ADMINISTRATIVE APPEAL DECISION
CLEAN WATER ACT
UNIVERSAL WELDING
NORTH POLE, ALASKA
ALASKA DISTRICT
FILE NUMBER POA-2008-0550
DATE: 31 January 2011

Review Officer (RO): David W. Gesl, U.S. Army Corps of Engineers (Corps), Northwestern Division, Portland, Oregon

Appellant: Universal Welding, North Pole, Alaska, represented in the appeal by Travis/Petersen Environmental Consulting, Inc. (TPECI)

District Representative: Greg Mazur, Project Manager, and Christy Everett, Fairbanks Field Office Chief, U.S. Army Corps of Engineers, Alaska District

Authority: Clean Water Act (33 USC 1344 et seq.)

Date Approved Jurisdictional Determination (JD) and Notice of Appeal Rights were provided to the Appellant: July 23, 2010

Receipt of Request for Appeal (RFA): July 28, 2010

Site Visit: A site visit occurred on August 6, 2010. Attendees included David Gesl, RO, Greg Mazur and Christy Everett, Fairbanks Field Office, Thom Lichte, Regulatory Program Manager, Pacific Ocean Division, and Eddie Packee and Laurence Peterson, TPECI. The site visit consisted of an inspection of the site to determine the character of the area and informal discussion of the appeal and site conditions.

Summary of Decision: Universal Welding challenged the District's Clean Water Act (CWA) jurisdictional determination for a wetland located in North Pole, Alaska. Universal argued that the wetland in question was a wetland adjacent to another wetland, and, per Corps of Engineers regulations, is not subject to Corps jurisdiction under the CWA. This argument did not have merit because: 1) Corps regulations do not exclude wetlands adjacent to wetlands from being subject to CWA authority, when such wetlands are otherwise subject to CWA authority, and 2) the wetland in question is a part of a larger wetland that remains at least biologically connected/continuous, despite being bisected by a road. Universal also disputed the District's finding that a shallow subsurface connection involving the aquifer in the alliuvial plain provided a significant nexus between the wetland and the Chena Slough and River. The Rapanos Guidance does not define the term "shallow subsurface connection" and there is no regulation, Executive Order, or any other official Corps policy that defines "shallow subsurface connection." The District acted within its zone of discretion when it found that the groundwater conditions in this area constitutes a shallow subsurface connection. Next, Universal questioned the existence and significance of an "occasional" surface connection between the subject wetland and Chena

River, but this was not a material point in the District's CWA decision. Finally, the JD was remanded to the District to further address its determination that the Chena Slough is a Traditionally Navigable Water (TNW) because the JD did not sufficiently document that determination.

Background Information: The proposed project site is located in North Pole, Alaska, near the Chena and Tanana Rivers. Previous Administrative Appeals in the same general vicinity include Great Northwest, Inc. (POA-1994-143-9), remanded to the District on July 18, 2008, and Killion (POA-1991-673), remanded to the District on November 13, 2009. The District reaffirmed jurisdiction in both cases. The Great Northwest decision was challenged in the United States District Court for the District of Alaska which found "Great Northwest's wetlands are not 'adjacent' to the Tanana River and therefore fall outside the definition of 'waters of the United States' as defined by 33 C.F.R. § 328.3." The Government has appealed the Great Northwest decision to the United States Court of Appeals for the Ninth Circuit, where the matter is pending.

The RFA challenges the Alaska District's Approved Jurisdictional Determination (JD) that a wetland on the Universal Welding property is subject to CWA authority.

The District determined a wetland at the Universal Welding site is a water of the United States because it is adjacent to C-Channel, a relatively permanent water (RPW), and to Chena Slough, a traditional navigable water (TNW), and it sustains a significant nexus with Chena Slough.[1]

Corps regulations define adjacent as follows: "The term adjacent means bordering, contiguous, or neighboring. Wetlands separated from other waters of the U.S. by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands.'"[2] The Rapanos Guidance explains that the Corps and the U.S. Environmental Protection Agency consider wetlands adjacent if one of following three criteria is satisfied: First, there is an unbroken surface or shallow subsurface connection to jurisdictional waters. This hydrologic connection may be intermittent. Second, the wetlands are physically separated from jurisdictional waters by man-made dikes or barriers, natural river berms, beach dunes, and the like. Third, the proximity of the wetlands to a jurisdictional water is reasonably close, supporting the science-based inference that such wetlands have an ecological interconnection with jurisdictional waters.

The District found that all the criteria for adjacency are met within the undeveloped portion of the subject property and that the hydrologic and ecologic factors associated with this site and similarly-situated wetlands indicate that the subject wetland sustains a significant nexus with Chena Slough, a traditional navigable water (TNW).[3]

Following the issuance of the significant nexus finding, the District clarified that the "shallow, fast moving aquifer in the alluvial plain provides the hydrologic connection from the subject wetland and similarly situated wetlands to downstream water bodies including C-Channel and Chena Slough."

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[1] Significant Nexus Finding p10
[2] 33 C.F.R. § 328.3(c)
[3] Significant Nexus Finding p2

Rapanos: As a result of the Supreme Court's decision in *Rapanos v. United States*, 547 U.S. 715 (2006), EPA and the Corps, in coordination with the Office of Management and Budget and the President's Council on Environmental Quality, developed the memorandum *Clean Water Act Jurisdiction Following the U.S Supreme Court's Decision in Rapanos* v. *United States & Carabell* v. *United States* (Memorandum). The Memorandum established new standards and level of documentation for jurisdictional decisions, along with a prescribed methodology to ensure consistency and compliance with the *Rapanos* decision.

It is well established that the Corps and EPA have CWA regulatory jurisdiction over traditional navigable waters (TNW) and all wetlands adjacent to TNWs. Based upon *Rapanos,* CWA regulatory jurisdiction also includes relatively permanent waterbodies (RPW) that are not TNWs, but flow year-round or "seasonally." Jurisdiction also applies to wetlands adjacent to RPWs, if the wetlands directly abut the RPW. In addition, jurisdiction extends to a waterbody that is not an RPW if that waterbody is determined (on the basis of a fact-specific analysis) to have a significant nexus with a TNW. Non-RPW, significant nexus, waterbodies include : (1) non navigable tributaries that do <u>not</u> typically flow year-round or have continuous flow at least seasonally; (2) wetlands adjacent to such tributaries; and, (3) wetlands that are adjacent to but that do not directly abut an RPW.

A significant nexus may be found where a tributary, including its adjacent wetlands, has more than a speculative or insubstantial effect on the chemical, physical and biological integrity of a TNW. Factors considered in the significant nexus evaluation include flow characteristics and functions of the tributary itself in combination with the functions performed by any wetlands adjacent to the tributary to determine their effect on the chemical, physical and biological integrity of TNWs. Hydrologic factors considered include volume, duration, and frequency of flow, including consideration of certain physical characteristics of the tributary (proximity to the TNW, size of the watershed, average annual rainfall). Ecologic factors considered include the ability for tributaries to carry pollutants and flood waters to TNWs, the ability of a tributary to provide aquatic habitat that supports a TNW, the ability of wetlands to trap and filter pollutants or store flood waters, and maintenance of water quality.

Project Area Description: The subject wetland is located in the alluvial plain between the Tanana and Chena Rivers. A map contained in the administrative record (AR) illustrates the geographic relationship between the Tanana River, Chena River, and Chena Slough.[4] It was reported that prior to 1940, Chena Slough was a major side channel of the Tanana.[5] As a result of the overall low river gradients, the Tanana River is braided. During high stages river water would flow across the alluvial plain and into the Chena River channel through overflow channels and sloughs, including Chena Slough.[6] The AR indicates that historically Chena Slough's source was the Tanana River and that it flowed into the Chena River. Downstream from that point, the Chena River then flowed into the Tanana River. The subject site is located within this "loop".

[4] AR at 197
[5] Id
[6] AR at 185

C-Channel is one of three drainage channels discharging into the Chena Slough. It is located to the west of the subject site, also within the Tanana River-Chena Slough-Chena River loop. C-Channel was constructed to drain groundwater and reduce flooding behind the Tanana River Flood Control Project, and, according to the AR, creates a local depression in the water table.

The USGS Topographic Quad for the area (Fairbanks D-1, Alaska), as well as aerial photographs, show numerous remnant channel scars in the area, as well as. Throughout the alluvial plain, wetlands and local depressions such as sloughs, swales, and abandoned river channels are common and may be perennially inundated.[7] During the site visit, the RO observed a depression that appeared to be a channel scar that crosses Peridot Road several times (without culverts) near the project site. The scar is part of what the District identified as an "occasional" surface water connection to C-Channel. The construction of a flood control levee, as well as roads and highways, have reduced and/or eliminated flows in many of these channels. It is reasonable to conclude that the wetlands located between the two rivers were created and influenced by flow, conditions, and riverine processes in the rivers. Arguably, those wetlands are "features" of one or both of the rivers.[8]

The aquifer is highly transmissive. Groundwater moves at relatively rapid rates,[9] and the ground water levels throughout the alluvial plain are greatly influenced by stages in the Chena and Tanana Rivers. The water table between the rivers fluctuates with the stages of those rivers, and fluctuations are attenuated with increasing distance from the rivers.[10] Water levels in wells within about half a mile of either river respond rapidly to changes in river stage.[11]

According to the District, "the abundant and shallow groundwater derived from the Tanana River sustains the numerous wetlands and water bodies distributed throughout the alluvial plain on flats as well as sloughs, swales and abandoned river channels. The hydrologic sustenance may be provided directly by Tanana River ground water (also called 'regional ground water') reaching the soil column or indirectly by Tanana River ground water serving as an aquitard to precipitation-derived soil water. Direct hydrologic sustenance provided by Tanana River ground water likely occurs in low-lying wetland areas and/or at ground water upwellings."[12]

The AR contains a Soil Survey Map that shows C-Channel and the subject wetland are both contained in a continuous area mapped as Mapping Unit #154.[13] Unit #154 is the NorthPole-Noonku complex, where 90% of the unit is composed of hydric soil.[14] The 2009 National Wetland Inventory Map shows a continuous wetland that encompasses both C-Channel and the

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[7] AR at 166

[8] Examples of other wetlands that would be considered "features" of a waterway include those located within river deltas and those created by and ecologically supported by riverine processes, such as backwater side channels. There is a high degree of influence and interrelatedness between waterways and wetlands that are features of those waterways, this interrelatedness supports an adjacency argument.

[9] Significant Nexus Finding p4

[10] AR at 161

[11] AR at 182

[12] Significant Nexus Finding p8

[13] AR at 133

[14] Significant Nexus Finding p3

Universal Welding property.[15] Peridot Road bisects both the continuous soil series and the continuous mapped wetland.

INFORMATION RECEIVED DURING THE APPEAL REVIEW: The Division Engineer has the authority to hear the appeal of this JD.[16] However, the Division Engineer does not have authority under the appeal process to make a final decision regarding JDs, because that authority remains with the District Engineer. Upon appeal of the District Engineer's decision, the Division Engineer, or his delegate, conducts an independent review of the AR to address the reasons for appeal cited by the Appellant. The AR is limited to information contained in the record by the date of the Notification of Administrative Appeal Options and Process (NAP) form. Pursuant to 33 C.F.R. § 331.2, no new information may be submitted on appeal. Neither the Appellant nor the District may present new information. To assist the Division Engineer in making a decision on the appeal, the RO may allow the parties to interpret, clarify, or explain issues and information already contained in the AR. Such interpretation, clarification, or explanation does not become part of the District's AR, because the District Engineer did not consider it in making the decision on the JD. However, in accordance with 33 C.F.R. § 331.7(f), the Division Engineer may use such interpretation, clarification, or explanation in determining whether the AR provides an adequate and reasonable basis to support the District Engineer's decision.

The District made a copy of its AR available to the RO and the Appellant. The District's AR also included a Response to the Appeal of the Approved Jurisdictional Determination.[17] That portion of the District's AR was prepared following issuance of the JD and contains new information and analysis that cannot be considered as part of the Appeal Evaluation. Additionally, the AR also contains items, including several telephone conversation records, which were not in the record when the JD was issued; this information is also considered new and cannot be considered as part of the Appeal Evaluation. New information and analysis can and should be considered by the District as part of any reconsideration of the JD, including remand of the decision. The appellant also has the opportunity to provide any additional information it would like considered in any reconsideration or remand of the JD directly to the District.

APPEAL EVALUATION, FINDINGS AND INSTRUCTIONS TO THE ALASKA DISTRICT ENGINEER (DE):

REASON 1: TPECI contends "the wetlands on the east side of Peridot Road are as a matter of law and regulation adjacent to the wetlands on the west side of Peridot Road which are adjacent to C-Channel."

FINDING: This reason for appeal does not have merit.

ACTION: No action is required.

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[15] AR at 134
[16] 33 C.F.R. § 331.3(a) (2).
[17] AR p5-19

DISCUSSION: TPECI argues that the Corps lacks jurisdiction over the wetlands on the property because those wetlands are adjacent to other wetlands, and thus not subject to CWA jurisdiction per Corps regulations. See 33 C.F.R. § 328.3(a)(7). TPECI argues that such wetlands are beyond CWA jurisdiction regardless of whether a significant nexus with a TNW or RPW exists. TPECI suggests that Peridot Road bisects a large wetland that extends from the subject wetland to channel C, and the road has split that wetland into two distinct and separate wetlands that are now "adjacent" to each other, consequently the wetland area in question is no longer jurisdictional. TPECI relies on 33 C.F.R § 328.3(c) which states, "Wetlands separated from other waters of the U.S. by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands'."

By its plain terms, 33 C.F.R § 328.3(a)(7) provides jurisdiction over all wetlands that are adjacent to any of the non-wetland waters covered by (a)(1) through (a)(6). 33 C.F.R § 328.3(a)(7) does not extend CWA jurisdiction to otherwise non-jurisdictional wetlands that are adjacent only to other wetlands, because wetlands are not included among the "waters. . . identified in paragraphs (a)(l) through (6)" to which adjacency establishes jurisdiction. 33 C.F.R § 328.3(a)(7) does not, however, state that "wetlands adjacent to wetlands" are excluded from CWA jurisdiction. It merely states that wetlands adjacent to jurisdictional, non-wetland waters <u>are</u> jurisdictional.

It is true that "wetlands that are themselves adjacent to other jurisdictional wetlands" may not be deemed jurisdictional on the basis of their adjacency to those other jurisdictional wetlands because (a)(7) does not assert jurisdiction on the basis of adjacency to wetlands.[18] But nothing in (a)(7) indicates that wetlands adjacent to other wetlands could not be jurisdictional if they *also* happen to be adjacent to other, jurisdictional waterbodies that are *not* wetlands; and nothing in (a)(7) strips jurisdiction from wetlands that otherwise meet the definitions set forth in (a)(1) through (a)(6), but which also happen to be adjacent to other jurisdictional wetlands.

The subject wetland is a feature of the Tanana-Chena River systems. Additionally, as discussed in the Project Area Description Section above, the subject wetland is part of a continuous wetland extending from west of C-Channel to east of the subject wetland. Although TPECI disagrees with the District regarding the hydrologic connection between the portions of the wetland bisected by Peridot Road, the AR strongly supports that there is, at the least, a biological connection between sides of the road. This continuous habitat supports semi-aquatic and

[18] Subsequent to the Supreme Court's holding in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) ("SWANCC'), the Corps may not be able to assert jurisdiction over isolated wetlands that lack a significant nexus to traditionally navigable waters. The Solicitor General addressed the SWANCC decision in relation to (a)(7) at oral argument in *Rapanos v. United States*, 547 U.S. 715 (2006), expressing the view that when the Corps promulgated (pre-SWANCC) the current regulatory provision at (a)(7), the Corps intended not to extend (a)(7) to assert jurisdiction over isolated, intrastate wetlands based solely on their adjacency to another wetland. *Rapanos*, Transcript of Oral Argument at 46-50 (Feb. 21,2006). Thus, in the case of two adjacent, but otherwise isolated, wetlands, if one independently qualified as waters of the United States under (a)(3) but the second did not, the first wetland would be jurisdictional, and the second wetland would not. Post SWANCC, neither wetland would likely be jurisdictional, absent a significant nexus to traditional navigable waters. Again, post-SWANCC, if the Corps could demonstrate a significant nexus between the first wetland and traditional navigable waters, but could not demonstrate a significant nexus between the second wetland and traditional navigable waters, the Corps could not assert jurisdiction over the second wetland.

wetland dependent wildlife. The AR documents observation of moose and wood frogs in the area, as well as discussion of other wildlife that use C-Channel and Chena Slough. Supporting material in the AR includes, but is not limited to, information that movements of wetland-dependent wildlife is not impeded by obstacles such as low traffic roads.[19] Peridot Road is a marginally engineered, low traffic road. There is adequate information in the AR to support professional judgment that biological interconnectivity remains between sides of Peridot Road, as well as C-Channel. Although Peridot Road crosses the wetland, it has not had the effect of changing a continuous wetland into two or more separate wetlands.

This reason for appeal does not have merit.

REASON 2: TPECI contends "The significant nexus finding relies upon speculation and contains contradictions that do not support the Alaska District's contention that there is shallow subsurface flow across, through, and over Peridot Road."

FINDING: This reason for appeal has merit on one of several points.

ACTION: The District must further document and clarify the record to support its conclusion that Chena Slough is a TNW or identify which waterway and/or point on that waterway does meet the criteria for being a TNW. It is noted that the District submitted a response to the appeal that contained substantial discussion -- that information is new and was not considered as part of the appeal process.

DISCUSSION: TPECI argues the District's findings included speculative and insubstantial analysis, including:

> The District's positions regarding the impact of two similar roads (Quinell Lane/Siegel Street and Peridot Road) on surface and shallow subsurface flow cannot be mutually supported. TPECI argued the District presented no factual basis to support a surface or shallow subsurface connection across Peridot Road.
>
> The District speculated in using historical aerial photography to support conclusions about drainage direction and flow patterns. TPECI alleged the District speculated in determining flow direction from aerial photography, which they believe represents historical, but not current conditions.
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> TPECI interpreted the District's findings as Peridot Road was "overtopped" only once in 25 years, and asserted that "a probability of surface flows of 4 percent per annum does not appear to be persistent flow."
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> The District's "discussion of subsurface groundwater flow and the interaction between infiltrating water and the broader alluvial aquifer is confusing and contradictory."

[19] AR at 250

> TPECI argued, "the hydrology data used by the Alaska District contradicts the assertion that shallow subsurface flow from the wetlands reaches C-Channel." It also stated, those flow estimates "form the basis" of the District's "significant nexus finding and subsequent justification of ecological relationship."

The District clarified that the significant nexus finding for the subject wetland is based upon a shallow subsurface connection, not a surface connection across Peridot Road. The District's significant nexus finding contains an extensive discussion of a surface water connection between the subject wetland and Chena Slough, which, the District clarified, "occasionally" overcame barriers (Peridot Road and other surface features) between the subject wetland and Chena Slough.

The District relied heavily upon review of historic aerial photography in identifying a surface water connection between the subject wetlands and C-Channel. Photographs from five different years ranging from 1985 to 2007 were examined with one, the 1985 photo, showing surface water extending from north of the subject wetland to Chena Slough. The surface connection appeared to follow, in part, a channel scar that is crossed several times by gravel roads, including Peridot Road. Those roads lack culverts to maintain flow. During the site visit, the RO found that the channel scar was discernable, though sometimes with difficulty, in most locations where it could be accessed. District staff confirmed they had not ground-inspected some parts of the connection pathway appearing on the 1985 photo due to private property access constraints. As a result, the AR does not contain sufficient information and analysis to support the criteria for adjacency that the subject wetland has an unbroken *surface connection* to jurisdictional waters.

TPECI challenges the District's finding there is an occasional surface connection on several grounds. Regardless of the merits of TPECI's arguments, remand is not warranted regarding a surface water connection. As stated above, *surface connection* was not the basis of the adjacency determination, consequently the jurisdictional call does not turn on a surface connection.

The District's JD does rely on the *shallow subsurface connection* criteria for adjacency, and TPECI challenges that as being speculative and not in accordance with law and guidance. The District's analysis relies heavily on the concept that the shallow subsurface connection is associated with the aquifer. As discussed above in the Project Area Description, the AR contains technical reports and studies supporting that the aquifer is highly transmissive and groundwater moves at relatively rapid rates, that ground water levels throughout the alluvial plain are greatly influenced by stages in the Chena and Tanana Rivers, that the water table between these rivers fluctuates with the stages of those rivers, that fluctuations are attenuated with increasing distance from the rivers, and that water levels in wells within about half a mile of either river respond rapidly to changes in river stage.

The Rapanos Guidance does not define the term shallow subsurface connection. There is no standard in law, regulation, Executive Order, or any other officially promulgated Corps policy guidance which defines shallow subsurface connection. There is no known legal or scientific standard for determining what constitutes a shallow subsurface connection. The District did not

act outside the zone of discretion delegated to the District by Corps regulations in finding that the groundwater conditions in this area constitute a shallow subsurface connection.

TPECI also disputed that Chena Slough is a TNW because it is not listed on the District's website and because the Chena River was defined as a navigable water of the United States at a point downstream from the subject wetland in *Petersen v United States.*, 367 F.2d 271(1966). TPECI is referring to a website list of *navigable waters* on the District's website, which are waters that are considered navigable under Section 10 of the Rivers and Harbors Act. *Petersen v United States* also involves a determination with respect to the waterway being a *navigable water*. *Navigable waters* are a subset of those waters considered TNW's under the CWA. TPECI's argument misinterprets that TNW and *navigable water* are synonymous, when they are not.

There are three basic elements required to reasonably draw a science-based finding: 1) observations/data, 2) analysis, and 3) conclusion(s). The AR contains substantial information that appears to support that Chena Slough could reasonably be considered a TNW. However, the AR does not contain an analysis of that information, only a conclusion that Chena Slough is a TNW. For this reason, the District has not adequately documented its finding with respect to Chena Slough being a TNW and remand of the decision is warranted.[20]

REASON 3: TPECI contends "the Alaska District made significant errors of fact regarding the directionality of surface and subsurface flow across Peridot Road and the high water flow path flowing towards Badger Road."

FINDING: This reason for appeal does not have merit.

ACTION: No action is required.

DISCUSSION: TPECI identified several items under this reason for appeal.

TPECI argues that survey work performed by them on July 26, 2010 indicates that the west side of Peridot Road is topographically higher than the east side. TPECI did not provide documentation to verify this claim and, in any event, the claim was made after the District completed the JD. The appeal of an approved JD is limited to the information contained in the AR when the appellant is notified of the decision. Neither the appellant nor the Corps may present new information, not already contained in the AR, during the course of the appeal.[21]

TPECI also reports a lack of seepage in roadside ditches on July 26 and 27, 2010, from which TPECI argues that subsurface seepage beneath the road bed is not occurring. Again, TPECI did not provide any documentation to verify this claim and it is also new information that cannot be considered in the appeal.

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[20] The AR provided by the District as part of the Appeal Review contained additional information and analysis, in a document the District identified as "Response to the Appeal of the Approved Jurisdictional Determination for POA-2008-0550, Channel C." That document is considered new information which could not be considered in this appeal. That information can be incorporated into the District's final jurisdictional determination.

[21] 33 C.F.R §331.7(f)

TPECI argues that the District's "attempt to link wetlands to the groundwater in the regional alluvial aquifer has been overturned in a previous appeal because the regional aquifer is below the rooting zone (B horizon) and the assertion that alluvial aquifer was influencing surface vegetation could not be supported." In the Killion Appeal (POA-1991-673), the appellant argued that for groundwater to be shallow, it must interact or impose constraints upon surface vegetation and soils, and that the seasonal high groundwater levels at that site were far below the rooting zone. Killion was remanded to the District on the basis that a shallow subsurface connection had not been sufficiently documented by the District-- the appeal did not "overturn" the District's JD, and the reasons for the remand did not include that the regional alluvial aquifer was below the rooting zone.

As discussed above, the *Rapanos* Guidance does not define the term "shallow subsurface connection." There is no standard in law, regulation, Executive Order, or officially promulgated Corps policy guidance which defines shallow subsurface connection. There is no known legal or scientific standard that limits shallow subsurface connections to where the connection influences surface vegetation. The District did not err or act outside the zone of discretion delegated to the District by Corps regulations by not applying a surface vegetation-soil influence standard or definition. TPECI's argument has no merit.

TPECI disputes that wetlands on the subject property drain towards Peridot Road, arguing that the District's diagram and described flow paths from the subject property to the culvert on Badger Road are errors of fact. As indicated in the discussion for the previous reason for appeal, a surface connection was not the basis of the adjacency determination and it is not a critical aspect of the decision.

This reason for appeal does not have merit.

OVERALL CONCLUSION: After reviewing and evaluating the RFA, the District's AR, and the recommendation of the RO, I find that the RFA has partial merit, and the JD is remanded to the District for further evaluation, documentation and reconsideration, in those areas identified as having merit herein.

Edward J. Kertis, Jr.
Colonel,
U.S. Army, Commanding