

**ADMINISTRATIVE APPEAL DECISION
CLEAN WATER ACT APPROVED JURISDICTIONAL DETERMINATION
SPANOS FAMILY PARTNERSHIP WEST LAKE VILLAGE PROPERTY
STOCKTON, CALIFORNIA
ARMY CORPS OF ENGINEERS, SACRAMENTO DISTRICT FILE #200400279**

30 June 2005

Review Officer: Douglas R. Pomeroy, U.S. Army Corps of Engineers, South Pacific Division, San Francisco, California

Appellant: Spanos Family Partnership

Appellant Representative: David Ivester, attorney for appellants

Authority: Clean Water Act (CWA), Section 404 (33 U.S.C. 1344)

Receipt of Request For Appeal: November 24, 2004

Appeal Meeting and Site Visit Date: February 25, 2005

Summary of Decision: The District did not sufficiently document and justify its conclusions that the areas under consideration in this administrative appeal decision should be considered within CWA jurisdiction. This appeal decision identifies which District conclusions must be further justified and what field conditions must be further documented if the District is to reasonably support a determination that the areas under consideration in this appeal are within CWA jurisdiction.

Background Information: The Appellant's 634-acre Westlake Village property (project site) is located in northwest Stockton, California, within the Bishop Tract Reclamation District (BTRD) boundaries. The project site is bordered by the Eight Mile Road, agricultural fields, and a recently completed golf course to the north, the recently constructed Spanos Park East housing development to the east, and the waters of Bishop Cut, Disappointment Slough, and Pixley Slough to the west and south. The project site elevation ranges from -1 foot below sea level at the eastern boundary of the property to -7 feet below sea level at the western boundary of the property. The mean high water elevation on Bishop Cut is approximately 3.43 feet. Waters from the surrounding sloughs would inundate the project site if the levee system were not present.

The project site is located within a larger 1,813-acre watershed and is surrounded by levees and waterways on three sides including Telephone Cut on the north, Bishop Cut on the west, and Disappointment Slough, and Pixley Slough on the south. On the fourth

side, the Spanos Park East development acts as a drainage boundary to the east of the project site. The Spanos Park East development drainage system discharges directly to Pixley Slough and has no connection to the project site. The District and the Appellant agree that Disappointment Slough, Pixley Slough, Telephone Cut, and Bishop Cut are within CWA jurisdiction.

The project site is currently used for agricultural production and has been in that use for approximately 100 years, since the levee system was put into place. Water from Disappointment Slough and Pixley Slough is pumped or siphoned over the levees and onto the project site to irrigate the agricultural fields. “Feeder Irrigation ditches” distribute the water and also drain some water from the fields. The District and the Appellant agreed the Feeder Irrigation ditches are outside of CWA jurisdiction although their reasons for reaching that conclusion were different. The Appellant did not appeal the District’s determination that the Feeder Irrigation ditches are outside of CWA jurisdiction and therefore it was unnecessary to evaluate that determination as part of this administrative appeal. The Feeder Irrigation ditches flow to a Primary Irrigation ditch (Primary ditch) and a Secondary Irrigation ditch (Secondary ditch), which collect water from the agricultural fields for drainage. The project site has high groundwater levels. Localized ponding and shallow flooding periodically occur on the western portion of the property.

The Primary ditch is located at the lowest elevation on the property. Water in the Primary ditch flows from east to west. The Primary ditch receives water from local precipitation, irrigated agricultural fields, and the Secondary ditch. Water in the Secondary ditch flows onto the project site from north and flows into the Primary ditch. The Secondary ditch receives runoff water from agricultural fields both on and north of the property, and from local precipitation. In addition, at the appeal meeting a BTRD representative stated that a recently constructed golf course just northeast of this property discharges stormwater and irrigation runoff into the Primary ditch. At the west end of the Primary ditch (elevation -7), a pump operated by the BTRD conveys water from the west end of the Primary ditch via two 18 inch diameter pipes over a levee and into Bishop Cut. The pump on the Primary ditch serves as a discharge point for the entire 1,813-acre watershed.

The District concluded that the Primary and Secondary ditches were within CWA jurisdiction as tributaries to Bishop Cut in accordance with 33 Code of Federal Regulations (CFR) 328.3 (a) (5), and as impoundments of waters otherwise defined as waters within CWA jurisdiction in accordance with 33 CFR 328.3 (a) (4). The District also identified some adjacent wetlands within CWA jurisdiction in accordance with 33 CFR 328.3 (a) (7) along the edges of the ditches. The specific acreage of wetlands bordering the ditches was not determined.

The Appellant disagreed with the District’s conclusions that any area within the levees on the project site could be within CWA jurisdiction and appealed.

Appeal Evaluation, Findings and Instructions to the Sacramento District Engineer (DE):

Reason 1: The irrigation ditches are not waters (within CWA jurisdiction) based on their construction (i.e. whether the ditches were constructed within upland or wetland areas).

FINDING: This reason for appeal had merit.

ACTION: The District must reconsider its CWA jurisdictional determination for the Primary and Secondary ditches as described in detail in this administrative appeal decision.

DISCUSSION: The District described its conclusions regarding the CWA jurisdictional status of the project site in two documents in the administrative record. The District's September 27, 2004 CWA jurisdictional determination letter described the District's conclusions stating that:

“Based on available information...waters of the United States, including wetlands... include approximately 4.5 acres of the channels identified... as ... *Primary and Secondary Irrigation Ditches*...since they are tributary drainages to navigable waters and were not constructed on dry land. We believe these larger channels were constructed in wetlands to drain this property.”

and that:

“Based on the available information we understand the *Feeder Irrigation Ditches* were likely constructed on land that was already drained and leveled and are not considered waters of the United States for this verification.”

The District further stated its basis for asserting CWA jurisdiction over the Primary and Secondary ditches in its CWA Jurisdictional Determination form on pages 156 and 157 of the administrative record stating that:

“Based on the available information, the primary and secondary channels within the project area are waters of the US because they were historically excavated in wetlands. The San Joaquin County soil survey indicates all of the soils within the project area are hydric soils, typically defined as saturated, flooded, or ponded long enough during the growing season to develop anaerobic conditions in the upper part. ...Historic maps portray the area as marsh prior to being placed under agricultural uses. ... The secondary channel drains into the primary channel which drains west to the pump station at Bishop Cut.”

and that:

“Once the land was drained and leveled for upland row crops, smaller drainage and irrigation ditches were excavated to enhance farming the land.”

The District stated that in this instance the ditches excavated in uplands had a different CWA jurisdictional status than the ditches that had been historically excavated in wetlands. The Review Officer asked the District at the appeal meeting how it applied this distinction in relation to determining what portion of the Corps definition of waters within CWA jurisdiction (33 CFR 328.3 (a)(1) – (7)) applied to the Primary and Secondary ditches.

The District stated that it used the guidance in the Preamble to the Corps *Final Rule for Regulatory Programs for the Corps of Engineers* FR V 51. No 219, page 41217, November 13, 1986, that states:

“For clarification it should be noted that we generally do not consider the following waters to be “Waters of the United States.” However, the Corps reserves the right on a case-by-case basis to determine that a particular waterbody within these categories of waters is a water of the United States...

- (a) Non-tidal drainage and irrigation ditches excavated on dry land.
- (b) Artificially irrigated areas which would revert to upland if the irrigation ceased.”

Further guidance on the CWA jurisdictional status of drainage ditches was provided in the Preamble to the Corps *Final Rule of Issuance and Modification of Nationwide Permits: Notice* FR V 65. No 47, page 12823, March 9, 2000, that states:

“A drainage ditch constructed in a stream, wetland, or other water of the United States remains a water of the United States, provided an OHWM (ordinary high water mark) is still present. Since drainage ditches constructed in waters of the United States are constructed either by channelizing a stream or excavating the substrate to improve drainage, it is unlikely that the drainage ditches will become dry land unless the hydrology is removed by some other action....If the construction of a drainage ditch has legally converted the entire area to dry land, then the area drained is not a water of the United States, however in most cases the drainage ditch would remain a water of the United States.”

and that

“The statement that non-tidal drainage ditches are waters of the United States if they extend the OHWM of an existing water of the United States is consistent with the final rule published in the November 13, 1986, Federal Register, and applies to ditches constructed in waters or that connect waters. Nothing in the NWP notice was intended to change the November 13, 1986, Federal Register notice which states that drainage ditches constructed entirely in upland areas generally are not considered to be waters of the United States.”

The Primary and Secondary ditches in this administrative appeal were constructed many years before the CWA was passed. The District and the Appellant agree that there were some wetlands on the project site prior to construction of the levees. Based on regional drainage patterns it is reasonable to assume that such wetlands once drained to waters outside of the project site levees. One such water is Disappointment Slough, which both the District and the Appellant consider within CWA jurisdiction. Disappointment Slough appeared on an 1850 map of the area. The construction of levees many years prior to enactment of the CWA separated the project site from Bishop Cut, Disappointment Slough and Pixley Slough. Except for some levee modifications to accommodate development on the eastern side of the project site over the past 20 years, the current drainage routes and levees correspond to easements established by the BTRD in 1919. Photographs in the administrative record show that the Primary and Secondary ditches have been in their current locations since at least 1940.

The Corps has addressed the use of historical conditions to determine CWA jurisdiction on several occasions. Regulatory Guidance Letter 86-09 dated August 27, 1986, Regulatory Guidance Letter 82-2 dated February 11, 1982, and the Preamble to 1977 Corps regulations Federal Register Volume 42, No. 138, page 37128, dated July 19, 1977 all state that the Corps intent under CWA Section 404 is to:

“regulate the discharges of dredged or fill material into the aquatic system as it exists and not as it may have existed over a record period of time”

Also, the Corps regulations at 33 CFR 328.5 state that:

“Man-made changes may affect the limits of waters of the United States...”

The District stated that the Primary, Secondary, and Feeder Irrigation ditches were all excavated in hydric soils, but that the Primary and Secondary ditches were historically excavated in wetlands while the Irrigation Feeder ditches were historically excavated on uplands. The District’s administrative record and historic aerial photographs did not provide sufficient documentation to establish whether the Primary and Secondary Ditches on the project site were excavated in wetland areas or in areas already converted to upland areas. However, even if the District conclusively established that the Primary and Secondary ditches had been excavated in wetlands prior to implementation of the CWA, the District did not explain why that fact would establish that those areas met the definition of waters within CWA jurisdiction in accordance with 33 CFR 328.3 (a) (3) (1) – (7).

In order to establish that the Primary and Secondary ditches are within CWA jurisdiction because they were excavated in wetlands at some point prior to implementation of the CWA, the District must supplement its current administrative record and document the following: (a) provide a sufficient factual basis that clearly establishes that the Primary and Secondary ditches were originally excavated in wetlands, rather than being excavated in uplands after the project site had been converted to uplands, (b) explain why

conditions that were modified prior to implementation of the CWA are relevant to a determination of CWA jurisdiction subsequent to implementation of the CWA in this instance, and (c) explain why a determination that the Primary and Secondary ditches were excavated in wetlands prior to implementation of the CWA provides evidence that the Primary and Secondary ditches currently meet the definition of an area within CWA jurisdiction in accordance within 33 CFR 328.3 (a) (3) (1) – (7).

If upon reconsideration of this jurisdictional determination the District concludes that the Primary and Secondary ditches were constructed in upland areas, the District must explain why the Primary and Secondary ditches were exceptions to the guidance that drainage ditches constructed in uplands are generally not waters of the United States within CWA jurisdiction.

Reason 2: The irrigation ditches are not tributaries (within CWA jurisdiction).

FINDING: This reason for appeal had merit.

ACTION: The District must reconsider its CWA jurisdictional determination for the Primary and Secondary ditches as described in detail in this administrative appeal decision.

DISCUSSION: The District and the Appellant agree that pumps convey water from the west end of the Primary ditch over the levee and discharge that water into Bishop Cut. The District and the Appellant agree that Bishop Cut is within CWA jurisdiction and Rivers and Harbors Act, Section 10, jurisdiction. The District and the Appellant agree that surface water from the project site cannot enter Bishop Cut or channels surrounding the project site without use of a pump. The frequency of such discharges of water from the Primary ditch into Bishop Cut is not discussed in the administrative record. The Review Officer clarified at the appeal meeting that the District's primary basis for asserting CWA jurisdiction over the Primary and Secondary ditches was the District's determination that those ditches currently meet the definition of tributaries in accordance with the Corps regulations at 33 CFR 328.3 (a) (5) because the Secondary ditch flows into the Primary ditch and the Primary ditch is pumped into Bishop Cut.

The BTRD oversees the operation and maintenance of the Primary and Secondary ditches, and operation of the pumps that convey water from the Primary ditch to Bishop Cut. However, the administrative record contains no details of the BTRD operating standards for the pumps such as whether BTRD is required to pump excess water to Bishop Cut to avoid flooding surrounding land, or whether the choice to discharge water to Bishop Cut is totally within the discretion of the BTRD or the Appellant. The administrative record describes the discharges of water from the pumps as discharges of stormwater and irrigation runoff. There is no detail in the administrative record regarding the duration, frequency or volume of water that is typically pumped. However, as there are two 18-inch pipes that connect from the Primary Ditch to a pump, and from the pump to Bishop Cut, the infrastructure is in place to discharge substantial volumes of water from the Primary ditch to Bishop Cut.

The pump can convey water from the Primary Ditch, at approximately 7 feet below mean sea level (MSL), to Bishop Cut, where CWA jurisdiction extends to the mean high tide line at 3.43 feet above MSL. The District concluded that this pumped connection between the Primary ditch and Bishop Cut represented a tributary connection within CWA jurisdiction. At the appeal meeting the Review Officer requested the District provide clarification regarding its conclusion that the water conveyed from the Primary ditch to Bishop Cut represented a tributary connection within CWA jurisdiction. The District provided two specific federal court decisions, United States of America v. The New Portland Meadows, Inc., 2002 U.S. Dist LEXIS 19153 (D. Or. 2002) and United States of America v. Adam Bros. Farming In., 2003 WL 24056707 (C.D. Cal) that it stated supported its conclusion. The District did not provide an analysis describing why these decisions were applicable to the jurisdictional determination under appeal.

The Appellant's appeal asserted that a tributary connection within CWA jurisdiction could not be established based on a pumped connection that conveyed water from a lower elevation to a higher elevation, and that an irrigation ditch could not be a tributary within CWA jurisdiction. In regard to pumped tributary connections, the Appellant's Request for Appeal and Appellant's Supplemental Brief regarding relevant federal court decisions (submitted as clarifying information) asserted that any tributary within CWA jurisdiction must have a "natural flow" (i.e. water that either flows by gravity from the tributary to a water within CWA jurisdiction, or if pumped, be a pumped flow that modifies a natural flow). The Appellant stated that his conclusion was consistent with Headwaters, Inc. v. Talent Irrigation District, 243 F.3d. 526, 533 (9th Cir. 2001), and a number of other federal courts decisions that the Appellant described in his submittals.

The Appellant asserted that the holding in Adam Bros., which the District cited as supporting its conclusion, was actually consistent with the Appellant's position that a tributary connection within CWA jurisdiction must flow by gravity from a higher elevation to a lower elevation, or if pumped, be a modification of such a gravity flow. The Appellant also stated his position that the determinations and discussions to the contrary in The New Portland Meadows, Inc. and Adam Bros., were simply incorrect, and that unpublished federal district court decisions are generally accorded little weight (Note: Adam Bros. is now a published case). The Appellant also asserted that apart from New Portland Meadows, no federal court decision had ever held that pumping water uphill [i.e. pumping water from a lower elevation to a water within CWA jurisdiction at a higher elevation] created a tributary connection within CWA jurisdiction.

I considered the clarifying information and federal court decisions provided by the Appellant and the District in relation to the recent Headwaters 9th Circuit Court of Appeals decision. The Appellant's conclusion that a "natural flow" or a pumped flow that modifies a natural flow is required to establish a tributary connection within CWA jurisdiction is not definitively stated in Headwaters.

The District must attempt to obtain information on the recent and historical volume and frequency of water conveyed between the Primary ditch and Bishop Cut and consider that

information as part of its reconsideration of its jurisdictional determination. The District must also consider such things as whether there are standard operating procedures that require the pump at Bishop Cut to operate under specific circumstances (i.e. such as to avoid flooding adjoining property owners) or whether the discharge of water from the Primary ditch to Bishop Cut is solely at the discretion of the BTRD, the project site property owner, and/or project proponent. The Preamble to the Corps *Final Rule of Issuance and Modification of Nationwide Permits: Notice FR V 65. No 47*, page 12823, March 9, 2000, provides some guidance regarding whether ephemeral flows are within CWA jurisdiction stating that:

“An ephemeral stream is a water of the United States, provided it has an OHWM. An ephemeral stream that does not have an OHWM is not a water of the United States. The frequency and duration at which water must be present to develop an OHWM has not been established for the Corps regulatory program. District engineers use their judgement on a case-by-case basis to determine whether an OHWM is present.”

The District must take into account the presence or absence of an OHWM in the Primary and Secondary ditches, and if the OHWM is absent, consider whether the OHWM in those ditches might be periodically removed as part of ongoing ditch maintenance activities associated with agricultural activities on the property.

The District must consider the new information provided by the BTRD at the appeal meeting that water from the off-site golf course is being discharged into the Primary ditch, and subsequently into Bishop Cut. The District must also consider the new information it obtained by observation during the site visit that additional channels may flow into the Primary and Secondary ditches, as described in the District’s March 1, 2005 e-mail to the Review Officer and the Appellant.

The Appellant asserted that since the CWA exempted agricultural runoff and irrigation return flows from being considered as point source discharges for purposes of the CWA that this provided evidence that the Primary and Secondary ditches were exempt from CWA jurisdiction. The CWA and the Corps regulations do not support this conclusion. The CWA and the Corps regulations at 33 CFR 323.4 clearly differentiate between activities that are exempt from obtaining a permit for the discharge dredged or fill materials into waters within CWA jurisdiction and activities that occur in areas outside of CWA jurisdiction. Exemptions from CWA section 404 requirements are identified in the Corps regulations at 33 CFR 323.4 as:

“Discharges not requiring permits.”

Implied in this definition is that if these discharges were not exempt, and they occurred in an area within CWA jurisdiction, they would require a permit. This is also clear from the Corps regulations at 33 CFR 323.4 (a) (1) (ii) which states that:

“If an activity takes place outside the waters of the United States, or if it does not involve a discharge, it does not need a section 404 permit, whether or not it is part of an established farming, silviculture, or ranching operation.” (i.e. whether or not it is an exempt activity).

That is, considering whether an activity is exempt from obtaining a CWA authorization is only relevant in areas within CWA jurisdiction, as an activity that takes place completely outside of CWA jurisdiction (i.e. no discharge to an area within CWA jurisdiction) would not require a CWA authorization regardless of whether or not it was an exempt activity. The fact that some of the Appellant’s activities may be exempt from CWA permit requirements does not pertain to whether the areas under consideration in this administrative appeal meet the definitions of areas within CWA jurisdiction in accordance with 33 CFR 328.3 (a) (1) - (7).

If the District concludes that the Primary and Secondary ditches are not within CWA jurisdiction as tributaries to a water within CWA jurisdiction, then the District must subsequently consider whether the Primary and Secondary Ditches are within CWA jurisdiction under other subsections of 33 CFR 328.3 (a) (1) - (7). In conducting this reconsideration the District must consider that the property has been enclosed by levees for many years prior to enactment of the CWA and determine if that has any effect on CWA jurisdiction of the Primary and Secondary ditches.

The District previously concluded that the Primary and Secondary ditches were within CWA jurisdiction as impoundments of water within CWA jurisdiction in accordance with 33 CFR 328.3 (a) (4). However, the District did not identify the basis of CWA jurisdiction that existed for the Primary and Secondary ditches prior to being impounded. In order to conclude that the Primary and Secondary ditches are waters within CWA jurisdiction in accordance with 33 CFR 328.3 (a) (4), the District must describe and justify the basis of CWA jurisdiction over those water before they were impounded (i.e. under what subsection of 33 CFR 328.3 (a) (1) – (7) was that water found to be within CWA jurisdiction prior to impoundment). If the District concludes that the Primary and Secondary Ditches are currently within CWA jurisdiction because they are an impoundment of waters that met the definition of waters within CWA jurisdiction prior to passage and/or implementation of the CWA, the District must explain why the historical status of those waters is relevant to the current determination of CWA jurisdiction.

If the District tentatively concludes that the Primary and/or Secondary ditches are isolated waters within CWA jurisdiction under 33 CFR 328.3 (a) (3), in accordance with the Environmental Protection Agency (EPA)/Department of the Army Joint Memorandum of January 15, 2003 (Appendix A to the Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of “Waters of the United States” – Federal Register Vol. 68, pages 1995 – 1998) the District must seek formal project-specific Corps Headquarters approval prior to asserting CWA jurisdiction on that basis.

The District concluded that the wetlands on the property met the definition of wetlands in accordance with the 1987 Wetland Delineation Manual. The Appellant concluded that

any wetlands bordering the Primary or Secondary ditches were the result of artificial irrigation water and should therefore be excluded from CWA jurisdiction. The District and the Appellant agree that substantial irrigation of agricultural fields occurs on the property, and that water from the agricultural fields, as well as from other sources, collects in the Primary and Secondary ditches. The Corps 1987 Wetland Delineation Manual, Section F, Atypical Situations, Subsection 4, Man-Induced wetlands provides procedures for evaluating whether a man-induced wetland should be considered a wetland for purposes of the CWA. This portion of the manual also states that:

“If hydrophytic vegetation is being maintained only because of man-induced wetland hydrology that would no longer exist if the activity (e.g. irrigation) were to be terminated, the area should not be considered a wetland.”

The District has also issued specific policy guidance memos regarding man-induced wetlands including Sacramento District Regulatory Branch Memo 2003-04 “Irrigated” Wetlands, and Sacramento District Regulatory Branch Memo 2004-03 “Leaky Ditch” Wetlands.

The administrative record did not clearly evaluate whether the wetlands bordering the Primary or Secondary ditches might be maintained solely by irrigation, and therefore did not meet the criteria to be considered wetlands within CWA jurisdiction in accordance with the 1987 Wetland Delineation Manual. The District must reconsider its conclusion that hydrophytic vegetation would grow adjacent to the Primary and Secondary ditches under normal circumstances and that areas bordering the ditches meet the definition of wetlands in accordance with the Corps regulations and the 1987 Wetland Delineation Manual. The District must consider its Sacramento District Regulatory Branch Memo 2003-04 “Irrigated” Wetlands, and Sacramento District Regulatory Branch Memo 2004-03 “Leaky Ditch” Wetlands, and specifically address how it considered these internal policy guidance documents in determining whether wetlands within CWA jurisdiction were present. The District must also consider the new information provided at the appeal meeting that stormwater and irrigation runoff from the golf course northeast of the property, and possibly a ponded area north of the project site, also flow to the Primary ditch.

Information Received and its Disposition During the Appeal Review: The Division evaluated this appeal based on the Appellant’s request for appeal, the District’s administrative record, clarification of the administrative record at the appeal conference including the Review Officer’s appeal meeting summary, and the following submittals:

1. Appellant’s Supplemental Brief of March 8, 2005 describing the Appellant’s evaluation of federal court decisions relevant to the current administrative appeal.
2. Sacramento District’s March 1, 2005 e-mail transmitting *United States of America v. The New Portland Meadows, Inc.*, 2002 U.S. Dist LEXIS 19153 (D. Or. 2002) and *United States of America v. Adam Bros. Farming In., et al.*, C.D. Cal. Case No. CV 00-07409 CAS (Dec 8, 2003 Findings of Fact and Conclusions of Law re: Clean Water Act Jurisdiction).

3. BTRD representative Chris Neudeck provided new information at the appeal meeting that stormwater and irrigation runoff the golf course northeast of the project discharged into the Primary ditch and subsequently to Bishop Cut. In accordance with 33 CFR 331.7(e)(6) this new information could not be considered during the administrative appeal. This new information will be considered during the District's reconsideration of its CWA jurisdictional determination.
4. The District stated that it observed a ponded area north of the property in its March 1, 2005 email that it believed provided additional water to the Secondary ditch. The Appellant provided an alternative interpretation of that site in its March 18, 2005 e-mail. Both e-mails were considered new information in regard to the ponded area, and the District must consider the materials provided by the Appellant in its reconsideration of this action.

Conclusion: The District did not sufficiently document its conclusions regarding its basis for CWA jurisdiction over the Primary and Secondary ditches. The District must reconsider and further document whether or not the Primary and Secondary ditches meet the definition of areas within CWA jurisdiction in accordance with the definitions in 33 CFR 328.3 (a) (1) – (7). However, since 33 CFR 328.3 (a) (1) – (7) contains several independent definitions of waters of the United States within CWA jurisdiction, the District must only identify that the Primary and/or Secondary ditches meet one of those definitions in order to appropriately conclude that the ditches are within CWA jurisdiction. That is, the District could agree with some of the Appellant's reasons for appeal, yet still find that the Primary and Secondary ditches are within CWA jurisdiction under one of the definitions of waters within CWA jurisdiction at 33 CFR 328.3 (a) (1) – (7).

original signed by

Joseph Schroedel
Brigadier General, U. S Army
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