

**Senate Environment and Public Works Committee
Subcommittee on Fisheries, Water, and Wildlife
hearing entitled, “Erosion of Exemptions and Expansion of Federal Control –
Implementation of the Definition of Waters of the United States”
Tuesday, May 24, 2016
Responses for the Record
Mr. Don Parrish**

Don R Parrish
American Farm Bureau Federation

I have attached the information requested by the committee and Senator Whitehouse specifically regarding communications and documentation related to the U.S. Army Corps of Engineers routinely regulating “puddles” (puddles are defined here as small wet-spots and tire ruts that hold rainwater on the surface of land and that do not meet the U.S. Army Corps wetland criteria). I have also attached supporting documentation that shows the U.S. Army Corps of Engineers routinely engaging in regulatory over-reach by requiring CWA permits when farmers change one type of crop to another or one type of farming activity to another type of farming activity. This documentation is summarized and provided by Ms. Jody Gallaway, President of Gallaway Enterprises. These examples reflect her firsthand knowledge and her on-the-ground experiences with the U.S. Army Corps of Engineers.

The American Farm Bureau would welcome an opportunity to work in a bipartisan manner to craft a legislative solution that would ensure that the U.S. Army Corps of Engineers does not improperly limit or narrow the exemptions authorized by Congress in Section 404 f of the Clean Water Act to protect normal farming operations.

Senate Committee on Environment and Public Works Subcommittee on Fisheries, Water, and Wildlife oversight hearing entitled, “Erosion of Exemptions and Expansion of Federal Control –Implementation of the Definition of Waters of the United States.” May 24, 2016

Request for Additional Information: Case Study 1 and Supporting Documents

Case Study 1

1. Project Summary:
SPK#2004-00896
The total project area is approximately 221 acres in size.

2. Issue:
 - a. Corps determined that puddles in the middle of a dirt road, filled after rain events and created from vehicular disturbance (tire ruts), are WOTUS.
 - b. Corps required placement of puddles on a delineation map that are not wetlands and required data sheets to support false assertion of federal jurisdiction by the Corps, or risk not obtaining a jurisdictional determination.

3. Supporting Information:
Exhibit A – 2007 Wetland Delineation (verifiedⁱ)
Exhibit B – Corps Field Inspection Record obtained from FOIA request
Exhibit C – 2014 Wetland Delineation (unverified)

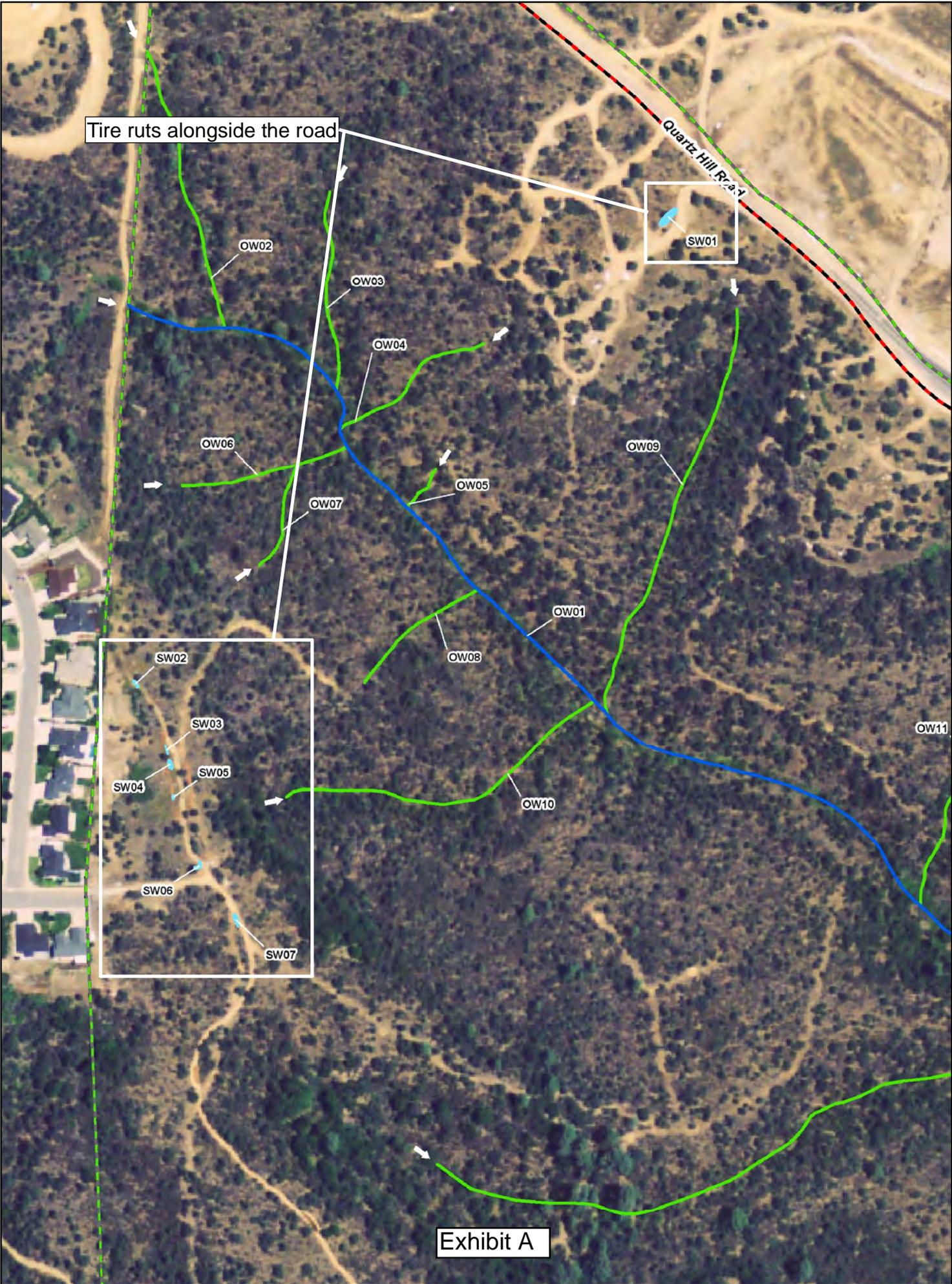
4. Details:
 - a. In 2007, a delineation of WOTUS (Exhibit A) was performed for the project area. Of the total 0.214 acres of *Seasonal Wetlands*, 25% of “wetland” features were human created tire ruts in the dirt roads. The consultants argued that the puddles in the dirt roads were not jurisdictional because they did not meet the Corps’ wetland criteria. Specifically, there was an absence of hydric soils and hydrophytic vegetation. Nonetheless, the Corps asserted jurisdiction and required a permit to fill the puddles. Refer to Exhibit B “Field Inspection Form” for the Corps regulator’s reasoning and justification for determining jurisdiction, which includes statements of “little to no veg” and “appears to be formed due to off-road activity.”
 - b. In 2014, following the reissuance of the 2012 Nationwide Permits and construction of Phase I of the project, another wetland delineation was completed for Phase II. Based on the direction of the Corps regional representative’s insistence on asserting jurisdiction over puddles in roads, additional puddles were delineated (Exhibit C). The additional puddles were a product of vehicular use in the area.

- c. Corps Regulator conducted a site visit after an intense rain event and used photos of ponded water to assert jurisdiction. This is not an acceptable method under the 1987 or 2008 Regional Supplement to the Corps of Engineers Wetland Delineation Manual.

5. Status: Pending.

ⁱ Verified means that the US Corps of Engineers has conducted a field review and performed a verification or jurisdictional determination, concurring with the extent, location, and type of WOTUS within the project area.

Exhibit A



Tire ruts alongside the road

Quartz Hill Rd #1

SW01

OW02

OW03

OW04

OW06

OW09

OW05

OW07

OW01

OW08

OW11

SW02

SW03

SW04

SW05

SW06

SW07

OW10

Exhibit A

Exhibit B

FIELD INSPECTION RECORD

1. Name (Inspector) <i>Kelley</i>	2. DATE <i>3-1-05</i>
3. PERMIT NUMBER <i>2004 CD 896</i>	5. SUSPENSE NUMBER
3. E-NUMBER	

INSTRUCTIONS: Place an "X" in the appropriate box or annotate the required information

- SECTION 10 - SECTION 404 - SECTION 13 - OTHER (Specify) _____	- PRE-CONSTRUCTION INSPECTION - COMPLIANCE INSPECTION - VIOLATION INSPECTION	- PROPOSED - EXISTING FLIGHT NUMBER _____	7. BANK	RIGHT	LEFT
			8. RIVER MILE		

9. NAME OF WATERWAY	10. COUNTY	11. PARCEL NUMBER
12. TRIBUTARY	13. SUBDIVISION <i>1324 Hwy</i>	14. LOT NUMBER
15. WIDTH OF WATERWAY	16. LOCATION (nearest town or city)	
17. NAME (property owner)	18. TELEPHONE NUMBER	
19. ADDRESS		
20. NAME (lessee)	21. TELEPHONE NUMBER	
22. NAME (person contacted)	23. TELEPHONE NUMBER	
24. NAME (agent)	25. TELEPHONE NUMBER	

26. FIELD SKETCH

- Observed pools along west side fire rd. little to no veg. appear to be formed due to off-road activity. Definitely receiving H₂O from pools previously considered potential habitat. ✓ w/ FWS it should be added.
- Walked down OW 16 (Gullyway?) Gullyway listed as open. Definite ground water input. on OW 16. OW 18, 19, & 20 - Tribs to OW 16 Definite ground water input. water observed seeping out of hill and rodent holes into streams. Needs to be mapped as intermittent as USF map indicated.

"little to no veg."
"appear to be formed due to off-road activity"

Exhibit C

Other Waters of the U.S. Impacts				
Feature Type	Label	Width (ft)	Length (ft)	Acres
Other Waters	OW01	12	5.1	0.0014
Other Waters	OW09	2	15.8	0.0007
Other Waters	OW10	10	6.6	0.0020
Other Waters	OW11	2	539.8	0.0248
Other Waters	OW12	4	164.5	0.0151
Other Waters	OW15	1	106.1	0.0024
Other Waters	OW17	3	676.3	0.0466
Other Waters	OW18	1	227.3	0.0052
Other Waters	OW19	1	167.3	0.0038
Other Waters	OW20	2	258.3	0.0119
Other Waters	OW21	2	199.4	0.0092
Other Waters	OW22	1	65.0	0.0015
Other Waters	OW31	1	27.8	0.0006
Other Waters	OW33	1	128.7	0.0030
Other Waters	OW34	1	10.7	0.0002
Other Waters	OW36	2	101.4	0.0047
Other Waters	OW37	2	96.8	0.0044
Total Impacts to Other Waters=			2,796.6	0.14

Wetland Features Impacts				
Feature Type	Label	Width (ft)	Length (ft)	Acres
Seasonal Wetland	WF01	N/A	N/A	0.0102
Seasonal Wetland	WF02	N/A	N/A	0.1621
Seasonal Wetland	WF03	N/A	N/A	0.0149
Total Impacts to Wetland Features=			N/A	0.19
Total Impacts to all Features=			2,796.6	0.32

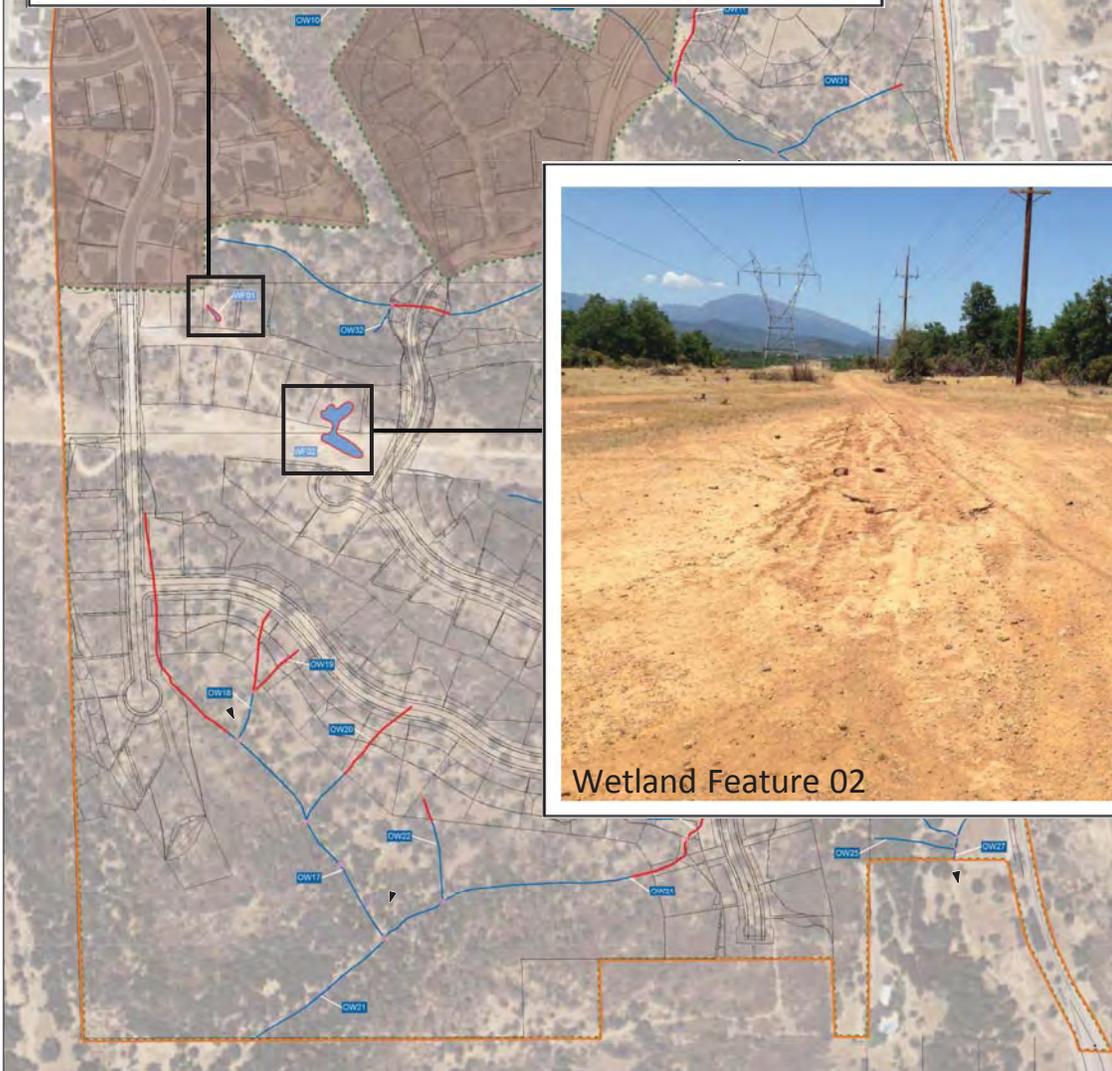
The features presented in this figure are to be considered preliminary until written verification from the USACE.



Wetland Feature 01



Wetland Feature 02



Project Boundary- 221.4 acres
Phase II Boundary- 166.4 acres
Developed Portion of Project- 54.6 acres (Phase I)
Impacted Seasonal Wetlands- 0.19 acres
Other Waters of the U.S.- 1.86 acres
Impacted Other Waters- 0.14 acres
20 Foot Contours
Flow Arrows
Feature Transitions

Senate Committee on Environment and Public Works Subcommittee on Fisheries, Water, and Wildlife oversight hearing entitled, “Erosion of Exemptions and Expansion of Federal Control –Implementation of the Definition of Waters of the United States.” May 24, 2016

Request for Additional Information: Case Study 2 and Supporting Documents

Case Study 2

1. Project Summary
SPK#2002-00641
The total project area is approximately 50.9 acres in size.
2. Issue:
 - a. Corps required the inclusion of puddles that form after rain events in a gravel parking lot in the wetland delineation report.
 - b. Corps required data sheets to support a false assertion by the Corps, or risk not obtaining a jurisdictional determination.
3. Supporting Information:
Exhibit A – Portion of original delineation of WOTUS
Exhibit B – Case Study Area
Exhibit C – 2007 Final Delineation WOTUS (small focus area is depicted demonstrating the Corps jurisdiction of puddles in parking lot) (verified¹)
Exhibit D – Site photos including chronological photos of WF 21
4. Details – The original wetland delineation was revised under the direction of the Corps to include wetland feature 21, a manmade puddle in a gravel parking lot. This revision resulted in an additional 0.079 acres of Seasonal Wetland being labeled as jurisdictional. As observed in Exhibit A, the delineator did not map the puddle in the parking lot as WOTUS. Supporting evidence was provided that the puddle was not jurisdictional. In Exhibit D the delineator provided a series of historical photos that show no connection (isolated) or ponding in the parking lot. However, the Corps later instructed the delineator to map the puddles as WOTUS and suggested language for a data sheet. .Despite arguments from the delineator that the feature is not WOTUS, the Corps asserted jurisdiction and would not verify the delineation map without including the feature. The final map (Exhibit C) shows the puddle in the parking lot. The data sheet (Exhibit E) indicates that no vegetation is present therefore it does not meet the criteria as a wetland. The Corps required Ms. Gallaway to change the data contained in her data sheet and map a feature that did not meet the wetland criteria as a wetland feature as a condition of obtaining a permit. The Corps frequently takes jurisdiction over similar features therefore this situation repeats frequently throughout the region.
5. Status: Project completed

¹ Verified means that the US Corps of Engineers has conducted a field review and performed a verification or jurisdictional determination, concurring with the extent, location, and type of WOTUS within the project area.

Exhibit A

Exhibit B

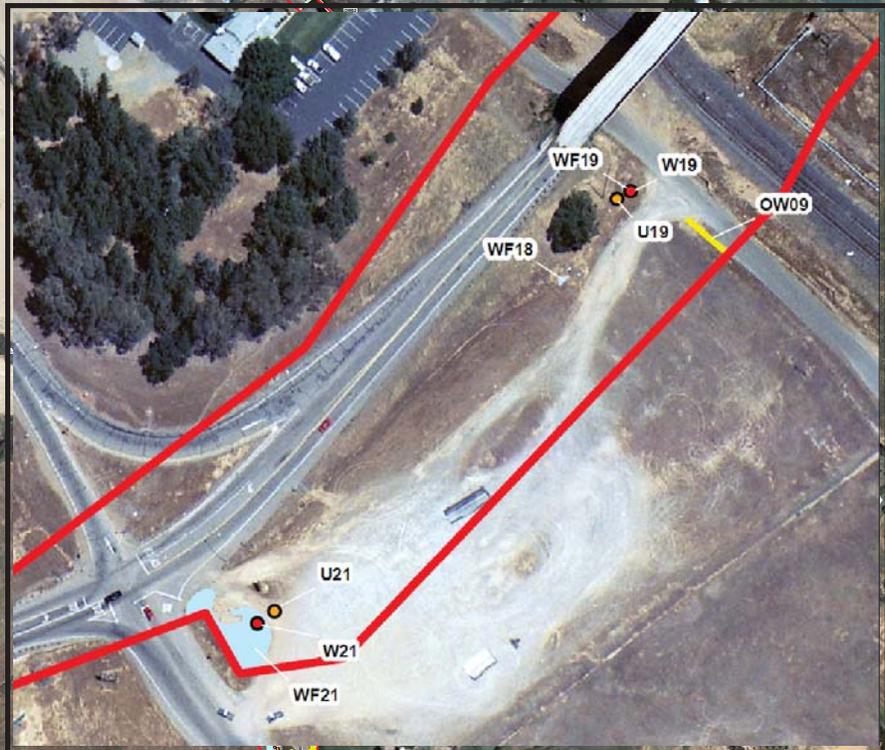


Map Detail 01.

Exhibit C



- Project Site (74.5 Acres)
- Matchline
- Soil Sample Sites
 - Upland - U#
 - Wet - W#
- Other Waters of the U.S. - OW#
 - Perennial
 - Intermittent
 - Ephemeral
 - Canal
 - Ephemeral Ditch
 - Culvert - C#
- Wetland Features - WF#
 - Jurisdictional Riparian
 - Fresh Emergent Wetland
 - Seasonal Wetland
- Previously Delineated Wetland Features - PDWF#
 - Fresh Emergent Wetland
 - Seasonal Wet Meadow



Delineated Features					
ID#	Type	Average Width (ft.)	Length (ft.)	Area (ft ²)	Acres
C01	Culvert	3	22.0	66.0	0.001
C02	Culvert	3	18.0	54.0	0.001
C03	Culvert	3	18.0	54.0	0.001
OW01	Canal	4	884.4	3541.7	0.081
OW02	Canal	6	138.4	831.1	0.019
OW02.1	Canal	6	584.8	3478.2	0.109
OW03	Canal	10	126.9	1269.0	0.029
OW04	Ephemeral	5	141.1	705.5	0.016
OW05	Canal	4	21.0	84.0	0.002
OW06	Intermittent	6	201.2	1207.1	0.028
OW07	Intermittent	23	93.3	2144.2	0.050
OW08	Canal	27	27.9	750.2	0.017
OW09	Ephemeral Ditch	2	48.9	97.7	0.002
OW10	Ephemeral Ditch	5	44.1	220.5	0.005
OW11	Ephemeral Ditch	5	28.2	141.0	0.003
OW12	Ephemeral Ditch	3	77.9	233.7	0.005
OW13	Ephemeral Ditch	3	28.7	86.1	0.002
OW14	Perennial	14	308.6	4320.6	0.099
Perennial Total =				394.6	0.084
Ephemeral Total =				141.1	0.016
Canal Total =				1369.1	0.285
Ephemeral Ditch Total =				278.0	0.006
Culvert Total =				34.2	0.001
Total of All OW/FUS =				2822.3	0.621
WF01	Jurisdictional Riparian	n/a	n/a	22681.1	0.517
WF02	Jurisdictional Riparian	n/a	n/a	37754.8	0.862
WF03	Jurisdictional Riparian	n/a	n/a	48770.9	1.104
WF04	Jurisdictional Riparian	n/a	n/a	17077.4	0.382
WF05	Jurisdictional Riparian	n/a	n/a	127053.9	2.928
WF06	Seasonal Wetland	n/a	n/a	36236.2	0.832
WF07	Seasonal Wetland	n/a	n/a	4119.1	0.094
WF08	Seasonal Wetland	n/a	n/a	1135.1	0.027
WF09	Seasonal Wetland	n/a	n/a	451.1	0.010
WF10	Seasonal Wetland	n/a	n/a	892.2	0.020
WF11	Seasonal Wetland	n/a	n/a	282.6	0.006
WF12	Seasonal Wetland	n/a	n/a	6382.0	0.144
WF13	Seasonal Wetland	n/a	n/a	526.1	0.012
WF14	Seasonal Wetland	n/a	n/a	222.0	0.005
WF15	Seasonal Wetland	n/a	n/a	642.3	0.015
WF16	Seasonal Wetland	n/a	n/a	97.3	0.002
WF17	Seasonal Wetland	n/a	n/a	821.2	0.019
WF18	Seasonal Wetland	n/a	n/a	282.6	0.006
WF19	Seasonal Wetland	n/a	n/a	1111.9	0.025
WF20	Seasonal Wetland	n/a	n/a	29799.8	0.684
WF21	Seasonal Wetland	n/a	n/a	6262.5	0.144
WF22	Seasonal Wetland	n/a	n/a	52812.1	1.212
Jurisdictional Riparian Total =				29799.8	0.684
Fresh Emergent Wetland Total =				6262.5	0.144
Seasonal Wetland Total =				52812.1	1.212
Total of All Wetland Features =				358770.4	8.190
Previously Delineated Features					
PDWF01	Fresh Emergent Wetland	n/a	n/a	6669.6	0.16
PDWF02	Seasonal Wet Meadow	n/a	n/a	671.1	0.02
PDWF03	Seasonal Wet Meadow	n/a	n/a	2178.0	0.05
PDWF04	Seasonal Wet Meadow	n/a	n/a	3830.4	0.088
Fresh Emergent Total =				6669.6	0.160
Seasonal Wet Meadow Total =				3830.4	0.088
Total of All Previously Delineated Features =				10890.0	0.250
Total of All Features =				398341.5	8.961

The information contained in this figure shall be considered preliminary and without verification by the USACE. Project boundaries, site plan and 2-D contours provided by SDS Engineering. DW/DTE outside of project boundary included in delineation due to inability access the project boundary project extent. Date of Aerial Photo: 2004. Map date April 20 2005/Revised July 4, 2006, July 18, 2006, & Aug. 3, 2006

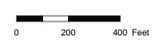


Exhibit D

Wetland Feature 21 Pictures



WF 21 looking south



WF 21 looking north



5/1/2006



4/1/2004



6/30/2005



9/10/98

* Aerial imagery showing the absence of wetland feature 21

Exhibit E

DATA FORM
 ROUTINE WETLAND DETERMINATION
 (1987 COE Wetlands Delineation Manual)

Project/Site:	Anderson Sewer	Date:	11/18/04
Application/Owner:	Sandy Sanderson	County:	Shasta
Investigator:	B. Taylor and S. Innecken	State:	CA
Do Normal Circumstances exist on the site?	yes	Community ID:	Seasonal Wetland
Is the site significantly disturbed (Atypical Situation)?	yes	Transect ID:	WF 21
Is the area a potential Problem Area?		no	Plot ID: W21

VEGETATION

	Dominant Plant Species	Stratum	Indicator		Dominant Plant Species	Stratum	Indicator
1.	No vegetation present			9.			
2.				10.			
3.				11.			
4.				12.			
5.				13.			
6.				14.			
7.				15.			
8.				16.			
Percent of Dominant Species that are OBL, FACW or FAC (excluding FAC -). n/a							
Remarks: Feature is highly disturbed due to off-road vehicle traffic. No vegetation was present.							

HYDROLOGY

<p>x Recorded Data (Describe in Remarks): Stream, Lake or Tide Gauge x Aerial Photographs Other (Soil Survey) No Recorded Data Available</p> <p>Field Observations: Depth of Water Surface: ___ (in.) Depth of Free Water in Pit: ___ (in.) Depth to Saturated Soil: _5_ (in.)</p>	<p>Wetland Hydrology Indicators:</p> <p>Primary Indicators:</p> <p> ___ Inundated (nearby) <u>X</u> Saturated in Upper 12 inches ___ Water Marks ___ Drift Lines ___ Sediment Deposits ___ Drainage Patterns in Wetlands</p> <p>Secondary Indicators (2 or more required): <u>X</u> Oxidized Root Channels in Upper 12 inches ___ Water-Stained Leaves ___ Local Soil Survey Data ___ FAC-Neutral Test ___ Other (Explain in Remarks)</p>
Remarks: none	

SOILS

Map Unit Name (Series and Phase):	Perkins Gravelly Loam, 0-3% slopes		
Drainage class:	well-drained and moderately well-drained		
Taxonomy (Subgroup):	Mollic Haploxeralfs	Field Observations	
		Confirm Mapped Type	x Yes __No

Profile Description:					
Depth (inches)	Horizon	Matrix Color (Munsell Moist)	Mottle Colors (Munsell Moist)	Mottle Abundance/Contrast	Texture, Concretions Structures, etc.
0-9 "	A1	10YR 3/3	10YR 6/8	many/small/prominent	Sandy loam
9-18"	A2	10YR 4/3	7.5YR 4/4	few/small/prominent	Sandy loam

Hydric Soil Indicators:

<input type="checkbox"/> Histosol	<input checked="" type="checkbox"/> Concretions
<input type="checkbox"/> Histic Epipedon	<input type="checkbox"/> High Organic Content in Surface layer in Sandy Soils
<input type="checkbox"/> Sulfidic Odor	<input type="checkbox"/> Organic Streaking in Sandy Soils
<input type="checkbox"/> Aquic Moisture Regime	<input checked="" type="checkbox"/> Listed on Local Hydric Soils List
<input checked="" type="checkbox"/> Reducing Conditions	<input checked="" type="checkbox"/> Listed on National Hydric Soils List
<input type="checkbox"/> Gleyed or Low-Chroma Colors	<input type="checkbox"/> Other (Explain in Remarks)

Remarks:

Wetland Determination

Hydrophytic Vegetation Present	x Yes	No	Is this Sampling Point Within a Wetland?		
Wetland Hydrology Present	x Yes	No			
Hydric Soils Present	x Yes	No			x Yes

Remarks: Wetland devoid of vegetation due to vehicle disturbance.

Senate Committee on Environment and Public Works Subcommittee on Fisheries, Water, and Wildlife oversight hearing entitled, “Erosion of Exemptions and Expansion of Federal Control –Implementation of the Definition of Waters of the United States.” May 24, 2016

Request for Additional Information: Case Study 3 and Supporting Documents

Case Study 3

1. Project Summary:
SPK#2013-00513
The total project area is approximately 20 acres in size.

2. Issue:
 - a. Corps requires the inclusion of puddles that form after rain events created by and resulting from vehicular disturbance in the middle of a dirt road.
 - b. No data was supplied for the non-jurisdictional feature, but it was considered jurisdictional and verified.

3. Supporting Information:
Exhibit A – 2013 Delineation of WOTUS map (verified¹)
Exhibit B – Technical memo to Corps regarding Non-jurisdictional Feature 1
Exhibit C – Photo of Non-jurisdictional Feature 1
Exhibit D – Delineation of WOTUS Jurisdictional Determination Letter from Corps

4. Details: The original delineation map (Exhibit A) indicated a non-jurisdictional feature with supporting data to confirm non-jurisdiction. Additional technical memos and data were supplied to the Corps describing the non-jurisdictional status of the man-made depression in a dirt road (Exhibit B). The language in Exhibit B was accepted by the Corps, however in the jurisdictional determination letter (Exhibit D), the Corps asserts jurisdiction over this feature resulting in an additional 0.002 acres Seasonal Wetland with no supporting data.

5. Status: No progress

¹ Verified means that the US Corps of Engineers has conducted a field review and performed a verification or jurisdictional determination, concurring with the extent, location, and type of WOTUS within the project area.

Exhibit A



- Project Boundary
- Nonjurisdictional Feature- NJ#
- Seasonal Wetland- WF#
- Proposed Road Realignment
- Culvert- C#
- Other Water- OW#
- 1 Foot Contours
- Flow Direction
- Soil Data Points**
- Upland- U#
- Wetland- W#

The features presented in this figure shall be considered preliminary until written verification by the USACE.

Other Waters of the United States						
Feature Label	Feature Type	Class	Width (ft)	Length (ft)	Area (sq ft)	Acres
OW01	Other Waters	NRPW	3	604.5	1813.5	0.042
OW02	Other Waters	NRPW	3	287.5	862.4	0.020
OW03	Other Waters	NRPW	4	473.8	1895.0	0.044
Totals=				1365.7	4570.9	0.105
Wetland Features						
Feature Label	Feature Type	Class	Width (ft)	Length (ft)	Area (sq ft)	Acres
WF01	Seasonal Wetland	PAMB	n/a	n/a	18703.0	0.430
Totals=					18703.0	0.430
Total of All Features=				1365.7	23273.9	0.535

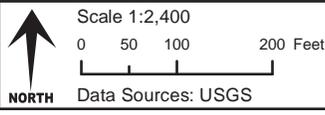


Exhibit A

Exhibit B

U.S. Army Corps of Engineers
Regulatory Division, Sacramento District
1325 J Street, Suite 1350
Sacramento, California 95814-2922
Attn: Zac Fancher

September 16, 2013

RE: Technical Memorandum for the Draft Delineation of Waters of the U.S Hilltop Drive Development Project (SPK-2013-00513)

Dear Mr. Fancher,

Gallaway Enterprises has made corrections and additions to the Draft Delineation of Waters of the U.S Hilltop Drive Development Project (WD) (SPK-2013-00513). Corrections and additional information added to the WD was made to clarify the size and classification of a non-jurisdictional feature within the project limits. The following excerpt is where corrections and additions to the WD were made.

The following paragraph can be found in the **Results** section under **Potential Non-jurisdictional** on Page 6.

Potential Non-jurisdictional

*One potentially non-jurisdictional seasonal wetland was delineated on the site. **This feature was created by** ~~an off road vehicles getting stuck in the mud and subsequent efforts to retrieve the vehicle.~~ **off road vehicles which subsequently left deep tire ruts in the soil. The indentations left by off road vehicles now hold enough water to support hydrophytic vegetation.** Because of disturbance from vehicles, vegetation was greatly reduced, but enough was present to complete the determination. The seasonal wetland appears to be isolated, as it is fed **mostly by heavy rains and some** on-site runoff but appears to have no direct connection to either of the streams. **This feature does not contribute to the function or ecology of the** ~~contribute any significant manner to the ecology or function of other jurisdictional features on site.~~ It does not abut nor is it adjacent and has no significant nexus. There are ~~0.1096~~ **0.002** acres of non-jurisdictional isolated wetland within the project area.*

gallaway

ENTERPRISES

**117 MEYERS STREET SUITE 120
CHICO, CA 95928 530 • 332 • 9909**

Should you have any questions, please do not hesitate to contact me at (530) 332-9909 or christine@gallawayenterprises.com.

Sincerely,



Christine Schukraft, Biologist
Gallaway Enterprises

Exhibit C



Photo of Non-jurisdictional Feature 1

Exhibit D



DEPARTMENT OF THE ARMY
U.S. ARMY ENGINEER DISTRICT, SACRAMENTO
CORPS OF ENGINEERS
1325 J STREET
SACRAMENTO CA 95814-2922

REPLY TO
ATTENTION OF

January 17, 2014

Regulatory Division (SPK-2013-00513)

Mr. Ron Giddings
MD Development
4255 Alta Camp Drive
Redding, California 96002-2468

Dear Mr. Giddings:

We are responding to your May 30, 2013, request for a preliminary jurisdictional determination (JD), in accordance with our Regulatory Guidance Letter (RGL) 08-02, for the Hilltop Drive Development Project site. The approximately 20-acre site is located on or near Sacramento River, Section 30, Township 32 North, Range 4 West, Mount Diablo Meridian, Latitude 40.5939°, Longitude -122.3630°, Shasta County, California.

Based on available information, we concur with the amount and location of wetlands and/or other water bodies on the site as depicted on the enclosed **April 29, 2013 Hilltop Drive Development Project Draft Wetland Delineation – Attachment A** map prepared by Gallaway Enterprises. The feature labeled "NJ01" on the above referenced map does not have an acreage figure indicated. Gallaway Enterprises has estimated this feature to be 0.002-acre in size. The Corps concurs with the estimate and has included "NJ01" in this Preliminary Jurisdictional Determination. The approximately 0.538-acre of wetlands and/or other water bodies present within the survey area are potential waters of the United States regulated under Section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act.

We have enclosed a copy of the *Preliminary Jurisdictional Determination Form* for this site. Please sign and return a copy of the completed form to this office. Once we receive a copy of the form with your signature, we can accept and process a Pre-Construction Notification or permit application for your proposed project.

You should not start any work in potentially jurisdictional waters of the United States unless you have Department of the Army permit authorization for the activity. You may request an approved JD for this site at any time prior to starting work within waters. In certain circumstances, as described in RGL 08-02, an approved JD may later be necessary.

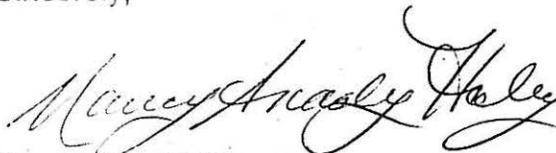
You should provide a copy of this letter and notice to all other affected parties, including any individual who has an identifiable and substantial legal interest in the property.

This preliminary determination has been conducted to identify the potential limits of wetlands and other water bodies, which may be subject to Corps of Engineers' jurisdiction for the particular site identified in this request. A Notification of Appeal Process and Request for Appeal form is enclosed to notify you of your options with this determination. This determination may not be valid for the wetland conservation provisions of the Food Security Act of 1985. If you or your tenant are U.S. Department of Agriculture (USDA) program participants, or anticipate participation in USDA programs, you should request a certified wetland determination from the local office of the Natural Resources Conservation Service, prior to starting work.

We appreciate your feedback. At your earliest convenience, please tell us how we are doing by completing the customer survey on our website under *Customer Service Survey*.

Please refer to identification number SPK-2013-00513 in any correspondence concerning this project. If you have any questions, please contact Mr. Zachary Fancher at our Sacramento Regulatory Office, 1325 J Street, Suite 1350, Sacramento, California 95814-2922, by email at Zachary.J.Fancher@usace.army.mil, or telephone at 916-557-6643. For more information regarding our program, please visit our website at www.spk.usace.army.mil/Missions/Regulatory.aspx.

Sincerely,



Nancy Arcady Haley
Chief, California North Branch

Enclosures

cc: (w/o encls)

Ms. Jody Gallaway, Gallaway Enterprises, 117 Meyers Street, Suite 120, Chico, California 95928-6592

Mr. Matthew Kelley, U.S. Army Corps of Engineers, Regulatory Division, Redding Field Office, 310 Hemsted Drive, Suite 310, Redding, California 96002-0935

Senate Committee on Environment and Public Works Subcommittee on Fisheries, Water, and Wildlife oversight hearing entitled, “Erosion of Exemptions and Expansion of Federal Control –Implementation of the Definition of Waters of the United States.” May 24, 2016

Request for Additional Information: Case Study 4 and Supporting Documents

Case Study 4

1. Project Summary:
SPK#2013-01091
The total project area is approximately 10 acres in size

2. Issue:
 - a. Corps requires the inclusion of a geotechnical test pit to assess soil percolation as a jurisdictional wetland feature
 - b. Delineator refused to supply data sheets for features that were not jurisdictional. Corps verified the delineation without data sheets for features they required add to the delineation map (WF04, WF05 and WF 06).

3. Supporting Information
Exhibit A – 2013 1st Submitted Draft Delineation map
Exhibit B – 2014 Revised Delineation map (verifiedⁱ)
Exhibit C – Photos of features the Corps required to be added to the original delineation map.

4. Details: Following the original submission of the draft delineation (Exhibit A), a site visit with consultant and Corps regulator was conducted, resulting in the Corps asserting jurisdiction of additional features (Exhibit B). The revised map includes an area labeled as a seasonal swale and two additional man-made features (WF04, WF05 and WF06). The seasonal swale (WF06) contained wetland indicator plants dominated by rye grass, but the same prevalence of rye grass was found in the upland areas, which means that the swale shouldn't be considered a wetland based on rye grass as a dominant plant. However the Corps claimed that the area was subject to sheet flow when there were significant rain events. The Corps regulator brought photos of the site and surrounding area taken during significant rain events and asserted jurisdiction based on the photos he had taken. The regulator indicated that they wanted the three additional features on the map because the site is known to flood during high precipitation events. The man-made feature (WF04) was a percolation test pit that was created as a result of geotechnical investigations. All three features that the Corps required to be mapped as wetlands did not meet the criteria as wetlands and the regulator did not supply any data.

5. Status: Proposed actions on the site are stalled due to project costs associated with the presence of wetlands, mitigation costs, and the inability to avoid through construction techniques.

ⁱ Verified means that the US Corps of Engineers has conducted a field review and performed a verification or jurisdictional determination, concurring with the extent, location, and type of WOTUS within the project area. PJD issued.

Exhibit A



The features presented in this figure are to be considered preliminary until written verification by the USACE.

Wetland Features						
Label	Type	Designation	Width (ft)	Length (ft)	Area (sq ft)	Acres
WF01	Seasonal Wetland	Adjacent	N/A	N/A	3796.6	0.087
WF02	Seasonal Wetland	Adjacent	N/A	N/A	502.6	0.012
WF03	Seasonal Swale	Adjacent	N/A	N/A	64.8	0.001
Wetland Features Totals=					4364.0	0.100

- Project Boundary
- Culvert- C#
- Contours
- Direction of Flow
- Soil Data Points**
- Test Pit- TP#
- Upland- U#
- Wetland- W#
- Wetland Feature- WF#**
- Seasonal Swale
- Seasonal Wetland



1:2,400 Map Date: 10/30/13

0 100 200 Feet

Data Sources: USDA Imagery (2013), Shasta County

Exhibit B

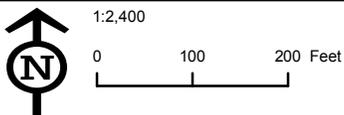
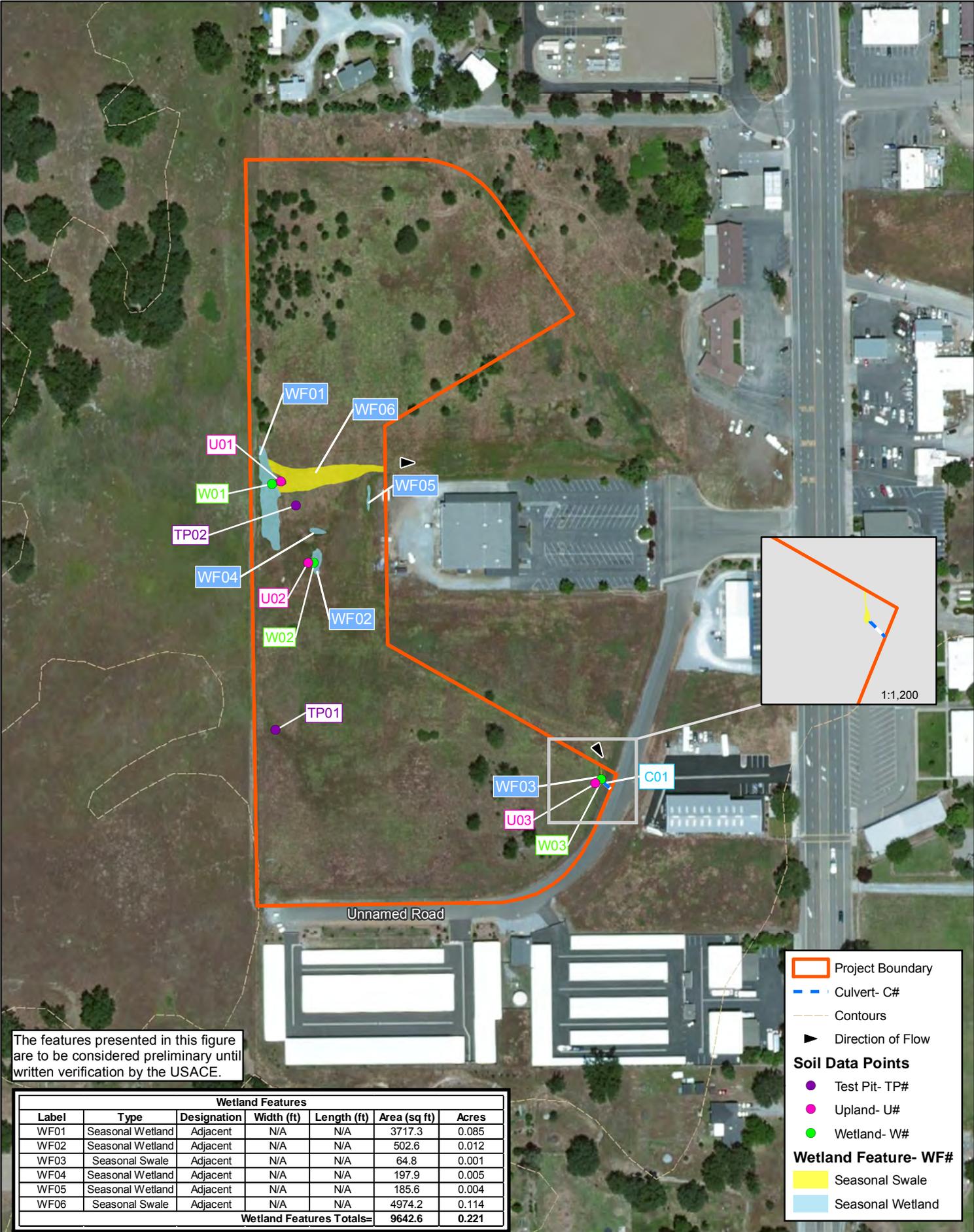


Exhibit B

Exhibit C

Site Photos



Test Pit Location Number 1.



Test Pit Location Number 2.



Wetland Feature 01.



Wetland Feature 04.



Wetland Feature 02.



Wetland Feature 03.



Wetland Feature 05.

Approximate Location of WF06



WF06

Senate Committee on Environment and Public Works Subcommittee on Fisheries, Water, and Wildlife oversight hearing entitled, “Erosion of Exemptions and Expansion of Federal Control –Implementation of the Definition of Waters of the United States.” May 24, 2016

Request for Additional Information: Case Study 5 and Supporting Documents

Case Study 5

1. Project Summary
SPK#2014-01031
The total project area is approximately 3,000 acres in size
Due diligence efforts to determine agricultural operations to avoid WOTUS
2. Issue:
 - a. Corps requires the inclusion of puddles resulting from vehicular disturbance that form after rain events in the middle of a dirt road used for farming practices.
 - b. Corps requires the inclusion of erosional areas within existing agricultural roads as well as erosional areas that developed at the roads edge as a result of vehicle tires.
3. Supporting Information:
Exhibit A – Aerial photograph showing dirt ranch roads used to access gas wells and cattle feeding stations.
Exhibit B – Photos of representative puddles and erosional features in dirt roads that Corps asserted jurisdiction on.
Exhibit C – Delineator’s notes from site visit with regulator contained within an email
4. Details: Following the submission of the delineation of WOTUS on the entire 3000 acre ranch, a site visit with consultant and Corps regulator was conducted, resulting in the Corps attempting to take jurisdiction of additional features, including over 50 small depressions within dirt and gravel roads, as well as erosional features that developed at the roads edge. Notice water bottle in Exhibit B, picture A for scale. Additional pictures are features that the Corps requested be mapped as WOTUS. Despite, the lack of **any hydrological connection** and considering that many of the so called “wetlands” created in the roads were not present before the roads were established the Corps advised to include the features on the delineation map and label them as jurisdictional. There are over 6 miles of dirt and gravel roads on this ranch. Exhibit A is a focused area depicting representative examples wherein the Corps required the mapping of isolated WOTUS in dirt roads. The applicant disagreed with Corps and withdrew his delineation and request for jurisdictional determination. Exhibit C describes the delineator’s notes from a site visit with the Corps regulator. Notable excerpts from these notes are the requirement to map farming roads as wetlands.
5. The agricultural project is suspended indefinitely.

Exhibit A



Exhibit A

Exhibit B



A.



B.

Exhibit B



Corps attempted to assert jurisdiction on most of the road side drainages that formed via erosion or were created to construct the road.



The Corps asserted jurisdiction claiming that sheet-flow was being conveyed in road-side swales even when they lacked bed, bank (ordinary high water mark) or maintained any hydrophytic vegetation (Case study 5).

Exhibit C

From: [Jody Gallaway](#)
To: [Melissa Murphy](#)
Cc: [Kevin Sevier](#); [Sam Rossi](#)
Subject: RE: Brasil Corps Visit 4/15/2015
Date: Monday, April 20, 2015 3:25:56 PM

Thanks Melissa,

We are not going to map wetlands that can't be substantiated with data or reflect Matt's interpretation of OHWM. So when you map the new wetlands make sure that they can or could be substantiated with real data and not a magical wand. Also, when we make changes to the OHWM or extent of OW boundaries I want an explanation for **each** change.

Thanks,
Jody

From: Melissa Murphy
Sent: Monday, April 20, 2015 2:57 PM
To: Jody Gallaway
Cc: Kevin Sevier
Subject: Brasil Corps Visit 4/15/2015

Jody,

Here are the issues Matt Kelly has with the areas I visited with him:

- OHWM: He claims we are mapping the low flow channel instead of the "active floodplain." He says within the active floodplain, last year's erodium and other upland plants will be swept away therefore all the upland plants you see in these areas will be new growth from this year. He suggested we use a laser level and the "rack lines" from storm events to determine the OHWM. One drainage we mapped the width at 6 ft and he wants it to be 35 ft wide.
- Seeps: He claims there are jurisdictional seeps located on many of the hillslopes that need to be mapped and "are obvious in aerial photos." We visited two of these seeps, although hydric soils were present, one lacked hydrophytic vegetation and the other I did not recognize the plants (Elena might remember what the specific plants were better than me).
- OW and Swales Combined: He suggested we include OW polylines through the vernal swales we have already mapped that run downhill into larger drainages. Although the example swale he showed me (a feature we had already mapped as a vernal swale) had no indication of an OHWM, bed or bank (which is why it was mapped as a swale).
- Wetlands on Roads: On several occasions we mapped wetlands on either side of a dirt road, but did not include the road within the wetland. He wants the dirt roads mapped as wetlands as well, arguing that the only reason wetland vegetation is not present is because of the constant disturbance from vehicle traffic. He claimed he's had this debate with you many times before and low lying dirt roads between wetlands should always be mapped.
- Ridge Tops: At the time of the site visit, plants on the ridge tops were already desiccated and difficult to identify. Matt claims the vegetation found in some of the ridge top depressions is desiccated immature Psilocarphus and should be mapped as wetlands. Matt did not key out

questionable plants to determine their species, he simply relied on pictures to figure out what it was. As Elena pointed out, you can't positively identify unknown plants down to species without keying them out.

Senate Committee on Environment and Public Works Subcommittee on Fisheries, Water, and Wildlife oversight hearing entitled, “Erosion of Exemptions and Expansion of Federal Control –Implementation of the Definition of Waters of the United States.” May 24, 2016

Request for Additional Information: Case Study 6 and Supporting Documents

Case Study 6

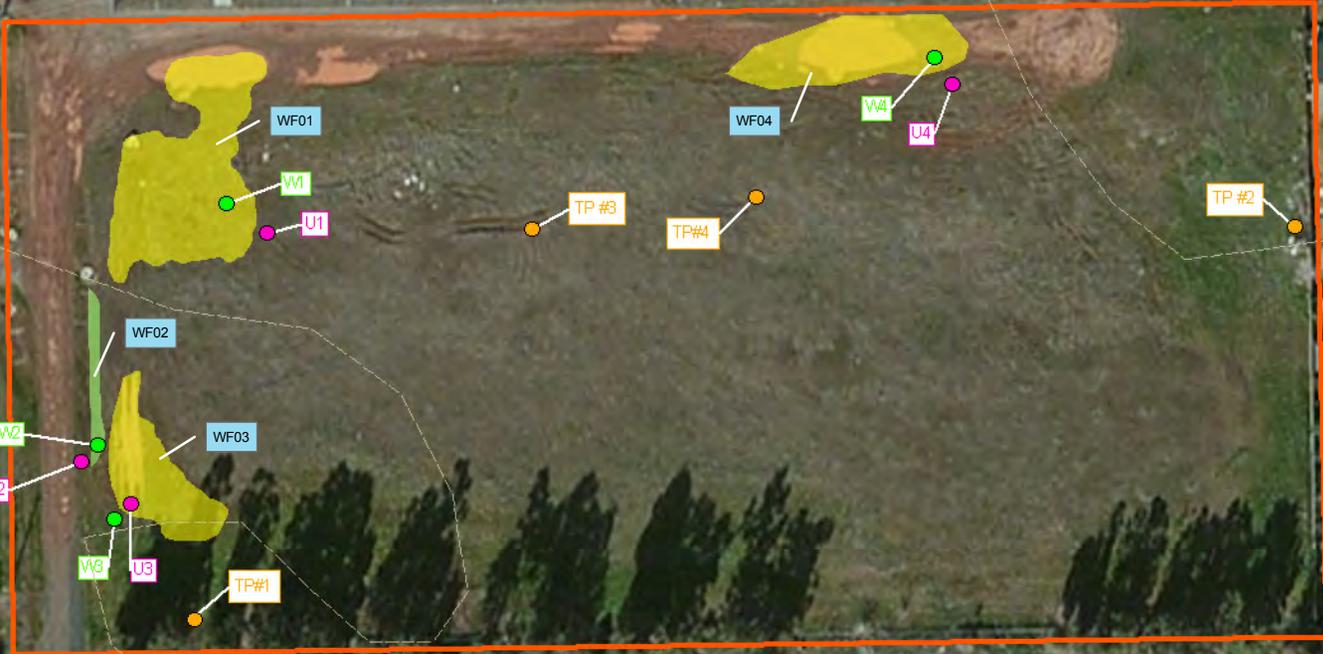
1. Project Summary
5 acre Delineation of WOTUS in an urban setting
2. Delineation of Waters of the US
Exhibit A – 2015 Final Delineation map submitted to Corps (entire map provided) (verifiedⁱ)

Exhibit B- Photos of representative wetlands on the site. WF 02 is created entirely by vehicle tire ruts, other wetlands are made larger by off-road activity. WF 04 is a small wetland in the middle of a dirt road. Test pit data is collected to demonstrate that features do not meet the criteria for jurisdiction. The Corps can and does assert jurisdiction despite data to the contrary, especially with issuing a PJD.
3. Jurisdictional Issues – Corps asserts jurisdiction of puddles in dirt roads and within wetlands entirely created by tire ruts. Despite the consultants claim of non-jurisdictional status. Applicant was forced to assume federal jurisdiction or withdraw application.
4. In process.

ⁱ Verified means that the US Corps of Engineers has conducted a field review and performed a verification or jurisdictional determination, concurring with the extent, location, and type of WOTUS within the project area. PJD issued.

Exhibit A

Wetland Features						
Feature Type	Label	Designation	Width (ft)	Length (ft)	Area (sq ft)	Acres
Vernal Pool	WF01	Adjacent	N/A	N/A	6,207.6	0.143
Seasonal Wetland	WF02	Adjacent	N/A	N/A	538.3	0.012
Vernal Pool	WF03	Adjacent	N/A	N/A	2,566.2	0.059
Vernal Pool	WF04	Adjacent	N/A	N/A	3,373.3	0.077
Seasonal Wetland Totals=				N/A	538.3	0.012
Vernal Pool Totals=				N/A	12,147.1	0.279
Wetland Features Totals=				N/A	12,685.5	0.291



- Project Boundary
- 5 ft. Contours *
- Soil Data Points**
- Test Pit- TP#
- Upland - U#
- Wetland - W#
- Wetland Features- WF#**
- Seasonal Wetland
- Vernal Pool

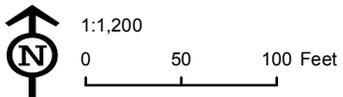


Exhibit A

Exhibit B

Site Photos



Vernal Pool (WF01)



Seasonal Wetland (WF02)



Vernal Pool (WF03)



Vernal Pool (WF04)



Test Pit 01



Test Pit 03



Test Pit 04

Senate Committee on Environment and Public Works Subcommittee on Fisheries, Water, and Wildlife oversight hearing entitled, “Erosion of Exemptions and Expansion of Federal Control –Implementation of the Definition of Waters of the United States.” May 24, 2016

Request for Additional Information: Case Study 7 and Supporting Documents

Case Study 7

1. Project Summary:
SPK#2015-000526
The total project area is approximately 2,700 acres

2. Issue:
 - a. Request for an Approved Jurisdictional Determination (AJD) was retracted due to delays by the Corps in reviewing the submittal and a Preliminary Jurisdictional Determination (PJD) was subsequently requested in order to pursue expedited processing.
 - b. Multiple regulators were assigned to the review of the draft delineation resulting in a wide variety of interpretations of the Clean Water Act.
 - c. Corps requested data points in actively farmed alfalfa fields in an attempt to take jurisdiction of low areas within the field and areas where irrigation water over ran the field
 - d. Corps threatened to pursue a violation for activities that the Corps perceived to result in discharge to wetlands related to the land use change.
 - e. Landowner hired a consultant to formally delineate all waters of the US so that he could plan agricultural operations of avoid all WOTUS thus eliminating a need for a permit. Original request was in May 2015.

3. Supporting Information:
Exhibit A –Portion of the original delineation map points that the Corps wanted additional evaluation and mapping

4. Landowner originally requested an approved jurisdictional determination but due to delays with the Corps response changed the request to a preliminary jurisdictional determination in August 2015 in hopes of facilitating a Corps decision.

Following submission of the original delineation the Corps started the initial process of issuing a violation for the construction of stock ponds on the ranch. These stock ponds were designed, funded, and construction supervised by the Natural Resource Conservation Service. The regulator was removed from the project and a new regulator was assigned in February 2016. The new regulator initially requested over 350 new data points within areas that exhibited “wetland” signatures on an aerial photo. This new request delayed the delineation review even further. By almost any standard the Corps data request was unreasonable, as the original delineation included over 600 data points that adequately covered the site and all represented wetlands and other waters.

The Corps requested additional data points in actively farmed alfalfa fields (Exhibit A) in an attempt to take jurisdiction of low areas within the field and areas where irrigation water over ran the field. The Corps also instructed the delineator to take additional data points in low areas within fields that are dry land farmed. The landowner decided to remove these fields from the delineation study boundary and move ahead with an agricultural project that involved planting an orchard in the alfalfa and fields historically used for dry land farming without a Corps verified delineation in these fields. This move would have essentially operating at risk. The Corp regulator informed the landowner and our staff that changing from alfalfa to orchards would constitute a land use change and that Corps regulators could pursue a violation for activities that the Corps perceived to result in discharge to wetlands related to the land use change. The Corps regulator informed the landowner that despite an extensive farming history, orchards were never planted on the ranch so they might not be considered a normal farming activity.

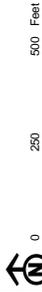
5. Status: Preliminary jurisdictional determination is still pending.

Exhibit A

**Sobarea Ranch
Phase I
Draft Wetland Delineation**



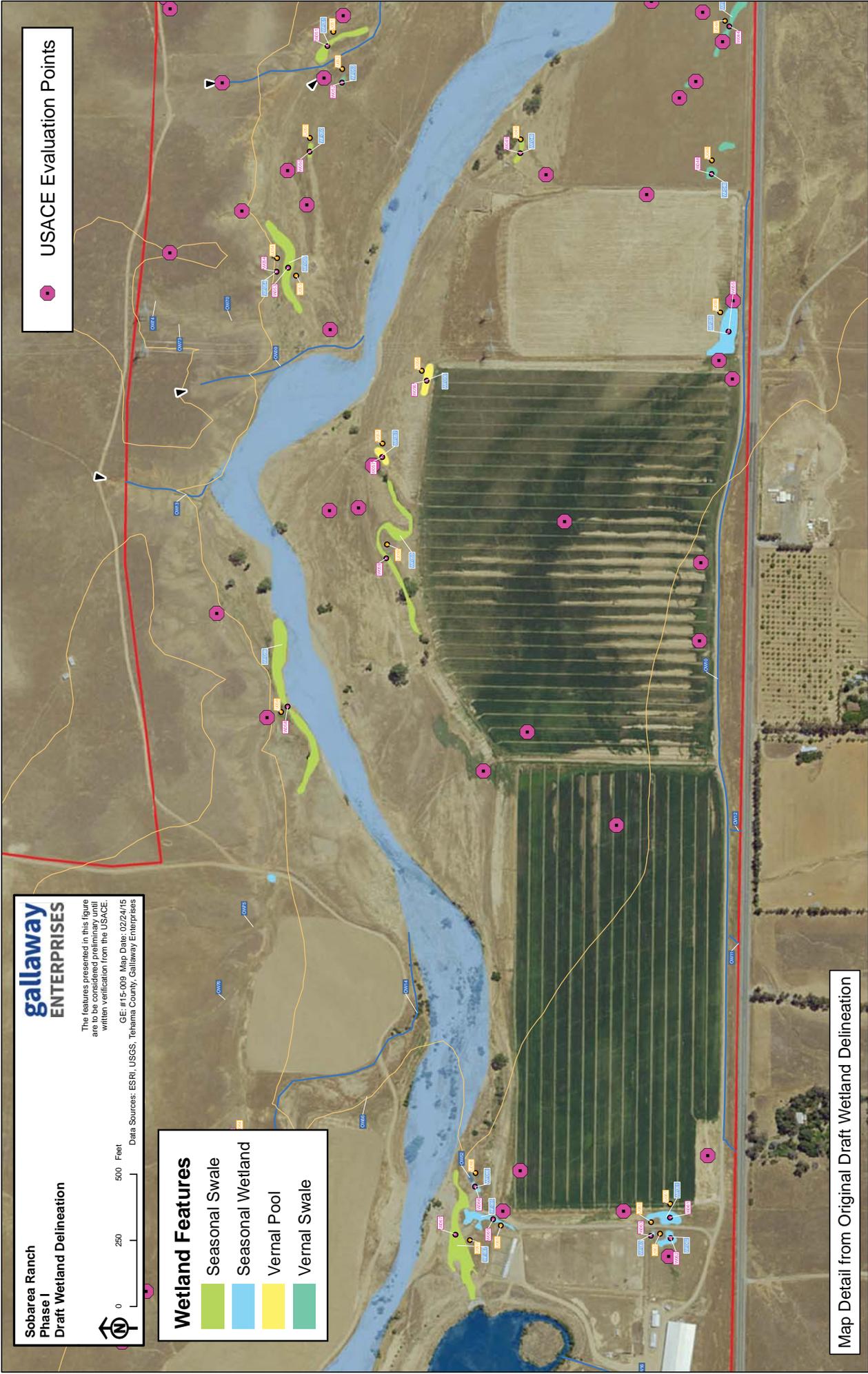
The features presented in this figure are to be considered preliminary until written verification from the USACE.
 GE: #15-009, Map Date: 02/24/15
 Data Sources: ESRI, USGS, Tehama County, Gallaway Enterprises



Wetland Features

- Seasonal Swale
- Seasonal Wetland
- Vernal Pool
- Vernal Swale

USACE Evaluation Points



Map Detail from Original Draft Wetland Delineation

Senate Committee on Environment and Public Works Subcommittee on Fisheries, Water, and Wildlife oversight hearing entitled, “Erosion of Exemptions and Expansion of Federal Control –Implementation of the Definition of Waters of the United States.” May 24, 2016

Request for Additional Information: Case Study 8 and Supporting Documents

Case Study 8

1. Project Summary:
SPK#2014-00183 (revised 2013-00958)
The total project area is approximately 175 acres

2. Issue:
 - a. Corps claims that routine disking of land within wetlands is considered a discharge into WOTUS and in the absence of a permit represents an unauthorized discharge and violation of the Clean Water Act.

3. Supporting Information:
Exhibit A –Corps letter concerning potential unauthorized activities in waters of the US. May 6, 2014

Exhibit B-Consultant response letter

Exhibit C- Corps resolution letter, August 27, 2014

4. Details: May 6, 2014, Landowner receives an investigation letter from the Corps notifying him that farming activities related to disking performed by a tenant farmer may have resulted in unauthorized discharge into WOTUS. The site has been historically used for high intensity cattle grazing during winter months. Tenant farmer has disked the site periodically over the last 15 years to improve forage for cattle. Since 2013, when the Sacramento Corps enforcement division opened, the Corps has aggressively pursued landowners and farmers who disk their property. Corps wetland specialists have informed our office that all disking for any purpose and at any depth within any “potential WOTUS” is a discharge into WOTUS and in the absence of a permit represents an unauthorized discharge and violation of the Clean Water Act. The property owners were shocked and felt that this was a new interpretation of the Clean Water Act and farming exemptions because they had been periodically disked their fields for more than 15 years and never received any notification from the Corps.

At the time of the investigation, the EPA and Corps had released the proposed Interpretive Rule which established 56 specific Natural Resources Conservation Service conservation practice standards that are considered exempt under CWA section 404(f)(1)(A). The Corps ruled that the farming activity was part of an established on-going normal ranching operation conducted in accordance with conservation practice standard 512 thus was exempt from CWA. However, an important part of the Corps ruling was that they determined that the disking did create a discharge. EPA and Corps regulations state that “plowing...will never involve a discharge” unless it changes a water to a “dry land”. The Corps routinely disregard and reinterpret their own

regulationsⁱ regarding plowingⁱⁱ and claim that all plowing does in fact create a discharge and requires a permit.

The Interpretive Rule has been withdrawn leaving the farmer to speculate about getting a notice of violation if he continues agricultural operations. The Corps stated that the disking created a discharge into WOTUS, but would his activities still be exempt? Would he need a permit to continue his farming activities, would he need a permit every time he disks and plants his field, would he be required to mitigate for disking his field and planting a crop to improve forage conditions? Farming at risk was not an option for this landowner.

5. Landowner sold the property and has discontinued farming.

ⁱⁱ The regulations define plowing as: “all forms of primary tillage, including moldboard, chisel, or wide-blade plowing, disking, harrowing and similar physical means utilized on farm, forest, or ranch land for the breaking up, cutting, turning over, or stirring of soil to prepare it for the planting of crops. 33 C.F.R. §323.4(a)(1)(iii)(D)

Exhibit A



OFFICE OF
REGULATORY DIVISION

DEPARTMENT OF THE ARMY
U.S. ARMY ENGINEER DISTRICT, SACRAMENTO
CORPS OF ENGINEERS
1325 J STREET
SACRAMENTO CA 95814-2922

CERTIFIED MAIL RETURN RECEIPT REQUESTED

May 6, 2014

Regulatory Division (SPK-2014-00183)

Mr. Robert Kelly Brown
Mr. Melvin Nels Leen
450 West East Avenue, Suite 110
Chico, California 95926

Dear Mr. Brown and Mr. Leen:

This letter is a request for information concerning potential unauthorized activities in waters of the United States. The activities are located on an unnamed tributary to Hamlin Slough, in unsectioned portions of the Rancho Esquon Mexican Land Grant, in Township 21 North, Range 2 East, Mount Diablo Meridian, Latitude 38.6404°, Longitude -121.7197°, Butte County, California (Enclosure 1).

We have received a report, which alleges that you have discharged dredged or fill material into waters of the United States. Section 404 of the Clean Water Act requires that a permit be obtained from the Corps prior to the discharge of dredged or fill material into waters of the United States, including wetlands (Enclosure 2).

We have opened an investigation in accordance with 33 CFR 326. We would appreciate your cooperation in this investigation. To ensure that all pertinent information is available for our evaluation and included in the public record, you are invited to provide any information which you feel should be considered. Thank you for your email of March 26, 2014, which describes activities on the property by another party which included disking and planting pasture grass. The answers to the following specific questions would be most helpful in determining if a violation has occurred:

- a. Please confirm that Pentz Property Partnership is the owner of the property shown in Enclosure 1 and the above description.
- b. What is the history of use on the property prior to the disking and planting to pasture grass as described in your March 26, 2014 email? Was this property used as pasture or rangeland regularly prior to the disking and planting? You indicated in your

time-line in the March 26, 2014, email that Mr. Mel Weir grazed cattle last year and the year before; can you tell me in the last 10 years (2005-2014) which years cattle were grazed on the property?

c. Prior to the disking and planting conducted by Mr. Weir, had the property been disked or plowed or planted? If so, how frequently (e.g., which years in the last ten)?

d. Was a wetland delineation and determination performed? Were wetlands and other waters mapped for the subject areas? Did another federal agency such as the U.S. Department of Agriculture, Natural Resources Conservation Service (NRCS) verify this delineation? Please send a copy of any delineation reports and verification letters.

e. Please describe the work associated with disturbance or manipulation of the soils. What types of equipment were used? How deep was the soil manipulated? If different treatments were used in different portions of the subject area, please indicate where each treatment was used. Was this work performed in accordance with a NRCS Conservation Practice (<http://www.nrcs.usda.gov/wps/portal/nrcs/detail/full/national/technical/cp/ncps/> for more information)? If so, which ones?

f. Did this work result in a discharge to waters of the U.S.? If so, please indicate the extent both in terms of volume of material discharged and the areal extent of waters affected.

g. Were permits from any other federal, state or local agency obtained for work in the subject area?

h. Please provide the names and addresses of all individuals and companies that conducted work in the subject area as well as the nature and timing of that work.

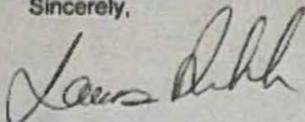
i. Have you or any companies you represent worked in any other areas that may have resulted in discharges to wetlands or other waters of the United States?

Additionally, would you please grant permission to USDA to discuss this case with us? USDA may have information that is pertinent to this case that, under some circumstances, they may not be able to share without your permission.

Since the information provided will become a part of the public record, it may be presented in any enforcement action that could result from this investigation and will be retained in our files. Any information you wish to provide should reach this office no later than 30 days from the receipt of this letter. We appreciate your cooperation and timely action on this matter.

Please refer to identification number SPK-2013-00958 in any correspondence concerning this project. If you have any questions, please contact me by email James.T.Robb@usace.army.mil or telephone 916-557-7610. For more information regarding our program, please visit our website at www.spk.usace.army.mil/regulatory.html.

Sincerely,



James T. Robb
Senior Project Manager, Enforcement Unit
Regulatory Division

Enclosures

cc: (w/o encls)

Mr. Scott Zaitz, Central Valley Regional Water Quality Control Board,
szaitz@waterboards.ca.gov

Mr. Ken Sanchez, U.S. Fish and Wildlife Service, Kenneth_Sanchez@fws.gov

Ms. Tina Bartlett, California Department of Fish and Game, Tina.Bartlett@wildlife.ca.gov

Ms. Jennifer Cavanaugh, Natural Resource Conservation Service,
jennifer.cavanaugh@ca.usda.gov

Mr. David Wampler, U.S. Environmental Protection Agency, Region 9,
Wampler.David@epa.gov

Exhibit B

gallaway ENTERPRISES

117 Meyers Street • Suite 120 • Chico CA 95928 • 530-332-9909

July 14, 2014

US Army Corps of Engineers
James Robb, Senior Project Manager, Enforcement Unit
1325 J Street
Sacramento CA 95814-2922

RE: SPK-2013-00958

Dear Mr. Robb;

On behalf of the property owners Gallaway Enterprises has prepared a response to your May 6, 2014 letter wherein you requested information regarding recent farming activities. As previously discussed, the farming activities were conducted by a neighboring farmer without the notification or approval of the landowner(s). As the landowners did not engage in any of the recent activities that have resulted in the current investigation, specific knowledge of the activities is limited.

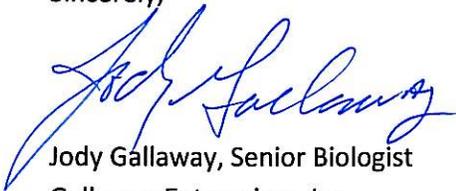
We have provided a response to your request for additional information in the same order as requested in your May 6th letter.

- a) Yes, the Pentz Property Partnership is the owner of the property shown in Enclosure 1 and as described in your May 6th letter.
- b) The land use history of the property prior to the disking and planting to pasture grass included cattle grazing and occasional disking to improve range conditions. Cattle have grazed the property every year over the last 10 years.
- c) The site was last disked in 2011 to improve range conditions.
- d) A wetland evaluation was performed for the entire site by Gallaway in 2004 but was never submitted to the COE for verification or determination. Some of the Waters were mapped as part of the Highway 99/149/70 Interchange Project (SPK 199700165). The Highway 99/149/70 Interchange Project Delineation of Waters of the United States was verified by the COE.
- e) The disturbance occurred between January 15 and March 2, 2014 and consisted of shallow disking of the entire site including wetlands and drainages and using a cultipacker to prepare the site for planting. The purpose of the disking was to plant a mix of annual plants including oats, rye, and alfalfa to improve forage for cattle. The activity that occurred on the property is consistent with NRCS Conservation Practice 512: Forage and Biomass Planting (attached). The entire site was disked using a field harrow with two rows of 14 inch disk blades pulled by a tractor with steel tracks. The site was disked repeatedly in some localized portions, and about 85% of the site was disked only once and in one direction. Disking depth across the entire site

- f) was about 6 inches. The site was prepared for seed using a cultipacker. The entire site was seeded with a seed mixture for the purpose of improving range feed for cattle.
- g) The work resulted in no obvious permanent fill of waters of the US.
- h) No permits from any local, state or federal agency were obtained to disk and plant the site for the purpose of improving range conditions.
- i) Mel Weir
2281 Highway 45
Glenn, CA 95943
Subject disking activities occurred between January 15 –March 2, 2014.
- j) To our knowledge no other companies or individuals have worked on this site; therefore no discharges to wetlands or other water of the United States have occurred.

We grant permission for you to speak to the USDA and NRCS about the farming activities that have occurred on this site. Should you have additional questions, please do not hesitate to contact me at (530) 332-9909 or jody@gallawayenterprises.com.

Sincerely,



Jody Gallaway, Senior Biologist
Gallaway Enterprises, Inc.

CC: Nels Leen
Kelly Brown

NATURAL RESOURCES CONSERVATION SERVICE

CONSERVATION PRACTICE STANDARD

FORAGE AND BIOMASS PLANTING

(Ac.)

CODE 512

DEFINITION

Establishing adapted and/or compatible species, varieties, or cultivars of herbaceous species suitable for pasture, hay, or biomass production.

PURPOSE

- Improve or maintain livestock nutrition and/or health.
- Provide or increase forage supply during periods of low forage production.
- Reduce soil erosion.
- Improve soil and water quality.
- Produce feedstock for biofuel or energy production

CONDITIONS WHERE PRACTICE APPLIES

This practice applies all lands suitable to the establishment of annual, biennial or perennial species for forage or biomass production. This practice does not apply to the establishment of annually planted and harvested food, fiber, or oilseed crops.

CRITERIA

General Criteria Applicable to All Purposes

Select plant species and their cultivars based on:

- Climatic conditions, such as annual precipitation and its distribution, growing season length, temperature extremes and the USDA Plant Hardiness Zone.

- Soil condition and landscape position attributes such as; pH, available water holding capacity, aspect, slope, drainage class, fertility level, salinity, depth, flooding and ponding, and levels of phytotoxic elements that may be present.
- Resistance to disease and insects common to the site or location.

Follow recommendations for planting rates, methods and dates obtained from the plant materials program, land grant and research institutions, extension agencies, or agency field trials.

Seeding rates will be calculated on a pure live seed (PLS) basis.

Plant at a depth appropriate for the seed size or plant material, while assuring uniform contact with soil.

Prepare the site to provide a medium that does not restrict plant emergence.

Plant when soil moisture is adequate for germination and establishment.

All seed and planting materials will meet state quality standards.

Do not plant federal, state, or local noxious species.

Apply all plant nutrients and/or soil amendments for establishment purposes according to a current soil test. Application rates, methods and dates are obtained from the plant materials program, land grant and research institutions, extension agencies, or agency field trials.

When planting legumes, use pre-inoculated seed or inoculate with the proper viable strain of Rhizobia immediately before planting.

Exclude livestock until the plants are well established.

Select forage species based on the intended use, level of management, realistic yield estimates, maturity stage, and compatibility with other species. Verify plant adaptation to the area prior to planting.

Additional Criteria for Improving or Maintaining Livestock Nutrition and/or Health

Use forage species that will meet the desired level of nutrition (quantity and quality) for the kind and class of the livestock to be fed.

Forage species planted as mixtures will exhibit similar palatability to avoid selective grazing.

Additional Criteria for Providing or Increasing Forage Supply During Periods of Low Forage Production

Select plants that will help meet livestock forage demand during times that normal farm/ranch forage production are not adequate.

Additional Criteria for Reducing Erosion and Improving Water Quality.

Ground cover and root mass need to be sufficient to protect the soil from wind and water erosion.

Additional Criteria for Producing Feedstocks for Biofuel or Energy Production

Select plants that provide adequate kinds and amount of plant materials needed.

CONSIDERATIONS

In areas where animals congregate consider establishing persistent species that can tolerate close grazing and trampling.

Where wildlife and pollinator concerns exist, consider plant selection by using an approved habitat evaluation procedure.

Where air quality concerns exist consider using site preparation and planting techniques that will minimize airborne particulate matter generation and transport.

Where carbon sequestration is a goal, select deep-rooted perennial species that will increase underground carbon storage.

During and upon stand establishment planning and application of the following conservation practices should be considered as applicable; Forage and Biomass Harvest (511), Herbaceous Weed Control (315), Nutrient Management (590), and Prescribed Grazing (528).

PLANS AND SPECIFICATIONS

Prepare plans and specifications for the establishment planting for each site or management unit according to the Criteria, Considerations, and Operations and Maintenance described in this standard. Record them on a site specific job sheet or in the narrative of a conservation plan.

The following elements will be addressed in the plan to meet the intended purpose:

- Site Preparation
- Fertilizer Application (if applicable)
- Seedbed/Planting Bed Preparation
- Methods of Seeding/Planting
- Time of Seeding/Planting
- Selection of Species
- Type of legume inoculant used (if applicable)
- Seed/Plant Source
- Seed Analysis
- Rates of Seeding/Planting
- Supplemental Water for Plant Establishment (if applicable)
- Protection of Plantings (if applicable)

OPERATION AND MAINTENANCE

Inspect and calibrate equipment prior to use. Continually monitor during planting to insure proper rate, distribution and depth of planting material is maintained.

Monitor new plantings for water stress. Depending on the severity of drought, water stress may require reducing weeds, early

harvest of any companion crops, irrigating when possible, or replanting failed stands.

REFERENCES

Ball, D.M., C.S. Hoveland, and G.D.Lacefield, 2007. Southern Forages, 4th Ed. International Plant Nutrition Institute, Norcross, GA.

Barnes, R.F., D.A. Miller, and C.J. Nelson. 1995. Forages, The Science of Grassland Agriculture, 5th Ed. Iowa State University Press, Ames

United States Department of Agriculture, Natural Resources Conservation Service. 1997. National Range and Pasture handbook. Washington, DC.

USDA, NRCS. 2008. The PLANTS Database (<http://plants.usda.gov>, 08October 2008). National Plant Data Center, Baton Rouge, LA 70874-4490 USA.

USDA, NRCS. 2009. Technical Note 3. Planting and Managing Switchgrass as a Biomass Energy Crop.

Exhibit C



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
U.S. ARMY ENGINEER DISTRICT, SACRAMENTO
CORPS OF ENGINEERS
1325 J STREET
SACRAMENTO CA 95814-2922

August 27, 2014

Regulatory Division SPK-2014-00183

Ms. Jody Gallaway
Gallaway Enterprises
117 Meyers Street Suite 120
Chico, California 95928

Dear Ms. Gallaway:

I am responding to your letter dated July 14, 2004, on behalf of your clients Mr. Robert Brown and Mr. Melvin Leen, in regards to activities involving discharges of dredged or fill material into wetlands and an unnamed tributary to Hamlin Slough, in unsectioned portions of the Rancho Esquon Mexican Land Grant, in Township 21 North, Range 2 East, Mount Diablo Meridian, Latitude 39.6404°, Longitude -121.7197°, Butte County, California.

Relying on the information you provided, we have determined the discharges of dredged or fill material were associated with disking and replanting pasture grasses and are part of an established on-going normal ranching operation conducted in accordance with Conservation Practice Standard number 512. As such, in accordance with the March 25, 2014, Interpretive Rule, the discharges do not require a permit under Section 404 of the Clean Water Act (CWA), provided they do not convert an area of waters of the U.S. to a new use and impair the flow or circulation of waters of the U.S. or reduce the reach of waters of the U.S.

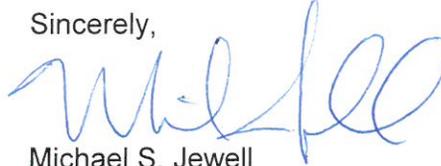
As recently explained in the Interpretive Rule, activities that are planned, designed, and constructed in accordance with one or more of the 56 specific Natural Resources Conservation Service (NRCS) national conservation practice standards are considered exempt under CWA section 404(f)(1)(A) and a section 404 permit is not required.

You may find the 56 specifically exempted conservation practice standards at: <http://water.epa.gov/lawsregs/guidance/wetlands/agriculture.cfm>. Information regarding NRCS's conservation practices in general may be found at: http://www.nrcs.usda.gov/wps/portal/nrcs/detailfull/national/home/?cid=nrcs143_026849. If technical assistance is needed to better understand a conservation practice, you should contact your local NRCS office by using the site locator at: <http://www.nrcs.usda.gov/wps/portal/nrcs/main/national/contact/local/>. Of course, information requests or questions about CWA jurisdiction under section 404 should be addressed to our project manager.

Please note that this notification does not eliminate the need for you to obtain any other applicable Federal, state, or local authorizations required by law. If additional work or discharge of dredged and/or fill material is proposed in waters of the United States that is not covered by one of the 56 specific exemptions, you may be required to obtain an authorization under section 404 of the CWA.

The Corps' Regulatory Project Manager for this matter is James Robb, and can be reached via telephone at 916-557-7610.

Sincerely,



Michael S. Jewell
Chief, Regulatory Division

Mr. Robert Brown, Owner, kellybrownrealty@sbcglobal.net

Mr. Nels Leen, Owner, us4leens@aol.com

Mr. Scott Zaitz, Central Valley Regional Water Quality Control Board, szaitz@waterboards.ca.gov

Mr. Ken Sanchez, U.S. Fish and Wildlife Service, Kenneth_Sanchez@fws.gov

Ms. Tina Bartlett, California Department of Fish and Game, Tina.Bartlett@wildlife.ca.gov

Ms. Jennifer Cavanaugh, Natural Resource Conservation Service,
jennifer.cavanaugh@ca.usda.gov

Mr. David Wampler, U.S. Environmental Protection Agency, Region 9,
Wampler.David@epa.gov

Senate Committee on Environment and Public Works Subcommittee on Fisheries, Water, and Wildlife oversight hearing entitled, “Erosion of Exemptions and Expansion of Federal Control –Implementation of the Definition of Waters of the United States.” May 24, 2016

Request for Additional Information: Case Study 9 and Supporting Documents

Case Study 9

1. Project Summary:
SPK-2014-01076
The total project area is approximately 1,100

2. Issue:
 - a. Request for an Approved Jurisdictional Determination (AJD) was discouraged and a Preliminary Jurisdictional Determination (PJD) was encouraged.
 - b. Corps required flow arrows on maps to falsely justify hydrologic connectivity based on sheet flow
 - c. Corps required data sheets to support a false assertion by the Corps
 - d. Corps demanded that the ordinary high water mark extent be mapped at almost to the 100 years flood limits

3. Supporting Information:

Exhibit A – Landowner request for approved jurisdictional determination, original delineation map, and Corps correspondence.

Exhibit B-Corps site visit emails, Corps GPS data from their field visit and instructions to map features.

Exhibit C- Updated delineation per Corps instructions (as applicable), Corps response letter, and consultant response letter and AJD withdrawal.

4. Details: Landowner hired a consultant to formally delineate all waters of the US so that he could plan agricultural operations to avoid all WOTUS thus eliminating a need for a permit. The landowner requested an approved jurisdictional determination (Exhibit A).

Corps discouraged an approved jurisdictional determination (AJD) and asked if they can perform a preliminary jurisdictional determination with a no permit letter or a plain jurisdictional determination because it is quicker (Exhibit A). However in reality, with a preliminary jurisdictional determination (PJD) the Corps ends up taking jurisdiction of anything that is a potential jurisdictional wetland even without any supporting data. The identification of “potential wetlands” defeats the purpose of trying to develop an agricultural project to avoid WOTUS and a CWA permit. In order to properly avoid WOTUS, the applicant needs to know what is and what is not a WOTUS, not what could possibly be a WOTUS. This argument has been repeated on numerous agricultural projects wherein the Corps delays, delays, delays, and then claims that a preliminary jurisdiction determination would be quicker. Eventually the landowner either withdraws the AJD request or capitulates and settles with a PJD. Without an approved jurisdictional determination, the landowner risks that the Corps won’t change its mind later.

In this case the consultant would only map features that could be substantiated with actual data rather than mapping features that might be a wetland based on the Corps aerial photo interpretation and demands. The consultant with over 20 years' experience delineating and mapping WOTUS spent 16 days on the property collecting data on over 1000 potential WOTUS features and only mapped features that met the criteria for jurisdiction. The Corps supplied no data to the contrary, instead supplying inaccurate GPS data with incomprehensible notes taken during a one-day 6-hour site visit and demanded to map features that looked like WOTUS from an aerial photo (Exhibit B).

Corps demanded that the delineation map show wetlands as jurisdictional waters with no supporting data.(Exhibit C).

Corps demanded that the ordinary high water mark extent be mapped at almost to the 100 years flood limits (significantly farther than the 2-10 year flood event that is supposed to mark the boundary of Corps jurisdiction) Exhibit C.

The Corps do not follow their own regulatory guidance¹ with regards to processing times for PJD and AJD requests and staff provided inconsistent guidance to the regulated public regarding the benefits of an AJD. Corps staff routinely informs the public that the processing time for a PJD is shorter than an AJD. However, in Corps educational classes they tell people that the consultation process only takes 20 days for a AJD and there is no different in processing times between an AJD and PJD. Reality tells a completely different story. Processing times measured from when the AJD request was made until the Corps sends the AJD letter to the client takes between 18-24 months.

The Corps refused to process the AJD request if the features were not mapped according to their interpretation.

5. Landowner withdrew the AJD and discontinued planned farming operations.

¹ US Army Corps of Engineers, Regulatory Guidance Letter 08-02, June 26, 2008. Jurisdictional Determinations. Available at: <http://www.usace.army.mil/Portals/2/docs/civilworks/RGLS/rgl08-02.pdf>

Exhibit A

gallaway ENTERPRISES

117 Meyers Street • Suite 120 • Chico CA 95928 • 530-332-9909

November 12, 2014

US Army Corps of Engineers
Leah Fisher, Senior Project Manager
1325 J Street
Sacramento, Ca 95814-2922

RE: Draft Delineation of Waters of the United States-Nance Canyon Agricultural Project,
Butte County, Ca

Dear Ms. Fisher,

On behalf of the property owners, Nance Canyon Partners, we are requesting a review and **approved jurisdictional determination** of the enclosed Draft Delineation of the United States: Nance Canyon Agricultural Project. Enclosed is a hardcopy of the delineation, including maps which meet the 2012 mapping standards and a copy on CD in PDF file format with GIS shapefiles. The applicant is proposing to utilize the site for agricultural purposes. Proposed development is planned for the upland areas and the applicant wants to avoid the need for permits from the Army Corps of Engineers (COE) thus the property owners will use the COE approved jurisdictional determination of the attached delineation as a guideline for complete avoidance of Waters of the United States.

Should you have any questions, please do not hesitate to contact me at (530) 332-9909 or email jody@gallawayenterprises.com

Regards,



Jody Gallaway
President and Senior Biologist

CC Don Swartz, Nance Canyon Partners, L.P.

Jody Gallaway

From: Fisher, Leah M SPK <Leah.M.Fisher@usace.army.mil>
Sent: Monday, January 26, 2015 1:17 PM
To: Jody Gallaway
Subject: RE: Nance Canyon AJD request (UNCLASSIFIED)

Classification: UNCLASSIFIED
Caveats: NONE

Hi Jody,
Looks like this landed on Kathy Norton's desk. Her number is 916-557-5260.
Thank you for your kind words.
At least we will get to work with each other until Whisper Ridge is complete. :) v/r, Leah

-----Original Message-----

From: Jody Gallaway [<mailto:jody@gallawayenterprises.com>]
Sent: Monday, January 19, 2015 3:24 PM
To: Fisher, Leah M SPK
Cc: Haley, Nancy A SPK; Elena Gregg
Subject: [EXTERNAL] Nance Canyon AJD request

Leah;

So sad that you will be leaving our region. You have been so professional and responsive, we really appreciate it.

The landowner for the Nance Canyon project has proposed to plant an agricultural crop and wanted to put this crop in the ground in the next couple of months. Could you let me know when this project has been re-assigned so I can get some idea on if the landowners will be able to meet their planting goals. Worse case scenario they may start planting in the obvious upland areas. Rightfully so, the landowners are concerned about perception as the project is located right on highway 99. They want to use the AJD to develop a planting plan to completely avoid Waters. I have copied Nancy is case this decision is already made.

I wish you all the best.

Thanks,

Jody Gallaway

President and Senior Biologist

Gallaway Enterprises, Inc.

117 Meyers Street, Suite 120

Chico, CA 95928

(530) 332-9909 office

(530) 332-9905 fax

www.gallowayenterprises.com <x-msg://55/www.gallowayenterprises.com>

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Classification: UNCLASSIFIED

Caveats: NONE

Sent: Thursday, February 26, 2015 12:40 PM
To: Finan, Michael C SPK; Norton, Kathy M SPK
Subject: [EXTERNAL] Nance Canyon Ag Project

Mike;

I spoke to my client about a PJD with No-permit letter as an option. He had his legal staff review and has decided to continue with an AJD request for this project. Please let me know when you would like to visit the property and I can go with you or I can come out and open the gates and let you have at it.

Thanks,

Jody Gallaway

President and Senior Biologist

Gallaway Enterprises, Inc.

117 Meyers Street, Suite 120

Chico, CA 95928

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Exhibit B

Jody Gallaway

From: Norton, Kathy M SPK <Kathy.Norton@usace.army.mil>
Sent: Wednesday, March 11, 2015 1:30 PM
To: Jody Gallaway
Subject: RE: Nance Canyon Ag Project

Hello Jody--

I am guessing you have heard by now that Mike is no longer with our office. I have been asked to take the lead on this wetland delineation, but in order to do this because it is a large site with a lot of features--I am going to need help from my co-workers that can use the GPS unit. The people most likely to help with this GPS are in training/meetings until the 23rd of March. I will send them an email asking for their help--but I'm not sure when they will respond to my request. I will try to setup an April field visit to the site, but that will depend on everyone's schedule and the completeness of the current wetland delineation submittal.

I understand that you want to proceed with an approved jurisdictional determination for this project.

Thank you--

Kathy Norton
Ecologist/Sr. Project Manager
USACE, Regulatory Division
California North Branch,
1325 J Street, Room 1350
Sacramento, California 95814-2922
916-557-5260; fax-916-557-7807
Customer Service Hours: 09:00 am-3:00 pm - Tuesday -Friday
kathy.norton@usace.army.mil

(We do not have "out-of-office" e-mail return notes. So--e-mails not returned in a reasonable amount of time means I'm not in the office, and haven't received your message.) Web page/surveys/information
<http://www.spk.usace.army.mil/Missions/Regulatory.aspx>
http://corpsmapu.usace.army.mil/cm_apex/f?p=regulatory_survey

-----Original Message-----

From: Jody Gallaway [mailto:jody@gallawayenterprises.com]
Sent: Thursday, February 26, 2015 5:26 PM
To: Finan, Michael C SPK; Norton, Kathy M SPK
Subject: [EXTERNAL] RE: Nance Canyon Ag Project

Mike,

We have not mapped anything as non-jurisdictional or isolated. We have considered all features on the Nance site as jurisdictional. I am meeting with my clients and their legal counsel in April to discuss further. In the meantime they directed me to ask the Corps to proceed with their original request. They also quote RGL08-02 specifically the section wherein it says that there should be no time difference between a AJD and PJD. In my experience as you have eluded also, there is a very large time and processing difference between an AJD and PJD. So large in fact perhaps RGL 08-02 should be modified or amended with a new RGL that explains the processing differences better.

Keep in mind that the project is adjacent to Highway 99 so they (property owners) expect accusations and complaints; therefore they are asking for the most rigorous evaluation of the delineation and want EPA's concurrence as well. The thought is that an AJD gives them more protection and certainty. I am not sure about protection but with regards to the certainty aspect I agree. I mainly agree because I have had various regulators provide varying opinions about the certainty a PJD gives. I have even had a case where there was a PJD provided by a regulator, that regulator left and the new regulator disagreed with the PJD and extent of wetlands. I completely understand that there are nuances between regulators but given such a large discrepancy between how regulators interpret the protections and certainty between a AJD and PJD I can understand why the regulated public would opt for something they perceive gives them a greater level of protection, especially when they are designing projects to avoid jurisdictional waters. If they were asking for a permit than a PJD would suffice. I think (and I am just guessing) that generally there is so much distrust, that even people who are designing projects to completely avoid Waters, which is consistent with the Clean Water Act, are fearful of government agencies changing their minds or public perception pushing governmental agencies into some action that they can't even foresee. They are looking for predictability, protection and certainty. They feel that a AJD allows them to use the delineation map as a base to design projects to avoid Waters, whereas a PJD can be reinterpreted over time, thus does not provide certainty. My client understands the 5 year expiration and plans to complete this very large agricultural project within 1 year of receiving the AJD.

Mike, thanks for your time and I hope my comments have been helpful. If there is anything else I can provide to you or to my client that helps move this project forward please let me know.

Regards,

Jody

-----Original Message-----

From: Finan, Michael C SPK [mailto:Michael.C.Finan@usace.army.mil]

Sent: Thursday, February 26, 2015 4:51 PM

To: Jody Gallaway; Norton, Kathy M SPK

Subject: RE: Nance Canyon Ag Project

Hi Jody, Are there isolated or other potentially non-jurisdictional waters on the site? If not, an AJD will generate considerably more work on everyone's part for a JD which will expire in 5 years. I am curious as to reasoning. In any event, I will check with Kathy on site visit schedule and get back to you. Thanks, Mike

Michael Finan, Wetland Specialist

U.S. Army Corps of Engineers

Sacramento District, Regulatory Division

1325 J Street, Room 1350, Sacramento, CA 95814-2922

PH: (916) 557-5324 (9am-3pm); FAX: -7803 michael.c.finan@usace.army.mil

* We want your feedback! Take the survey:

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* Need information on the Regulatory Program? Visit our website:

www.spk.usace.army.mil/Missions/Regulatory.aspx

* Sign up to receive our Public Notices. Email:

cespk-regulatory-info@usace.army.mil

BUILDING STRONG(r) And Taking Care of People

-----Original Message-----

From: Jody Gallaway [mailto:jody@gallawayenterprises.com]

USACE, Regulatory Division
California North Branch,

1325 J Street, Room 1350
Sacramento, California 95814-2922
916-557-5260; fax-916-557-7807
Customer Service Hours: 09:00 am-3:00 pm - Tuesday -Friday
kathy.norton@usace.army.mil
(We do not have "out-of-office" e-mail return notes. So--e-mails

not returned in a reasonable amount of time means I'm not in the office,
and haven't received your message.)

Web page/surveys/information

<http://www.spk.usace.army.mil/Missions/Regulatory.aspx>

http://corpsmapu.usace.army.mil/cm_apex/f?p=regulatory_survey

From: Jody Gallaway [mailto:jody@gallawayenterprises.com]
Sent: Wednesday, March 25, 2015 4:46 PM
To: Norton, Kathy M SPK
Subject: [EXTERNAL] Nance Canyon

Hello Kathy;

I hope things have stabilized following Mike's passing and a schedule for completing the approved JD for the Nance Canyon project has been determined. I will be meeting with my clients on Friday and they would like an update. This is a very large agricultural project and they run the risk of losing their farming tenant if this gets extended too much further. I believe we submitted the request on November 12, 2014 and have sent the shapefiles and hardcopies of all data sheets.

Thanks,

Jody Gallaway

President and Senior Biologist

Gallaway Enterprises, Inc.

117 Meyers Street, Suite 120

Chico, CA 95928

(530) 332-9909 office

(530) 332-9905 fax

www.gallawayenterprises.com <x-msg://55/www.gallawayenterprises.com>

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-----Original Message-----

From: Norton, Kathy M SPK [mailto:Kathy.Norton@usace.army.mil]
Sent: Friday, March 27, 2015 1:26 PM
To: Jody Gallaway
Subject: RE: Nance Canyon

Hi Jody--

Also--if you could hold the 21st of April open for a field visit just in case the 16th doesn't work out....or we need another day--please.

Thanks much--

Kathy Norton
Ecologist/Sr. Project Manager
USACE, Regulatory Division
California North Branch,
1325 J Street, Room 1350
Sacramento, California 95814-2922
916-557-5260; fax-916-557-7807
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<http://www.spk.usace.army.mil/Missions/Regulatory.aspx>
http://corpsmapu.usace.army.mil/cm_apex/f?p=regulatory_survey

-----Original Message-----

From: Jody Gallaway [mailto:jody@gallawayenterprises.com]
Sent: Thursday, March 26, 2015 1:07 PM
To: Norton, Kathy M SPK
Cc: Elena Gregg
Subject: [EXTERNAL] RE: Nance Canyon

Kathy,
This day will work fine for us. As the day gets closer, we will contact you to confirm.

Thanks!
Jody

-----Original Message-----

From: Norton, Kathy M SPK [mailto:Kathy.Norton@usace.army.mil]
Sent: Thursday, March 26, 2015 1:05 PM
To: Jody Gallaway
Subject: RE: Nance Canyon

Hi Jody--

I believe the 16th of April works for us to come look at Nance Canyon. Please let me know if that day works for you. Depending on how that day goes--as to how much we get done--we may need another field day after that.....Thank you--

Kathy Norton

Ecologist/Sr. Project Manager

USACE, Regulatory Division

California North Branch,

1325 J Street, Room 1350

Sacramento, California 95814-2922

916-557-5260; fax-916-557-7807

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http://corpsmapu.usace.army.mil/cm_apex/f?p=regulatory_survey

-----Original Message-----

From: Jody Gallaway [mailto:jody@gallawayenterprises.com]

Sent: Wednesday, March 25, 2015 4:55 PM

To: Norton, Kathy M SPK

Subject: [EXTERNAL] RE: Nance Canyon

I am so sorry, I can only imagine how difficult things are.

My meeting is at 9 am this Friday the 27th.

-jody

From: Norton, Kathy M SPK [mailto:Kathy.Norton@usace.army.mil]

Sent: Wednesday, March 25, 2015 4:53 PM

To: Jody Gallaway

Subject: RE: Nance Canyon

Hi Jody-- Things are still not stabilized with Mike's passing.but we are trying....

I have been asking the gps people to help with Nance Canyon and trying to get a handle on their schedule-and will get back to you as soon as I can. When is your meeting on Friday with the landowner....please.

Kathy Norton

Ecologist/Sr. Project Manager

Jody Gallaway

From: Norton, Kathy M SPK <Kathy.Norton@usace.army.mil>
Sent: Wednesday, June 10, 2015 8:47 AM
To: Jody Gallaway
Subject: [PossibleSpam] RE: Nance Canyon

Hi Jody-- It is in review--I'm checking to see if all of the spots we asked your folks to go check--were checked and data taken/wetland areas added. Thanks--

Kathy Norton
Ecologist/Sr. Project Manager
USACE, Regulatory Division
California North Branch,
1325 J Street, Room 1350
Sacramento, California 95814-2922
916-557-5260; fax-916-557-7807
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<http://www.spk.usace.army.mil/Missions/Regulatory.aspx>
http://corpsmapu.usace.army.mil/cm_apex/f?p=regulatory_survey

-----Original Message-----

From: Jody Gallaway [mailto:jody@gallawayenterprises.com]
Sent: Tuesday, June 09, 2015 11:50 AM
To: Norton, Kathy M SPK
Subject: [EXTERNAL] RE: Nance Canyon

Good afternoon Kathy,

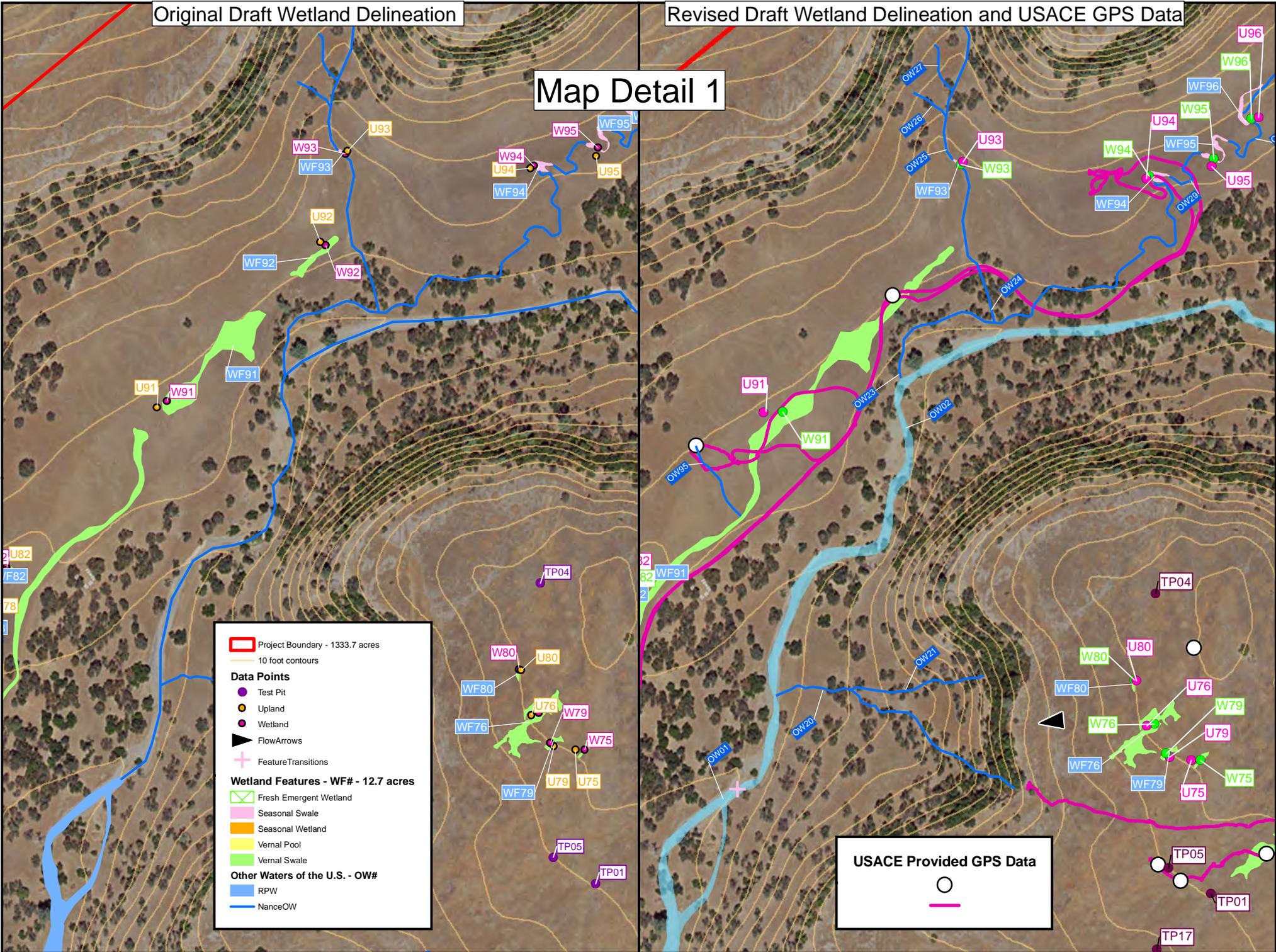
How are we progressing on the AJD for this project?
Thanks,

Jody Gallaway
President and Senior Biologist
Gallaway Enterprises, Inc.
117 Meyers Street, Suite 120
Chico, CA 95928
(530) 332-9909 office
(530) 332-9905 fax
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Original Draft Wetland Delineation

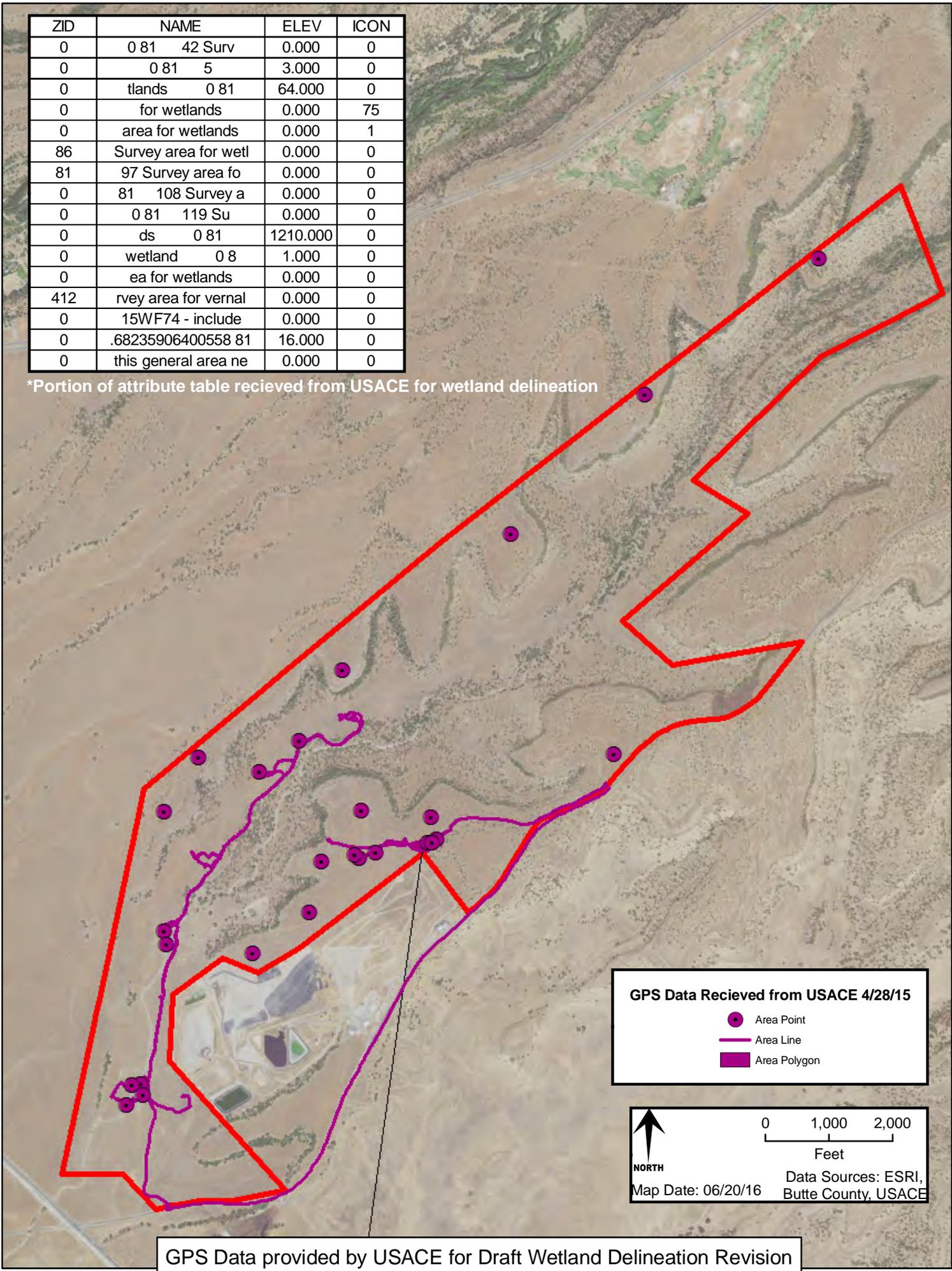
Revised Draft Wetland Delineation and USACE GPS Data

Map Detail 1



ZID	NAME	ELEV	ICON
0	0 81 42 Surv	0.000	0
0	0 81 5	3.000	0
0	lands 0 81	64.000	0
0	for wetlands	0.000	75
0	area for wetlands	0.000	1
86	Survey area for wetl	0.000	0
81	97 Survey area fo	0.000	0
0	81 108 Survey a	0.000	0
0	0 81 119 Su	0.000	0
0	ds 0 81	1210.000	0
0	wetland 0 8	1.000	0
0	ea for wetlands	0.000	0
412	rvey area for vernal	0.000	0
0	15WF74 - include	0.000	0
0	.68235906400558 81	16.000	0
0	this general area ne	0.000	0

*Portion of attribute table received from USACE for wetland delineation



GPS Data Recieved from USACE 4/28/15

- Area Point
- Area Line
- Area Polygon

NORTH

0 1,000 2,000
Feet

Map Date: 06/20/16 Data Sources: ESRI, Butte County, USACE

GPS Data provided by USACE for Draft Wetland Delineation Revision

Exhibit C



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, SACRAMENTO DISTRICT
1325 J STREET
SACRAMENTO CA 95814-2922

July 29, 2015

Regulatory Division SPK-2014-01076

Mr. Don Swartz
Nance Canyon Partners, L.P.
2038 Daladier Drive
Rancho Palos Verdes, California 90275

Dear Mr. Swartz:

We are responding to your consultant's November 12, 2014, draft wetland delineation report, and May 12, 2015, revised wetland delineation requests for an approved jurisdictional determination for the approximately 1,349-acre Nance Canyon Property. This property is located in Sections 1-2, 10-12, 14-15, and 22, Township 21 North, Range 2 East, MDB&M, Butte County, California. Based on our review of the information that has been submitted, we are unable to verify this delineation of wetlands and other waters of the United States at this time.

Staff from Gallaway Enterprises (Gallaway) and the Corps of Engineers (Corps) conducted a field visit on April 16, 2015 of this property. During this visit it was determined that potential waters of the United States (WOUS) were not identified on the delineation map. A revised wetland delineation report dated May 12, 2015 was later received by our office from Gallaway for review. After reviewing this document we have determined that additional potential WOUS are still not appropriately identified on the wetland delineation map.

Boundaries of other waters of the United States like rivers and creeks can be identified by debris lines and other features that show the ordinary boundaries of the streams' active floodway. The Corps gave guidance to Gallaway out in the field on how to map the entire creek areas. This mapping was not completely expanded as required in the revised wetland delineation report. Please expand the map creek areas to appropriately reflect the guidance that was given out in the field, and that can also be seen in years of aerial photographs of the site. In addition, the Corps has issued Regulatory Guidance Letter (RGL) 05-05, *Ordinary High Water Mark Identification* and the August 2008 *Field Guide to the Identification of the Ordinary High Water Mark (OHWM) in the Arid West Region of the Western United States* (2008 OHWM Delineation Manual), to assist in identification of the OHWM of the streams.

Also, during the April 16, 2015 site visit, Gallaway was directed by the Corps to map all of the vernal pools on the upper terraces of both sides of Nance Canyon. Directions were given on how to locate these features based on wetland evidence in the landscape. Although Gallaway's May report did improve on the mapping of the area, additional aquatic features are still not mapped and need to be appropriately mapped in the delineation report. Gallaway's May report states that the vernal pool terrace areas have a "[b]iotic crusts like those described in the Arid West manual as asphalt-like crusts were observed. They are not indicators of wetland hydrology." The Corps has identified that these areas are ponding-remnant biotic crust features that do show evidence of hydrology, algal matting, and need to be mapped.

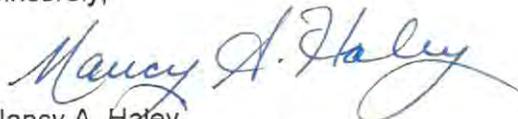
Additionally, the delineations sent by Gallaway references the 1989 Federal Manual for Identifying and Delineating Wetlands. In 1992 the Corps was prohibited from using 1989 Interagency Delineation Manual. Currently, the only documents that may be used to identify wetlands on the project site are the 1987 Wetland Delineation Manual and the September 2008 *Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Arid West Region*. The use of, or reference to, the 1989 Manual is not appropriate.

The Corps is committed to completing this approved JD as expeditiously as possible. Following the April 16th field visit progress was made in that Gallaway identified and mapped additional aquatic features and appropriately expanded jurisdictional features as identified by evidence in the field. However, because the correct policies, procedures, and regulations were not completely followed in the delineation, we are unable to complete the requested jurisdictional determination at this time until every aquatic feature is mapped appropriately as directed.

In order to complete the approved jurisdictional determination, following our review of any additional information provided to our office, we will complete any required coordination with the U.S. Environmental Protection Agency and Corps' Headquarters as appropriate. An itemized list of minimal information we need to process your request is enclosed. Once we receive complete information we will continue to evaluate your delineation, including a site visit if necessary.

Please refer to identification number SPK-2014-01076 in any correspondence concerning this project. If you have any questions, please contact Ms. Kathy Norton at the letterhead address, Room 1350, by email at Kathy.Norton@usace.army.mil, or telephone at 916-557-5260. For more information regarding our Regulatory Program, please visit our website located at www.spk.usace.army.mil/Missions/Regulatory.aspx.

Sincerely,



Nancy A. Haley
Chief, California North Branch

Enclosure

cc: (w/o encl)

Mr. Scott Zaitz, Regional Water Quality Control Board, 364 Knollcrest Drive, Suite #205,
Redding, California 96002-0175
Mr. Jason Brush, US Environmental Protection Agency, 75 Hawthorne Street, (WTR-8), San
Francisco, California 94105-3941
Ms. Jody Gallaway, Gallaway Enterprises, 117 Meyers Street, Suite 120, Chico, California
95928-6592

**MINIMUM STANDARDS FOR ACCEPTANCE OF PRELIMINARY
WETLANDS DELINEATIONS**

Page 1

November 30, 2001

The Regulatory Branch of the Sacramento District, U.S. Army Corps of Engineers (Corps) receives numerous requests to perform wetland delineations for potential applicants for permits under Section 404 of the Clean Water Act. Due to limited staff and resources, the response time can be several months or longer. To expedite this process, the Corps encourages applicants to use consultants to conduct preliminary wetlands delineations, especially for large and/or complex areas. Preliminary delineations may then be submitted to the Corps for review and verification.

While accurate delineations by qualified individuals have resulted in a quicker review and response from the Corps, substandard or inaccurate delineations have resulted in unnecessary time delays for applicants. These delays are due to insufficient, incomplete, or conflicting data, which prevent the Corps from verifying the proposed wetland boundaries. Such delineations must be returned by the Corps to the applicant or consultant for revision.

To improve the quality of and consistency of delineations, the Corps has developed **minimum standards necessary for accepting a delineation for verification of the jurisdictional boundaries**. Any submittal that does not meet these requirements will be returned to the applicant or consultant. All deficiencies must be corrected by the applicant or a consultant prior to re-submittal.

MINIMUM REQUIREMENTS

The preliminary wetlands delineation report shall include:

- A statement that the delineation has been conducted in accordance with the 1987 "Corps of Engineers Wetlands Delineation Manual"
- A narrative describing the wetlands.
- Justification for the wetlands boundaries.
- The total acreage of the project site.
- Existing field conditions such as season and flood/drought conditions.
- A discussion of the hydrology source (subsurface or surface, including potential irrigation influence) and drainage gradients.
- A site location map, preferably outlined on a 7.5 minute USGS quadrangle, along with any other pertinent maps of the site. The map must provide the name of the USGS quadrangle, Section, Township, Range, and UTM or latitude and longitude.
- Directions to the site.
- Contact information for the applicant(s) and property owner(s).
- A discussion of plant communities and habitat types present on the site and a list of the scientific name, common name(s), and indicator status of all plants.
- Soil descriptions, soil map(s), and a list of hydric soils or soils with hydric inclusions on the site.
- Any observed and/or documented examples of an interstate or foreign commerce connection. Examples include, but are not limited to:
 - Recreational or other use by interstate or foreign travelers.
 - Sale of fish or shellfish in interstate or foreign commerce.
 - Use by industries, including agriculture, operating in interstate or foreign commerce.

**MINIMUM STANDARDS FOR ACCEPTANCE OF PRELIMINARY
WETLANDS DELINEATIONS**

Page 2

-
- A delineation map at an appropriate scale (for most projects, a scale of one inch to 100 or 200 feet). The map should not exceed one inch to 400 feet unless there are extenuating circumstances. Note: map scales must be accurate and in round numbers, any maps using a photographic base must be corrected for distortions, and any overlays must be of identical scale. The map must include:
 - The boundary of the entire project area.
 - ✓ All features which meet the criteria for wetlands or other waters of the United States.
 - Color or thatched coding of the different wetlands coding of different wetland types present.
 - Topography.
 - Clearly and accurately identified data point locations and the location and identification number of surveyed or GPS established flags, stakes, or wetland boundaries.
 - ✓ All waters of the U.S., including but not limited to, in state waters, tributaries, wetlands, and all other waters such as intrastate lakes, rivers, streams, and mudflats as described in 33 CFR 328.3, must be shown on the delineation map. Those features which meet wetlands criteria or are potential waters of the U.S., but may be isolated and lacking an interstate or foreign commerce connection or are non-jurisdictional for other reasons must still be shown on the map. Any justification for the Corps to make a non-jurisdictional determination should be provided in the report.
 - Standard mapping conventions (e.g. north arrow, location map, etc.) and other identifying features which facilitate the correlation of map locations with ground features (e.g., buildings, fence lines, roads, right-of-ways, trees, streams, topographic features, etc.)
 - A reference block which identifies the project, the delineators, surveyors, date of initial preparation and date(s) of any revision.
 - Individual numbers or other designations for each water feature identified.
 - A table displaying the respective size (in acres) of each water and cumulative acreage of each type of water.

 - Data sheets completely and appropriately filled out. Data forms may be modified from the Corps' standard version, but they must present all essential information necessary to make a wetlands/nonwetlands determination.

 - ✓ At least one set of paired points documented for each feature or complex. Additional data forms may be necessary depending on various factors including the size and shape of the wetlands on the site, difficulty in identifying a precise wetlands/uplands boundary, and the width of any transition zones.

 - Additionally, before the Corps can complete its verification of the delineation, wetland boundaries must be marked with flags or stakes. Flags or stakes must be individually numbered and surveyed by traditional methods or by GPS equipment accurate to less than one meter. The survey data must specify the geographic coordinate system used in referencing the data, including projection and datum (e.g., Latitude-Longitude: NAD27 or UTM – Zone 10; NAD83). Data should be provided in a digital geographic information system (GIS) format to expedite review, with ESRI Shape files being the preferred format. The Corps also strongly recommends that property boundaries be flagged or staked and surveyed.

 - Additional information often can be expedite a wetland verification. Particularly helpful data includes topographic maps, aerial and ground photographs, and related reports. Expanded narrative reports may also clarify the investigation. However, the Corps emphasizes that these reports should be succinct with only the relevant information presented. Irrelevant, verbose, or perfunctory information will only delay the Corps' evaluation.

 - ✓ Acreage totals for all wetland and other waters of the United States features mapped within the project boundary must be identified in the legend of the map.

 - ✓ Identify date in which photographs were taken within the wetland delineation report.

gallaway ENTERPRISES

117 Meyers Street • Suite 120 • Chico CA 95928 • 530-332-9909

August 17, 2015

US Army Corps of Engineers
Kathy Norton
1325 J Street, Room 1350
Sacramento CA 95814-2922

RE: Nance Canyon Partners, L.P. (SPK 2014-01076)

Dear Ms. Norton,

We are responding to your July 29, 2015 letter in which you provided comments on the revised May 12, 2015 delineation report prepared by Gallaway Enterprises. The revised report thoroughly addressed the comments provided by Ms. Norton in the field and responded to all requests for changes to the delineation map based on the GIS data supplied to our office. In fact, Gallaway actually mapped the extent of the OHWM at a greater distance than requested by Ms. Norton and as identified on the Corps GIS data collected on the April 26 field visit. Expanding the extents of creeks further into upper terrace areas and presenting that information on a delineation map would be contrary to the guidance provided in the field by the Corps and RGL 05-05. Gallaway made an additional field visit on April 26, 2015 to confirm the mapping of the OHWM following the Corps guidance. Transects were established along Nance Creek, each transect evaluating the width of the creek and associated floodway based on the OHWM boundary which was identified using the regulations, policies, and procedures outlined in RGL 05-05. The data was used along with the data provided by the Corps to augment the delineation map accordingly. OW01 and OW02 collectively represent Nance Creek as depicted on the May 12, 2015 revised map and reflect an average width of 45 feet for the entire creek. The average transect width was determined to be 42 feet which correlates well with the average creek width currently represented on the delineation map.

After reviewing the extent of the active floodplain on several aerial photographs from differing years, it is apparent that the extent of the active floodplain boundary has not deviated beyond what was mapped in the May 12, 2015 revision. The extents presented in the May 12, 2015 map are a reflection of the site conditions, data gathered in the field and information integrated from the Corps field visit.

In paragraph 4 of the July 29, 2015 letter from the USACE, it says that Gallaway mapped additional wetland features in the upper terraces of Nance Canyon following the Corps site visit but that still more additional features were not mapped. In many cases, the Corps has actually requested that we map rock outcroppings as wetlands due to the "signature" given during review of aerial photography. The letter also makes reference to the indicator of these features being "ponding remnant biotic crust features that do show evidence of hydrology, algal matting, and need to be mapped." Gallaway maintains that the areas in question examined during the site visit do not contain biotic crusts that are indicators of ponded water and did not provide all three wetland parameters and, therefore, are not jurisdictional wetland features.

Biotic crusts are typically a composition of multiple organisms that occur together on the soil surface. Not all biotic crusts are indicators of hydrology. As the Arid West Manual describes, "Certain types of biotic crusts such as rough-surfaced or pedicellate crusts and asphalt-like crusts, do not develop or are destroyed in areas that become inundated. They are not indicators of wetland hydrology." Further studies, conducted in part by William N. Brostoff, have identified and distinguished between "upland" crusts and "aquatic remnant" crusts and suggested that these biotic crust types can help in identifying the boundaries of playas in the arid west. In a paper published in 2005, Brostoff et al. describes the "upland" crusts as being dominated by cyanobacterium and several other species including lichens and mosses and the "aquatic remnant" crust as being dominated by either algae or bacteria. Within the Nance Canyon Property, the biotic crusts observed on the terraces were dominated by cyanobacterium, bryophytes, and some lichens. These crusts are not typical of crusts found in seasonally ponded features since the physical structure of these crusts can be destroyed when submerged in water (Lichvar et al. 2006). In addition to the presence of "upland" crusts in the terrace area on the Property, the vegetation that is present, though sparse, did not meet the dominance test or the prevalence index. As such, these areas lacked hydric vegetation as well as hydrologic indicators. The soils in these areas in question generally demonstrated a very small percentage of redox features, however, the upland areas also demonstrated similar soils. Wetland features that were added to the delineation are all positioned on pockets of deeper soil, which allowed water to pond for enough duration to meet the three wetland parameters. The areas where the biotic crust was located that are being requested to be added as wetland features are positioned on particularly thin soils, frequently where bedrock was partially exposed, and were not added due to the lack of the three wetland parameters and the composition of the biotic crust being one typical of uplands.

All vernal pools in the upper terraces were mapped and included in the May 12, 2015 revision. Directions were provided to Gallaway by the Corps to investigate areas identified on an aerial photo that may contain vernal pool features. The investigation concluded that there were a few vernal pools in the areas that the Corps identified with the aerial photo. This investigation and the results are supported by scientific evidence. The presence or absence of jurisdictional features must rely on scientific information and not opinions, guesses or, speculation. The Corps representatives at the site exposed their misunderstanding of the basic information and methods necessary to complete a WOTUS delineation such as the use of test pit data. The same Corps representative requested that Gallaway remove a wetland feature from the map based on the absence of *Ranunculus muricatus*, when the reality was that the wetland feature met all of the parameters to be classified as a jurisdictional feature. Gallaway staff encouraged the Corps to visit the upper terrace areas to evaluate the areas in question using the standard scientific methods for determining jurisdictional features, but Corps staff refused, instead relying on their opinion based on a misinterpretation of an aerial photo.

All jurisdictional wetlands have a paired dataset. Upland data sheets for features 120-122 are not missing rather these features are located in a complex therefore data is extrapolated. The extrapolation of data is consistent with the *1987 Wetland Delineation Manual* when features are part of a complex and are similarly situated. In addition, the acreage totals for all wetland and other waters of the United States features mapped within the project are identified in the legend on the May 12, 2015 revised map,

consistent with the *2012 Final Map and Drawing Standards for the Pacific Division Regulatory Program*. We also included a separate table that provides the area and linear distance, as applicable for each feature. The project site is large and contained too many features to include the area calculations for each feature in the legend, therefore we summarized which is consistent with *2012 Final Map and Drawing Standards for the Pacific Division Regulatory Program*.

Though the upper terraces in the Property appear to be composed of vernal pool/swale complexes due to the aerial signature, the majority of the signatures are located on slopes as conveyed on the revised May 12, 2015 delineation map. As water tends to run downhill, the potential for ponding to an extent that would create jurisdictional wetlands is very low. Very similar lands surround the Property that contain similar landforms and aerial signatures. One such area located to the south of the Property was recently delineated and verified by the USACE (SPK 2013-01078, Old Durham Wood site). This delineation verified that the vast majority of the areas on the property that exhibited aerial signatures similar to those vernal pool/swale complexes were in fact not jurisdictional wetlands due to the thin soils, rock outcroppings, slope, landscape position, and lack of the three wetland parameters. If you have any question about this delineation, please reference the SPK number provided above.

We referenced the 1989 manual but did not use it to determine wetland indicator status, which was clearly described in the report and most importantly in the manner of data collection which reflects the *September 2008 Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Arid West Region*. We have referenced this manual in over 200 delineations submitted to the Sacramento office and recently referenced this manual in 6 delineations submitted to the San Francisco office with not one previous objection. This change in the review of our delineations is consistent with the Corps recent re-interpretation of other guidance documents. While referencing the manual may be inappropriate based on recent internal Corps guidance it does not invalidate the data used to make jurisdictional boundary determinations. In the future we will refrain from referencing this document.

Inconsistency in guidance interpretation and reliance on aerial photographs without incorporation of field data leads to an unpredictable and lengthy process. By any reasonable measure of response time this approved JD process has not been expeditious. We sought the guidance from the Corps regarding the best course of action for this client and were advised that seeking an approved jurisdictional determination would provide the greatest amount of security to the applicant. This was poor guidance and significant delays resulted in the termination of the project. On behalf of the applicant we are formally withdrawing the request for an approved jurisdictional determination for the Nance Canyon project.

Sincerely,



Jody Gallaway, President
Gallaway Enterprises, Inc.

References:

Lichvar et al. 2006. SURFICIAL FEATURES ASSOCIATED WITH PONDED WATER ON PLAYAS OF THE ARID SOUTHWESTERN UNITED STATES: INDICATORS FOR DELINEATING REGULATED AREAS UNDER THE CLEAN WATER ACT. WETLANDS, Volume 26, No. 2. The Society of Wetland Scientists.

Brostoff et al. 2005. Photosynthesis of cryptobiotic soil crusts in a seasonally inundated system of pans and dunes in the western Mojave Desert, CA: Field studies. *Flora* 200 (2005) 592–600. (letterhead)

CC: Don Swartz, Nance Canyon Partners, L.P., 2038 Daladier Drive, Ranchos Palos Verdes, CA 90275

Jody Gallaway

From: Jody Gallaway
Sent: Monday, August 03, 2015 3:12 PM
To: Norton, Kathy M SPK (Kathy.Norton@usace.army.mil)
Subject: Nance Canyon 2014-01076

Kathy;

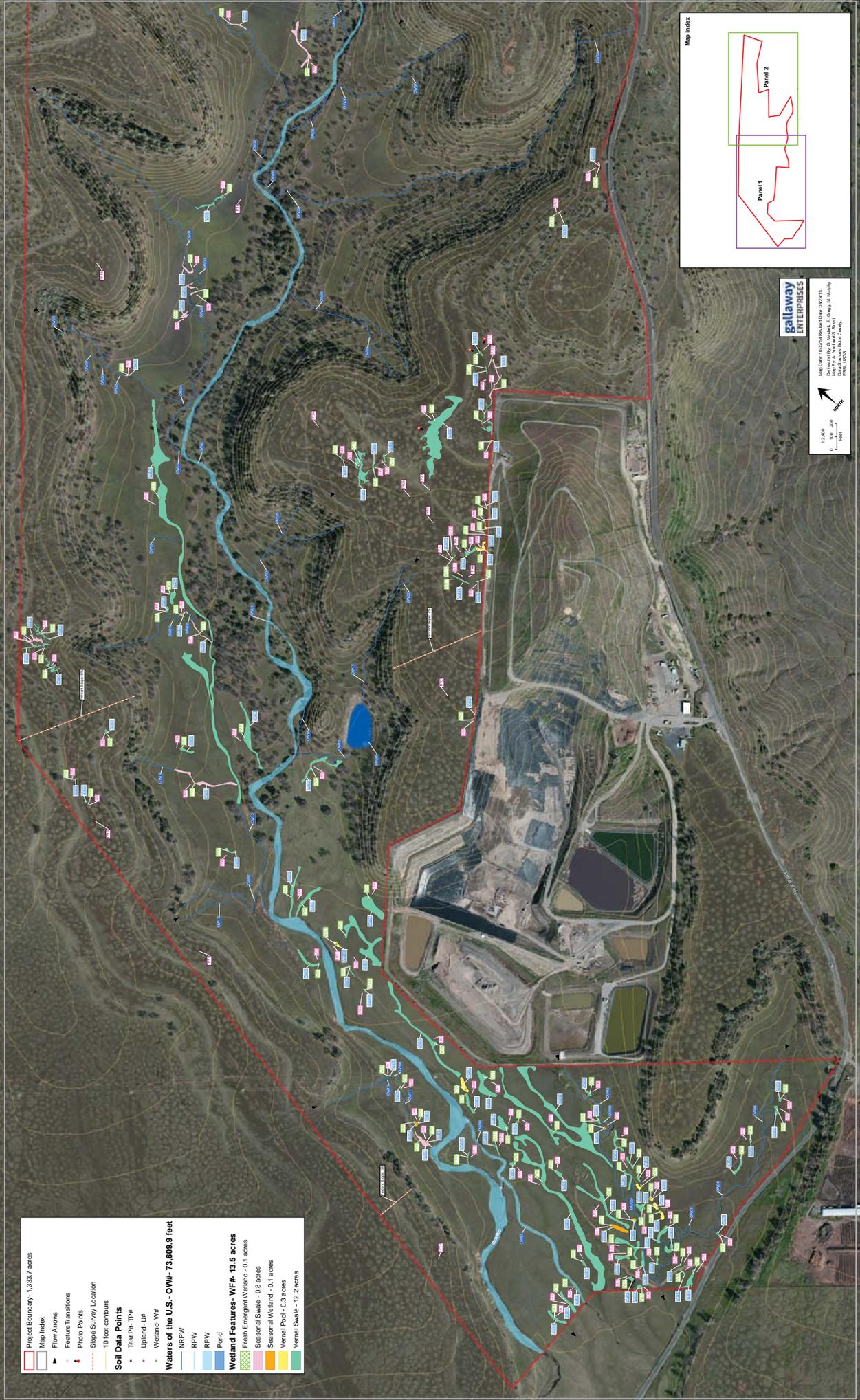
We received your July 29, 2015 letter today regarding the Nance project. Could you provide the source, photograph date(s) for the "years of aerial photographs" that were reviewed by your office to determine the location of the OHWM. The OHWM determined by your office is clearly NOT determined by reviewing on the ground physical indicators such as debris lines, changes in vegetation patterns, extent of normal erosion from frequent flow associated with a normal flood interval event (2-10 years). My staff does not recall the collection, review, or verification of actual field data or a discussion of site specific indicators of the OHWM during your one day site visit, therefore I presume you must be making this determination based solely on a review of aerial photography. We have a tendency to collect actual field data in conjunction with a review of aerial photography as part of the decision making process for determining the OHWM as discussed in the *2008 Field Guide to the Identification of the Ordinary High Water Mark*. I believe our reliance on actual field data from having spent over 16 days on this site, including the collection of transects to determine the OHWM versus the Corps OHWM review solely from aerial photographs continues to create a disconnect between what is and what it should be based on a change in Corps policy. At your soonest convenience please provide the source, photograph date(s) for the "years of aerial photographs" that were reviewed by your office to determine the location of the OHWM so that we can better understand the disconnect between field and office.

Jody Gallaway

President and Senior Biologist
Gallaway Enterprises, Inc.
117 Meyers Street, Suite 120
Chico, CA 95928
(530) 332-9909 office
(530) 332-9905 fax

www.gallawayenterprises.com

A DBE certified business dedicated to exceptional client services.



Project Boundary - 1,333.7 acres

- Map Index
- Flow Arrows
- Feature Transitions
- Photo Points
- Slope Survey Location
- 10 foot contours

Soil Data Points

- Test Pit, TP#
- Upland, U#
- Wetland, W#

Waters of the U.S. - OW# - 73,609.9 feet

- RPW
- RPW
- Pond

Wetland Features - WFA# - 13.5 acres

- Fresh Emergent Wetland - 0.1 acres
- Seasonal Swale - 0.8 acres
- Seasonal Wetland - 0.1 acres
- Vernal Pool - 0.3 acres
- Vernal Swale - 12.2 acres

1:2,000
0 100 200 Feet

Map Index

Panel 1
Panel 2

gallaway ENTERPRISES

Map Date: 10/27/14 Revised Date: 5/29/15
 Date: 10/27/14
 Date: 5/29/15
 Date: 10/27/14
 Date: 5/29/15

CASE STUDY #10

CHANGE IN USE:

Change in crop type

Note information contained on the Sacramento District's website, <http://www.spk.usace.army.mil/Missions/Regulatory/Permitting/Section404Exemption.s.aspx> which eviscerates the section 404(f) exemption by stating:

“if a property has been used for cattle grazing, the exemption does not apply if future activities would involve planting crops for food; similarly, if the current use of a property is for growing corn, the exemption does not apply if future activities would involve conversion to an orchard or vineyards.”

At the same website, the Sacramento District takes it upon itself to determine how long a field may lay fallow to be subject to the exemption:

“An operation is not[sic] longer established when the area on which it was conducted has been converted to another use or has lain idle so long that modifications to the hydrologic regime are necessary to resume operations.”

Unfortunately for farmers, according to the Corps, as demonstrated in the Duarte case, described below, plowing is a change to the hydrologic regime necessary to resume operations, the need to plow takes away the exemption, giving the Corps control over what crops can be grown when, and where.

JOHN DUARTE and Duarte Nursey

California farmer John Duarte owns and operates a farm near Sacramento. In 2012 he purchased a 450-acre parcel of land. After John plowed the land to plant wheat, in February 2013, the Army Corps sent him a letter instructing him to “cease and desist” his operation. The letter instructed him to stop his wheat operation because his plowing had resulted in the discharge of pollutants to WOTUS found on the parcel in violation of the Clean Water Act. What followed was an enforcement action brought by the Corps against not only John's company, but him personally. The federal district court recently ruled against John and this litigation is expected to play out in federal courts for years.

Aside from the precedent this litigation will make, this litigation is important because the briefs filed by the Department of Justice reveal just how narrow the government (here the Corps) interprets the so-called “normal farming” exemptions from 404 permit requirements. Just as important is the 173-page (without attachments) expert report prepared by the government, explaining how plowing that disturbs the soil and hydrology is not the kind of “plowing” the government intends to allow, and how the waters and soils in land are so interconnected that any

disturbance of land and water in a field, no matter how small, will impair the flow or reach of a WOTUS and trigger the statutory recapture provision. The result is that few, if any, plowing and farming activities will ever qualify for the regulatory permit exemptions for so-called “normal” farming operations.

The Corps interprets its own regulation narrowly, establishing that the permit exemption for “established and on-going” operations is limited only to “land already under active cultivation.” None of the permit exemptions, whether for plowing or planting in a WOTUS, will ever apply to land that a farmer decides to not cultivate for a time and for any reason, including adverse market conditions, or new land brought into cultivation. For John, his land’s history of agricultural production (grazing) and tillage (wheat) failed the government’s test of an “established and on-going” operation because the wheat production was fallowed for many years, and plowing was necessary to reestablish cultivation. How many years land can lay fallow is up to the discretion of the Corps, as is whether the plowing caused enough alteration in the soils and hydrology to trigger the recapture provision.