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 <u>and</u> 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 <u>and</u> 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

regulations[i] regarding plowing[ii] 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 be 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

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

REPLY TO ATTENTION OF

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/detailfull/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 Sates 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.

Conservation practice standards are reviewed periodically and updated if needed. To obtain the current version of this standard, contact your Natural Resources Conservation Service State Office or visit the Field Office Technical Guide.

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

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

REPLY TO
ATTENTION OF

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