
Leonardo V. Flor  
COL, EN  
Commanding