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 suppling 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 guidance[i] 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.

[i] 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.gallawayenterprises.com <x-msg://55/www.gallawayenterprises.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

(530) 332-9909 office

(530) 332-9905 fax

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Nance Canyon Agricultural Project

Draft Wetland Delineation- Panel 1



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

* 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
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, 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
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: 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--

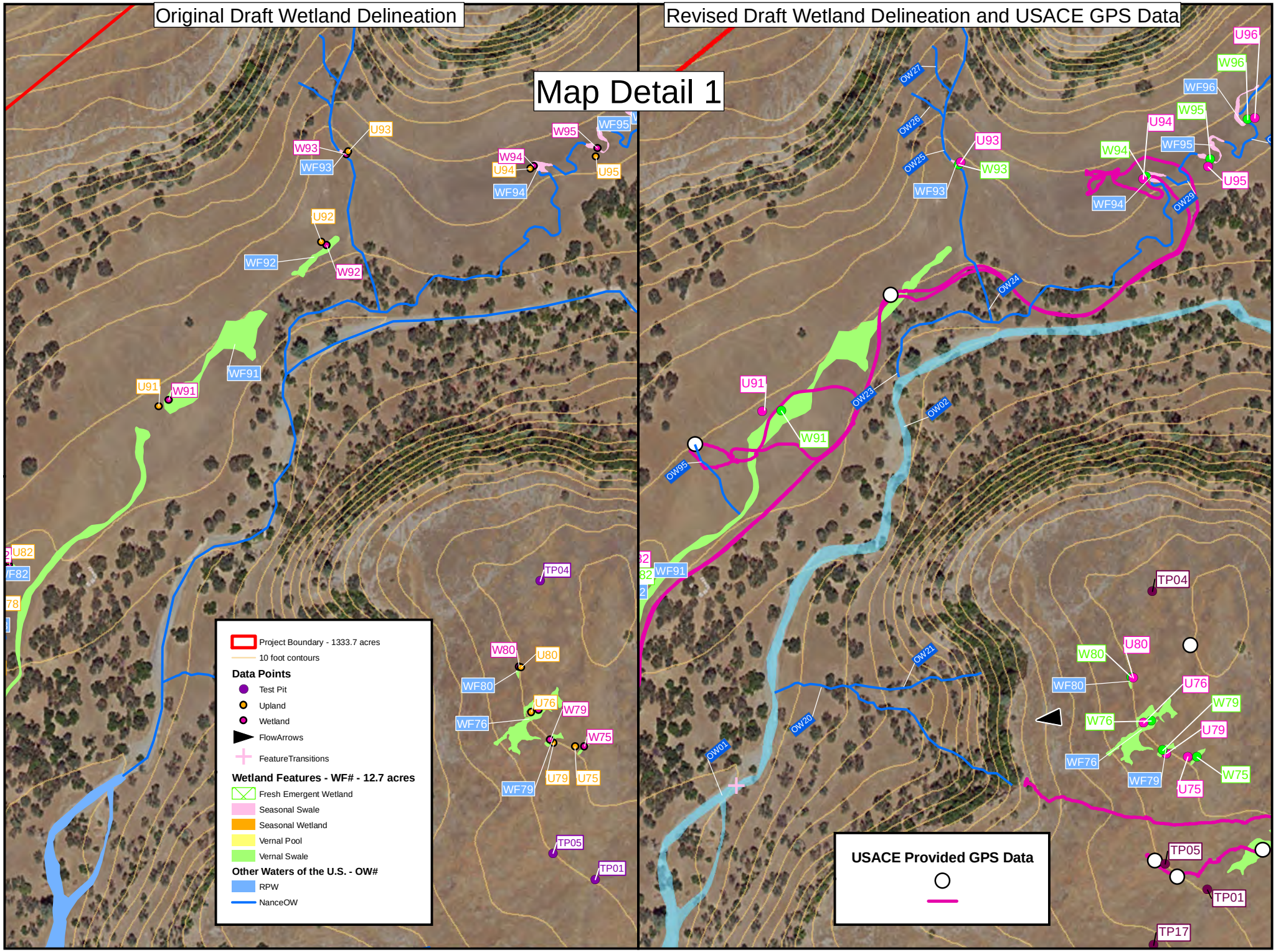
Kathy Norton
Ecologist/Sr. Project Manager
USACE, Regulatory Division
California North Branch,
1325 J Street, Room 1350
Sacramento, California 95814-2922
916-557-5260; fax-916-557-7807
Customer Service Hours: 09:00 am-3:00 pm - Tuesday -Friday
kathy.norton@usace.army.mil
(We do not have "out-of-office" 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: Tuesday, June 09, 2015 11:50 AM
To: Norton, Kathy M SPK
Subject: [EXTERNAL] RE: Nance Canyon

Good afternoon Kathy,

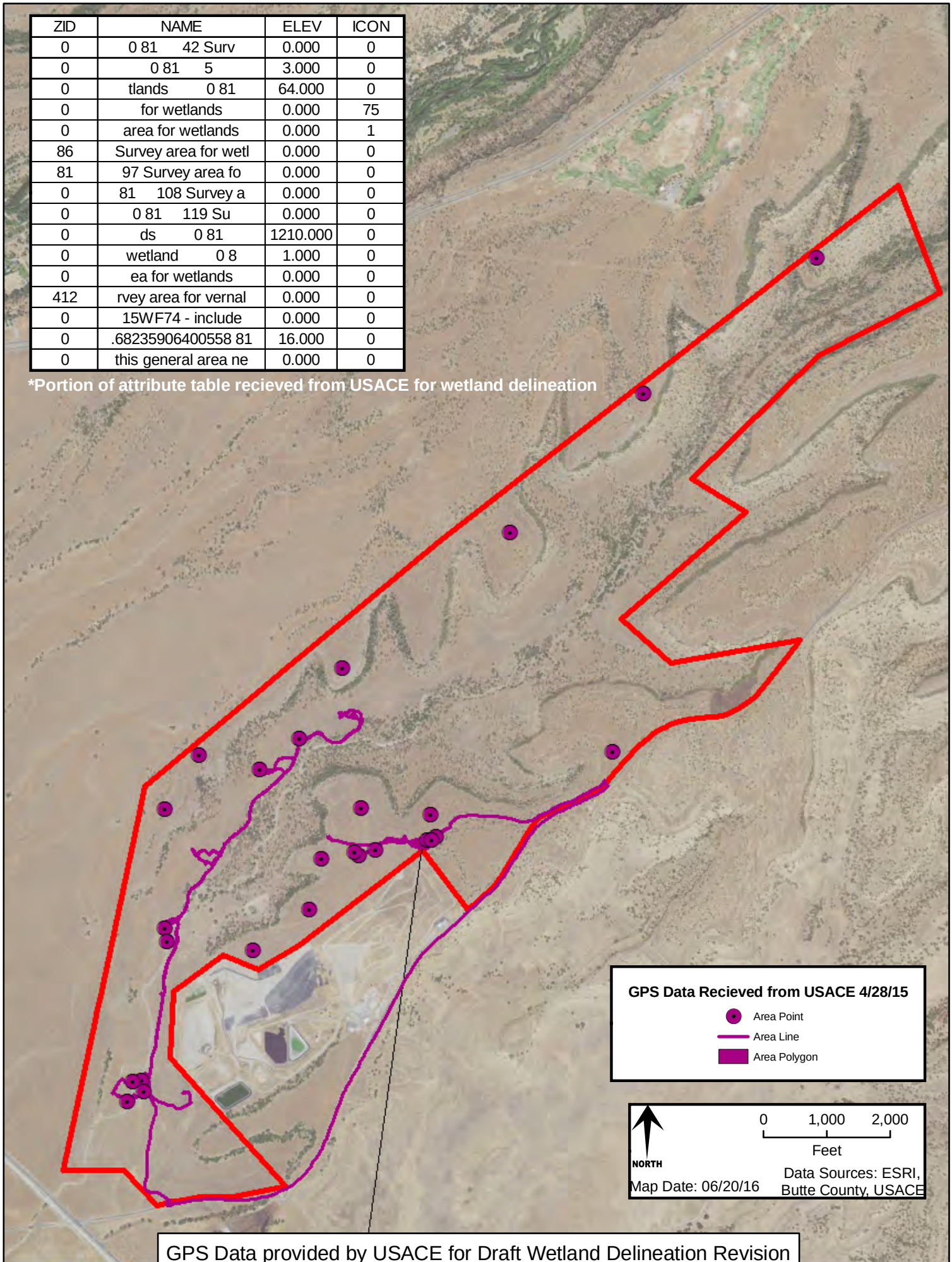
How are we progressing on the AJD for this project?
Thanks,

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
Project Boundary - 1333.7 acres
10 foot contours
Data Points
Test Pit
Upland
Wetland
FlowArrows
FeatureTransitions
Wetland Features - WF# - 12.7 acres
Fresh Emergent Wetland
Seasonal Swale
Seasonal Wetland
Vernal Pool
Vernal Swale
Other Waters of the U.S. - OW#
RPW
NanceOW
USACE Provided GPS Data

ZID	NAME	ELEV	ICON
0	0 81 42 Surv	0.000	0
0	0 81 5	3.000	0
0	tlands 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 recieved from USACE for wetland delineation



GPS Data provided by USACE for Draft Wetland Delineation Revision

Exhibit C

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

REPLY TO
ATTENTION OF

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

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

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.

___ 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 scale7. 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)

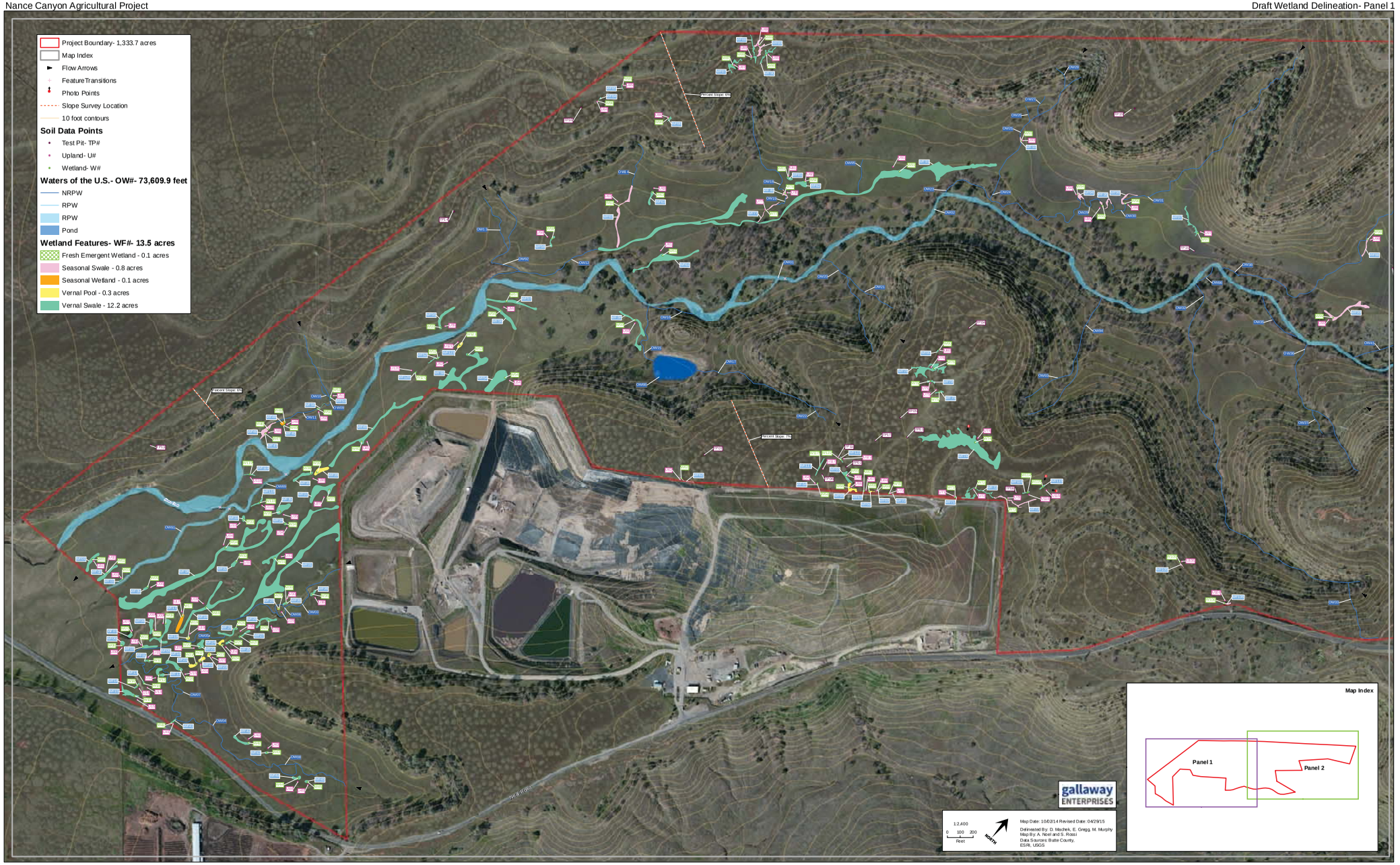
CC: Don Swartz, Nance Canyon Partners, L.P., 2038 Daladier Drive, Ranchos Palos Verdes, CA 90275

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
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www.gallawayenterprises.com
A DBE certified business dedicated to exceptional client services.


Project Boundary- 1,333.7 acres
Map Index
Flow Arrows
FeatureTransitions
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
NRPW
RPW
RPW
Pond
Wetland Features- WF#- 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
Percent Slope 9%
Percent Slope 9%
Percent Slope 9%
Map Index
Panel 1
Panel 2
gallaway ENTERPRISES
1:2,400
0 100 200
Feet
NORTH
Map Date: 10/6/2014 Revised Date: 04/29/15
Delineated By: D. Machek, E. Gregg, M. Murphy
Map By: A. Noel and S. Rossi
Data Sources: Butte County, ESRI, USGS