



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
SAN FRANCISCO DISTRICT, U.S. ARMY CORPS OF ENGINEERS
1455 MARKET STREET
SAN FRANCISCO, CALIFORNIA 94103-1398

MAY 17 2010

Regulatory Division

SUBJECT: File Number 2001-26557N

Mr. Edgar B. Washburn
Morrison Foerster
425 Market Street
San Francisco, California 94105-2482

Dear Mr. Washburn:

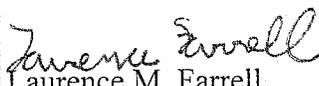
This letter is written in response to the South Pacific Division's remand of the administrative appeal for the Napa Junction Road property jurisdictional determination. The subject property is located east of Highway 29, American Canyon, Napa County, California (APNs 059-020-028, 035).

Based on further review in accordance with the procedures outlined in the "CWA Jurisdiction Following the U.S. Supreme Court Decision in Rapanos v. United States" the San Francisco District has determined that the extent of U.S. Army Corps of Engineers' (Corps) jurisdiction was accurately determined as stated in our jurisdictional determination letter to Mr. Ross Dobberteen, LSA Associates, Inc. on March 4, 2009. The subject property contains waters of the United States that are subject to Corps jurisdiction pursuant to Section 404 of the Clean Water Act (33 U.S.C. Section 1344).

All proposed discharges of dredged or fill material into waters of the United States must be authorized by the Corps pursuant to Section 404 of the Clean Water Act (33 U.S.C. Section 1344). Waters of the United States generally include tidal waters, lakes, ponds, rivers, streams (including intermittent streams), and wetlands.

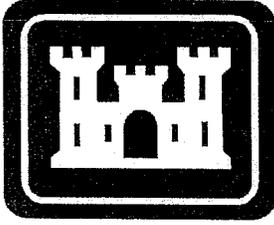
Should you have any questions regarding this matter, please call David Wickens of our Regulatory Division at 415-503-6787. Please address all correspondence to the Regulatory Division and refer to the File Number at the head of this letter.

Sincerely,


Laurence M. Farrell
Lieutenant Colonel, U.S. Army
Commanding

Copies Furnished:

✓ SPD, Attn: Mr. Thomas Cavanaugh
US EPA, San Francisco, CA
CA RWQCB, Oakland, CA
Mr. Ross Dobberteen, LSA Associates, Inc.
Mr. Richard Gooch, Union Pacific Railroad Company



Memo For The Record

Project Manager: David Wickens

File No.: 26557N

Subject: Response to Administrative Appeal Remanded to San Francisco District Reconsideration by Division Appeal Officer for the Napa Junction Road Property (aka Union Pacific Railroad Company Project), Located east of Highway 29, American Canyon, Napa County, California (APNs 059-020-028, 035).

The request for Jurisdictional Appeal was received June 26, 2009.

The appeal site meeting and site visit was October 29, 2009.

The memorandum from Appeal Officer Mr. Thomas J. Cavanaugh, South Pacific Division, dated March 3, 2010, determined that the San Francisco District must re-evaluate its jurisdictional determination (JD).

Date of Visits: JD Site visit conducted on January 28, 2002 (JD letter sent February 8, 2002). JD Site visits conducted on May 8, 2007 and February 5, 2008 (JD letter sent March 4, 2009). JD appeal site visit conducted on October 29, 2009.

Additional observations of hydrologic connection to Navigable Waters: April 12, 2010, April 20, 2010, April 29, 2010.

Photographs of hydrologic connection taken on April 20, 2010.

Notes: A memorandum dated March 3, 2010, by the South Pacific Division Appeal Officer (Appeals Officer), Mr. Thomas J. Cavanaugh determined that the San Francisco District must re-evaluate its jurisdictional determination based on instructions he provided in the enclosed administrative appeal decision document. The Administrative Appeal

Decision Document contains the Appeal Officer's evaluation, findings, and instructions to the District Engineer (DE).

This MFR contains the Appeal Officer's findings and instructions (italicized) followed by my response to those comments.

Findings and Instructions from the administrative appeal decision document:

The Administrative Appeal Review Officer (Review Officer), in his Memorandum for the Commander of the San Francisco District (District), determined the Appellant's reason for appeal, "*The wetlands are not a water of the United States*" (Reason #1), had merit. Based on this, the Review Officer determined the following:

"If the District's decision is to continue to assert that the wetlands on-site are adjacent to a TNW, it must document the rationale that leads to that conclusion. The District must reconsider its decision that the drainage on the property is a seasonal RPW. If the District's final determination is that the drainage is a seasonal RPW, that determination must be based on observations or other data which support that conclusion."

Response to Comment: The District documented the rationale leading to the conclusion that the wetlands on site are adjacent to a TNW. The rationale was documented in the MFR within the Administrative Record. It was also documented in the District's November 18, 2009, response to questions prepared by the Review Officer. However, in response to the Review Officer's finding, I have bolstered the file with additional site inspection data, aerial photo information, photographs of the property and surrounding area taken during a site visit April 20, 2010, and U.S. Geological Survey (USGS) California Water Science Center Hydrologic Data. The following additional information is attached to this MFR:

1. **Additional Site Inspections (Observational Data):** Additional site inspection data compiled by Dan Martel, Corps Wetland Specialist, from site visits conducted April 12 and 29, 2010. Data gathered during these site inspections provides additional observations and data regarding the significant hydrologic connection the wetlands and unnamed streams on the property have to traditional navigable waters. During both site inspections water was observed flowing from the property into the culvert that connects

to the North Slough. Visual observations also revealed vegetative suppression in the bed of the unnamed streams and/or a small amount of obligate wetland plant vegetation. This condition infers extended periods of inundation during the growing season which can be attributed to the local climate's rainy season. A seasonal connection to traditional navigable waters can be inferred and is not speculative.

On April 20, 2010, I visited the site to gather additional information. I documented the hydrologic conditions with photographs. I observed water flowing from the unnamed streams on the subject property into the culvert that discharges into North Slough. I observed vegetative suppression in the bed of the streams. I also observed tadpoles in the stream. I observed sediment deposits on vegetation and multiple stems of vegetation bent in the direction of flow. In conclusion, indicators of a seasonal hydrological regime were observed that one would expect to see from relatively permanent waters possessing seasonal flow regime. Recorded data (also gathered) provides further evidence that my conclusions are not speculative and the unnamed streams are relatively permanent waters that possess seasonal flow.

During my April 20, 2010 site visit I also took photographs of the North Slough located approximately 400 feet north of the subject property. The purpose of these pictures is to illustrate the engineered solution that went into solving flooding concerns in the immediate area. This segment of the North Slough has engineered bed and banks (constructed of concrete) for flood control. It is not a speculative determination that the subject property and the neighboring properties individually and cumulative contribute significant amounts of water to the Napa River during the rainy season. The photographs also illustrate the close proximity the Napa Junction Property is to a segment of the North Slough engineered for flood desynchronization.

2. Recorded Data: The USGS California Water Science Center hydrologic data for the area. Attached is a water data report produced by the USGS that includes statistics of monthly mean data for water years 1960-2008. The data provides additional information to the common understanding that there exists a rainy season weather pattern in the area where the project is located. Precipitation amounts during the rainy season are markedly elevated. The rainy season is an annual occurrence. The data shows the rainy season extends from late October to early June. Therefore, it is not speculative to conclude the unnamed streams on the property are relatively permanent

waters that flow seasonally. Furthermore, in conjunction with indicators of large flow events observed in the field, it is not speculative to infer a significant hydrologic connection between all aquatic features on the property and the North Slough (which discharges directly into the Napa River).

Findings and Instructions from the administrative appeal decision document:

“In order to comply with policy requirements of the Revised Rapanos Guidance, the District must document that its conclusion that the drainage is an RPW has been evaluated under the “significant nexus standard.” Additionally, the District is required to complete a significant nexus evaluation for the non-RPW, and a separate significant nexus analysis for those wetlands which are adjacent and abut the non-RPW.”

Response to Comment: With respect to the unnamed stream that flows along the toe of the outside of the berm, the District has completed a significant nexus determination. The Corps is in the process of submitting this determination to the Environmental Protection Agency (EPA) for concurrence.

The unnamed streams within the balloon shaped property are RPWs and contiguous to the North Slough, which flows into the Napa River. Under the policy requirements of the Revised Rapanos Guidance, these features do not need to be evaluated under the “significant nexus standard.” The MFR contained in the administrative record documents why the unnamed streams within the balloon shaped property are RPWs.

Most of the wetlands located on the balloon shaped parcel are contiguous to the unnamed streams. However some of the adjacent wetlands are neighboring the unnamed stream. For these wetlands the significant nexus test was completed. The Environmental Protection Agency (EPA) reviewed this determination and concurred. This information is contained in the administrative record and attached to this MFR.

Findings and Instructions from the administrative appeal decision document:

“The District must also include an analysis and conclusion of whether wetlands on the property have been abandoned, and are thus potentially jurisdictional.”

Response to Comment: When the Corps first visited the site in 2002 the site was abandoned. The Corps took jurisdiction of the aquatic features located on the balloon shaped parcel and the landowner did not raise the issue of abandonment. In 2007 and then in 2008 the Corps, at the request of the landowner, re-visited the site and found the balloon shaped parcel to be in the same condition as it was in 2002. The Corps, together with the landowner’s representatives, and the Review Officer, visited the site in 2009 and found site conditions to be unchanged. Finally, the Corps visited the property in 2010 and it was abandoned.

In response to the Appeal Officer’s comment I have bolstered the Corps file with aerial photo information. Aerial photos, dating back to 1993, depict the property to be in the same condition as was observed to be during every Corp site visit--abandoned. The railroad line was removed and abandoned from the southern portion of the balloon-shaped parcel many years ago. The District’s conclusion that wetlands on the balloon shaped parcel have been abandoned is not speculative. Visual observations from site visits and from aerial photos taken long before our first site visit support this determination.

Every time the Corps has been invited onto the balloon shaped parcel by the landowner safety gear has not been a requirement to gain access. The entire southern loop that makes up more than half of the “balloon shape” has not had railroad tracks atop the berm for more than 20 years. The interior of the parcel does not contain any indicators of regular, intermittent, or recent construction activity. Furthermore, every Corps site inspection has been treated by the landowner’s representatives as a visit to an abandoned parcel. This was also the case when the District visited the site with the Division Appeal Officer and the landowner’s representatives, including the landowner’s legal council.—the site visit was conducted under the auspices of a visit to an abandoned parcel: no requirement for safety gear, or awareness for activity of any kind on the property. No equipment has ever been seen on the balloon shaped parcel. No evidence of equipment activity on the balloon shaped parcel has ever been observed. Furthermore, aerial photos dating as far back as June 15, 1993 depict the site in the same abandoned condition that was observed in 2009. By any reasonable standard, the balloon shaped property is abandoned and has been abandoned

for many years. Site visits to the property have been treated by the landowner as a visit to abandoned property.

To make the Corps' position clear: The Corps finds the balloon shaped parcel contains wetlands that have been abandoned, thus subject to Corps jurisdiction.

Findings and Instructions from the administrative appeal decision document:

“Finally, the District must clearly document the jurisdictional status and role of the culvert and other man-made or man-altered features, such as the ditch along the outside of the berm, in its final decision.”

Response to Comment: The culverts on the property form a contiguous connection between the unnamed stream and traditional navigable waters of the United States. The jurisdictional status of the culverts that the unnamed streams flow through, prior to being discharged into the North Slough, is that the culvert pipe does not sever Section 404 Clean Water Act jurisdiction between the upstream waters and the traditional navigable waters downstream (pursuant to the Revised Rapanos Guidance dated December 2, 2008). To the contrary, the culverts assist in providing a conduit for contiguous flow to traditional navigable waters. Furthermore, it should not be forgotten why the culverts on the property were installed—to maintain a connection to traditional navigable waters in an effort to prevent seasonal flooding of the property.

The ditch along the outside of the berm (unnamed stream, RPW), discharges off site to the west and into the unnamed stream which flows into North Slough. Pursuant to Revised Rapanos Guidance dated December 2, 2008, it is subject to Corps jurisdiction. The MFR from the Administrative Record describes the significant hydrologic connection the unnamed stream has with traditional navigable waters. Also, in response to a previous comment from the appeal decision document, a significant nexus document has been prepared and has been submitted to the EPA for concurrence.

Findings and Instructions from the administrative appeal decision document:

“The District’s January 6, 2009, Memorandum for the Record (MFR) includes an unsupported conclusion that the railroad spur has been abandoned. The MFR does not respond to the status of the wetlands on the property relative to abandonment. It also does not respond to the assertion that the culvert does not connect the wetlands on the property to downstream waters. “

Response to Comment: The District’s January 6, 2009 MFR drew a conclusion that the railroad spur was abandoned based on Corps site visits in 2002, 2007, and 2008. During all site visits the commonly held understanding was that the balloon shaped property had been abandoned. When the balloon shaped parcel was first visited by the Corps in 2002 the property was in a state of abandonment and was observed as such. Furthermore, safety gear was not required to gain access to the balloon shaped parcel, the entire southern loop that makes up more than half of the “balloon shape” did not have railroad tracks atop the berm, the interior of the parcel did not contain any indicators of regular, intermittent, or recent construction activity. The site inspection on the property was treated as a site visit to an abandoned parcel by the Corps and by the landowner’s representatives who escorted Corps personal onto the property. This was also the case when the Corps visited the property in 2007 and 2008. This was also the case in 2009 when the District visited the site with the Division Appeal Officer and the landowner’s representatives, including their legal council.—the site visit was conducted under the auspices that the parcel was abandoned. Therefore, safety gear or any awareness of construction or railroad activity of any kind on the property was not necessary. Furthermore, aerial photos dating as far back as June 15, 1993 depict the site in the same abandoned condition. In response to the Appeal Officer’s comments this information will be logged to the administrative record to support our conclusion the railroad spur has been abandoned.

“ . . . It also does not respond to the assertion that the culvert does not connect the wetlands on the property to downstream waters. “

Response to Comment: The District’s January 6, 2009 MFR makes the assertion that the culverts on the property assist in the significant hydrologic connectivity of the wetlands on the property to navigable waters. The MFR

in our Administrative Record functions to record our observations in the field and to outline our jurisdictional position. To this end, our jurisdictional determination follows the U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook (Guidebook).--The Guidebook document was intended to be used as the U.S. Army Corps of Engineers Regulatory Nation Standard Operating Procedures for conducting an approved jurisdictional determination (JD) and documenting practices to support an approved JD. What is important to note: our January 6, 2009 MFR was written to document why the Corps should take jurisdiction over the aquatic features on the property in accordance with Federal Guidance. The MFR was not written to respond to assertions made by the landowner that were received after the January 6, 2009 MFR was written.

To reiterate, it is the District's position that the culverts connect all aquatic features on the property to a traditional navigable water: Two culverts on the subject property were installed to, and do function to, connect all aquatic features contained within the balloon shaped parcel to navigable waters. Therefore, all aquatic features described in the MFR contained in the Administrative Record are subject to Corps jurisdiction pursuant to Section 404 of the Clean Water Act (U.S.C. Section 1344) as the aforementioned Revised Rapanos Guidance requires them to be.

Findings and Instructions from the administrative appeal decision document:

"The District has not included data in the administrative record to sufficiently support its conclusions. If the District's decision is to continue to assert that wetlands on-site are adjacent to a TNW, it must document the rationale that leads to that conclusion. The District must reconsider its decision that the drainage on the property is a seasonal RPW. If the District's final determination is that the drainage is a seasonal RPW, that determination must be based on observations or other data which support that conclusion. In order to comply with policy requirements of the Revised Rapanos Guidance, the District must complete a significant nexus evaluation for that drainage. Additionally, the District is required to complete a significant nexus evaluation of the non-RPW, and a separate significant nexus analysis for those wetlands which are adjacent and abut the non-RPW. The District must also include an analysis and conclusion of whether wetlands on the property have been abandoned,

and are thus potentially jurisdictional, and clearly document the jurisdictional status and role of the culvert and other man-made or man-altered features, such as the ditch along the outside of the berm in its final decision.”

Response to Comments: I disagree with the Appeals Officer’s conclusion that the administrative record does not include data to sufficiently support our conclusions. The conclusion that all aquatic features on the property are adjacent to navigable waters was based on data collected and visual observations required to draw such conclusions and pursuant to the revised Rapanos guidance dated December 2, 2008. Our conclusions were supported in the administrative record. Where a significant nexus determination was required for some of the wetlands in the balloon shaped parcel, we completed that determination and received concurrence from the EPA.

Furthermore, important tests for adjacency were met:

- the unnamed streams and wetlands on the property are in very close proximity to North Slough.
- multiple visual observations of a significant hydrologic connection to navigable waters.
- the fact that the subject parcel is located in an area of the country that is subject to a Mediterranean Climate. In such a climate there is a rainy season.

However, in response to the aforementioned comments I have:

- bolstered the administrative record with additional site visit data.
- added to the file the USGS California Water Science Center hydrologic data for the area to provide recorded evidence of a rainy season.
- added photographic data to depict the significant hydrologic connection to North Slough.
- processed a significant nexus form for EPA review and concurrence regarding the unnamed stream located on the outside of the berm.

“ . . . The District must also include an analysis and conclusion of whether wetlands on the property have been abandoned, and are thus potentially jurisdictional. . . ”

In response to this comment I have bolstered the Corps file with information that the balloon shaped property has been abandoned.

“ . . . and clearly document the jurisdictional status and role of the culvert and other man-made or man-altered features, such as the ditch along the outside of the berm in its final decision.”

In response to these comments I have added information to the file, most of which is contained in the MFR, that speak to the jurisdictional status of the culvert and berm with respect to the unnamed stream located along the outside of the berm.

Neither the culvert nor the berm severs the hydrologic connection to navigable waters. As mentioned in this MFR and described in the administrative record, water from the property flows into the North Slough. Visual observations of this significant hydrologic connection have been visually observed on site.

I have bolstered the file with recorded data to further my assertion that there is a rainy season that causes seasonal flow. This data is from a credible source, the visual observations have been recorded to the file and the inference that the wetlands and streams have a seasonal connection to traditional navigable waters is not speculative.

Summary: I recommend the Corps continue to assert jurisdiction over all wetlands and unnamed streams on the property.

The aforementioned unnamed tributary and wetlands on the subject property likely provide value by performing the following functions: flood flow alteration (i.e. storage and flow desynchronization), sediment / toxicant / pathogen retention, biogeochemical cycling (i.e. biologic, physical, chemical transformations of various nutrients within the soil and water), and wildlife habitat (i.e. stream/wetland macro invertebrates). Of these functions, sediment retention, and macro invertebrate habitat were observed during my site investigation. Based on limited information, potential and observed functions and values provided by the unnamed tributary and the wetlands on site are translated into increased food web production, flood retention, and improved water quality delivered to the North Slough and the Napa River. Therefore, it is likely that the aquatic features on the subject property have the ability to significantly affect the chemical, physical, and biological integrity of a downstream TNW. No specific studies have been completed to determine the magnitude of functions and values that are being performed.

Flow regime of the unnamed streams: The unnamed streams flow seasonally based on the presence of a stable OHWM, unvegetated bed, and on precipitation patterns in the Mediterranean climate (November - March).

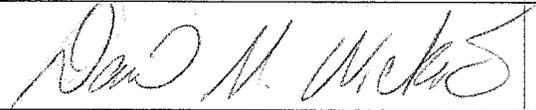
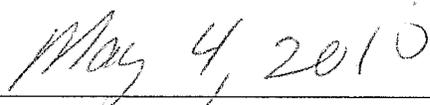
The property is abandoned. Aerial photos are attached dating back as far as 1993 depicting the property in its current state--abandoned.

Corps Staff Recommendations: The wetlands on the subject property and the unnamed stream have a clear and significant hydrological connection to traditional navigable waters.

Based on my observed conditions in the field, and current Corps of Engineers Regulatory Guidance, I recommend the Corps continue to assert jurisdiction over the wetlands and unnamed streams on the property.

Signature

Date

	
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