

# ATTACHMENT A: APPEAL DECISION DOCUMENT

## ADMINISTRATIVE APPEAL DECISION COSTCO SYRACUSE WAREHOUSE PROPERTY APPROVED JURISDICTIONAL DETERMINATION SACRAMENTO DISTRICT SPK-2023-00753

**Division Engineer:** Colonel James Handura, South Pacific Division<sup>1</sup>

**Review Officer:** Travis Morse, South Pacific Division

**Appellant/Applicant:** Mr. Joon Kim, Costco Wholesale Corp.

**Regulatory Authority:** Section 404 of the Clean Water Act (33 USC 1344 *et seq.*)

**Date Acceptable Request for Appeal Received:** March 29, 2024

**Date of Appeal Meeting:** June 6, 2024

**Summary of Appeal Decision:** This appeal concerns a decision by the Sacramento District regarding regulatory jurisdiction over an 18.9-acre wetland known as Wetland 1, situated on a 32.7-acre Property west of 3000 West in Syracuse, Davis County, Utah, between 1700 South and 2700 South, under Section 404 of the Clean Water Act (CWA).<sup>2</sup> The District determined Wetland 1 to be an adjacent wetland subject to its regulatory authority under the CWA.

On March 29, 2024, the South Pacific Division (SPD) received a Notification of Administrative Appeal Options and Process and Request for Appeal (NAO/NAP) form submitted by Costco Wholesale Corp. (the Appellant). The Appellant challenged the District's decision through the administrative appeal process.<sup>3</sup> The appeal asserts two main points: that the District misinterpreted the U.S. Supreme Court's ruling in *Sackett v. U.S. Environmental Protection Agency* (*Sackett*) regarding what constitutes a Water of the United States (WOTUS); and, that the decision contradicts pre-2015 regulations and guidance on CWA jurisdiction criteria.

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<sup>1</sup> Pursuant to 33 CFR 331.3(a), the Division Engineer has the authority and responsibility for administering the administrative appeal process. While the Review Officer served to assist the Division Engineer in reaching and documenting the Division Engineer's decision, the Division Engineer made the final decision on the merits of this specific appeal. The District Engineer retains the final Corps decision-making authority for the approved jurisdictional determination.

<sup>2</sup> AR 002-042. The AJD also concluded that 1,064 linear feet (0.05 acre) of irrigation ditch is not jurisdictional under the CWA, to which the Appellant has no dispute.

<sup>3</sup> See 33 CFR 331 *et seq.*

The Appellant argues that Wetland 1 does not meet the criteria of being 'adjacent' to a WOTUS as defined in *Sackett*, contending that the distance and chain of features between Wetland 1 and the Great Salt Lake (GSL) are too distant and tenuous to establish a 'continuous surface connection.' The appeal also challenges that the AJD lacks evidence and does not comply with the pre-2015 regulatory definitions or guidance to establish that a wetland is 'adjacent.'

The administrative record (AR) failed to demonstrate compliance with applicable policy, regulations, and guidance, and was found inadequate to support the AJD. The District did not document its considerations and disagreements with the Appellant's submissions, misapplied regulatory definitions, and failed to coordinate its decision with the local EPA region. These are deemed essential steps in making a valid jurisdictional determination. Without indication of procedural compliance nor sufficient documentation of its conclusions, the District's decision on CWA jurisdiction lacks foundation.

In sum, the reasons for appeal have merit, and therefore, the AJD is remanded to the District for reconsideration. The District must thoroughly review its decision to ensure accurate and sufficient information and analysis are included in the AR. It should document disagreements with the Appellant's submissions, conduct necessary evaluations, and detail its findings. Finally, the District must abide by the applicable policy and coordination requirements before finalizing its determination.<sup>4</sup>

**Information Received and its Disposition During the Appeal:** The administrative appeal was evaluated based on the District's administrative record (AR), the Appellant's Request for Appeal (RFA), and discussions at the appeal meeting with the Appellant and the District.

The AR is limited to information contained in the record as of the date of the Notification of Administrative Appeal Options and Process form (*i.e.*, January 30, 2024).<sup>5</sup> No new information may be submitted to support an RFA and, therefore, neither the Appellant nor the District may present new information to the Appeal Review Officer (RO).<sup>6</sup> 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 AR, because the District Engineer did not consider it in making the decision on the AJD. However, 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.<sup>7</sup>

A general account of the timeline and information received during this appeal review and its disposition is as follows:

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<sup>4</sup> [https://epa.gov/system/files/documents/2023-10/2023-joint-coordination-memo-pre-2015-regulatory-regime\\_508c.pdf](https://epa.gov/system/files/documents/2023-10/2023-joint-coordination-memo-pre-2015-regulatory-regime_508c.pdf).

<sup>5</sup> AR 004-005.

<sup>6</sup> See 33 CFR 331.2.

<sup>7</sup> See 33 CFR 331.7(f).

1. On March 29, 2024, SPD received the request for appeal (RFA) dated March 29, 2024.
2. On April 3, 2024, SPD notified the Appellant that the RFA met the required criteria for an administrative appeal.
3. On April 3, 2024, the RO requested that the administrative record (AR) be provided to all parties no later than April 18, 2024.
4. On April 11, 2024, the District provided a copy of the AR to the RO and the Appellant.
5. On April 16, 2024, the RO approved the District's request to provide an amended copy of the AR no later than April 24, 2024.
6. On April 23, 2024, the District provided an amended copy of the AR to the RO and the Appellant. The AR is limited to information contained in the record by the date of the NAO/NAP form. In this case, that date is January 30, 2024.
7. On June 6, 2024, the RO conducted an informal meeting and visited the Property with the Appellant and the District. During the meeting, the District provided two amendments to the AR, included as Appendix D to the Appeal Meeting MFR.
8. On June 11, 2024, the RO provided a draft Memorandum for Record (MFR) to the Appellant and the District. Comments on the draft MFR, which were received from the District and the Appellant, were used to update the final MFR, dated June 17, 2024.
9. The District cited training it received in October 2023, which cited both *United States v. Cundiff*, 555 F.3d 200 (6<sup>th</sup> Circuit 2009) and prior EPA/DOJ practice during the appeal meeting as legal basis for its AJD and further referenced, in its responses to agenda items attached to the appeal meeting MFR as Appendix C, training and guidance given to the District and to the Public and provided the Appellant a single-page printout of a presentation it cited as providing instruction that non-jurisdictional features can provide a CSC. The Appellant included with its written responses to agenda items a rebuff to the District's comparison of its circumstances to *Cundiff* on June 12, 2024, which is attached to the Appeal Meeting MFR as Appendix B.

**Evaluation of the Appellant's Reason for Appeal, Findings, and Instructions to the District Engineer.** The review is limited to whether the District examined the relevant data and articulated a satisfactory explanation for its action including a rational connection between the facts found and the decision made. The reason for appeal below is based on the Appellant's RFA but has been rephrased to clearly describe the findings that must be made regarding this appeal. Because the Appellant reasons overlap and the pertinent matters are intertwined, *i.e.*, implementation of the pre-2015 regulatory regime consistent with *Sackett*, both reasons for appeal were considered together.

**Reason for Appeal:** The AJD is inconsistent with *Sackett v. EPA* and contrary to the pre-2015 regulations and Corps guidance.

**FINDING:** This reason for appeal *DOES HAVE MERIT*.

**DISCUSSION:** The March 29, 2024, Request for Appeal (RFA) argues that the District's AJD is flawed for several reasons: it claims the AJD is arbitrary, lacks evidence, contradicts legal precedents, and violates regulations and guidelines. The RFA raises concern about the District's handling of the AJD process, noting delays and inadequate consideration of contradictory evidence.<sup>8</sup> It points out that the District withdrew the initial AJD request due to insufficient information, later reopening it after receiving additional documentation. The District's request for information also informed the Appellant that the request for an AJD had been administratively withdrawn for lack of information.<sup>9</sup> This process, according to the Appellant, was inconsistent and lacked transparency.<sup>10</sup>

According to the RFA and discussions during the appeal meeting, the Appellant asserts that Wetland 1 does not meet the criteria to be considered an "adjacent wetland" and is, therefore, not jurisdictional. They argue that Wetland 1 is distinct from other Waters of the United States (WOTUS), it does not have a continuous surface connection (CSC) to the GSL, and that there is no relatively permanent flow from Wetland 1 to the GSL.

The RFA disputes that the flow path identified by the AJD is an incorrect and indirect tie to WOTUS through non-jurisdictional features, asserting that the District failed to prove a connection, hydrologic or physical, between Wetland 1 and the GSL. The Appellant clarified during the appeal that the culverts identified by the AJD lead to an underground irrigation pipeline running along the western side of the property, terminating south and west before reaching visible water.<sup>11</sup> The complaint includes that the AR does not contain meaningful consideration of distance between Wetland 1 and another water nor an evaluation of how, or at what frequency, water moves between the Property and the GSL.<sup>12</sup>

The RFA references the 1986 regulatory definition of "adjacent wetlands," emphasizing that Wetland 1, separated from the GSL by approximately 2 miles and bordered by non-jurisdictional culverts and pipelines, does not meet the criteria for adjacency or barrier separation as per the regulatory guidelines.<sup>13</sup> The RFA contends that Wetland 1 does not qualify as an "adjacent wetland" under pre-2015 regulations because it directly borders non-jurisdictional concrete culverts leading to an underground irrigation pipeline, rather than directly touching a WOTUS. Further, the Appellant claims that it is

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<sup>8</sup> *E.g.*, Appeal Meeting MFR pp. 6-7; AR 116-122.

<sup>9</sup> AR 103-104.

<sup>10</sup> AR 002-003.

<sup>11</sup> AR 079.

<sup>12</sup> See discussion of adjacency and distance at 88 FR 3004, 3089 and 3132.

<sup>13</sup> See 33 CFR 328(c).

rare for water to leave the Property and unlikely that it would ever reach the GSL as surface flow.

The Appellant said that the AJD contradicts its Agent's jurisdictional opinions and that irrigation has caused wetland acreage to expand.<sup>14</sup> The AR contains an account of irrigation practices relative to site conditions at the Property.<sup>15</sup> The claim is that the only source of hydrology to the site is applied as irrigation, suggesting that any surface water reaching the culverts is entirely tailwater.<sup>16</sup> The RFA describes Wetland 1 as an artificially irrigated area that would revert to dry land without irrigation, stating that regulatory provisions indicate it should not be considered jurisdictional.<sup>17</sup> However, at the appeal meeting, it became apparent that neither party had considered the effects of irrigating the Property prior to issuance of the AJD, nor whether the wetland would cease to be a wetland if irrigation ceased. Further, the Appellant confirmed that it had not before reported that the disposition of the Property was atypical or problematic but said that the District should have caught the issue since the AR indicates that wetland acreage at the Property had grown more than four times what was delineated at the Property in 2019.<sup>18</sup>

**ACTION:** The issues above must be considered in the context of how regulatory districts determine the applicability of CWA jurisdiction. Pertinent to the matter at hand, CWA jurisdiction is based on physical criteria outlined by Corps regulation, guidance, and the Supreme Court, particularly focusing on the concept of CSC for wetlands to qualify as WOTUS. Districts are tasked with conducting AJDs as requested, documenting findings contextually, and issuing formal decisions concerning the applicability of the CWA to specific tracts of land.<sup>19</sup> While districts are directed to respond to requests in a timely manner, there is no statutory entitlement for applicants to receive an AJD, nor is there a regulatory requirement for districts to issue AJDs.

The pre-2015 regulatory regime refers to the pre-2015 definition of "waters of the United States," implemented consistent with relevant case law and as informed by applicable guidance. The pre-2015 definition of "waters of the United States" is also referred to as the Corps' 1986 regulations, inclusive of the exclusion for prior converted cropland, which was added in 1993.<sup>20</sup> However, the Supreme Court's decision in *Sackett* rejected the 1986 interpretation of adjacent and said that the plurality standard established in *Rapanos* is controlling; a CSC exists between a wetland and RPW where the wetland directly touches the tributary.<sup>21</sup> Under this regime, wetlands are jurisdictional if they

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<sup>14</sup> AR 119-120, "the site is over-irrigated ... wetlands are consequently a lot bigger."

<sup>15</sup> AR 122, 124-178.

<sup>16</sup> Appeal Meeting MFR p. 3; AR 069, 072, 076, 120, 132-134.

<sup>17</sup> *C.f.*, 33 CFR 328.3(b)(4).

<sup>18</sup> Appeal Meeting MFR pp. 3, 8-9; AR 107, "There are discrepancies between the two delineations ... 4.6 acre of wetlands ... versus 18.9 acres of wetlands[.]"

<sup>19</sup> See 33 CFR 320.1(a)(6); Regulatory Guidance Letter (RGL) 16-01.

<sup>20</sup> See 33 CFR 328.3 (2014).

<sup>21</sup> *Rapanos* Guidance, p. 7. The *Rapanos* plurality uses phrases like continuous physical connection to describe the CSC requirement, *e.g.*, *Rapanos*, 547 U.S. at 747, 751 n.13, 755.

have a CSC to covered waters such as traditional navigable waters or relatively permanent tributaries.

The Corps will assert jurisdiction over (in part) “relatively permanent non-navigable tributaries of traditional navigable waters and wetlands with a [CSC] with such tributaries.”<sup>22</sup> Districts are directed to implement CWA regulations consistent with *Sackett*, narrowing the definition of “adjacent” to wetlands that have a CSC with covered waters. CSC means a physical, rather than hydrologic, connection between wetlands and covered waters. This can be established by direct abutment or through discrete physical features like ditches, pipes, or culverts that maintain a continuous connection. *Sackett* does not require the agencies to prove that wetlands and covered waters are visually identical, but adjacent wetlands must have a CSC with covered waters to qualify as WOTUS and be “as a practical matter indistinguishable from waters of the United States ... so that there is no clear demarcation between ‘waters’ and wetlands.”<sup>23</sup>

The demonstration that wetlands have a CSC and so are indistinguishable is a fact-specific one. A CSC requirement can be met by a wetland abutting a jurisdictional water. Such evidence can suffice to meet the CSC requirement. Depending on the factual context, the requirement can be met when a culvert, pipe, or ditch (regardless of whether such feature would itself be jurisdictional) serves as a physical connection that maintains a CSC between an adjacent wetland and a relatively permanent water (RPW).<sup>24</sup> In contrast, wetlands with an adjacency relationship to a tributary where the relevant reach was non-relatively permanent, were considered under the significant nexus standard pre-*Sackett*, even if there was an RPW below the non-RPW relevant reach.

Still, non-relatively permanent ditches, pipes, and culverts are features that can serve as all or part of a CSC depending on the factual context, because these features often have physical indicators of flow (e.g., bed and bank and other indicators of an ordinary high water mark) that provide evidence that the features physically connect wetlands to jurisdictional waters including during storm events, bank full periods, and/or ordinary high flows. Depending on the factual context, including length of the connection and physical indicators of flow, more than one such feature can serve as part of a CSC where they together provide an unimpaired, continuous physical connection to a jurisdictional water.

The *Standard Operating Procedures for the U.S. Army Corps of Engineers Regulatory Program* (SOP) instruct staff to explain the rationale for the District's determination in the AR, disclose the data and information relied upon, and if applicable, explain what data or information received greater or lesser weight, and what professional judgment or assumptions were used in reaching the determination.<sup>25</sup> The District is to note which

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<sup>22</sup> Clean Water Act Jurisdiction Following the Supreme Court's Decision in *Rapanos v United States*, dated December 2, 2008, See p. 12.

<sup>23</sup> 598 U.S. at 678 (quoting *Rapanos*, 547 U.S. at 742, 755).

<sup>24</sup> 88 FR 3004, 3090.

<sup>25</sup> See SOP, p. 9.

specific aspect(s) of a submittal are not relied upon and state the reason why any such aspects were not relied upon. Documentation must provide a comprehensible foundation for the decision, explain gaps in the AR, and include logical argument to address inconsistent information.<sup>26</sup>

For questions regarding the geographic scope of CWA jurisdiction, such as in this instance, the EPA instructs District staff on how to make jurisdictional determinations that comply with *Sackett* according to an interagency agreement between the EPA, Department of the Army (Army), and Army Corps of Engineers (Corps).<sup>27</sup> According to the agreement, for the District to consider the jurisdictional status of adjacent wetlands, the District must coordinate its draft AJD with the EPA and the AR must reflect that such coordination occurred. To finish, District policy also identifies that coordination with EPA is required for certain AJDs.<sup>28</sup> The same District policy requires peer-review.

Relevant to this instance, on October 5, 2023, Corps Headquarters provided binding direction for its regulatory districts to copy it when coordinating wetlands with EPA that: (1) have a CSC but that are distant from RPWs; (2) have a potential connection to an RPW via an identifiable feature but there is no evidence that the identifiable feature provides a connection; or (3) is not abutting an RPW but is connected to a RPW by a discrete feature.<sup>29</sup>

There is no other relevant regulatory guidance or requirement mandating that a wetland have both a CSC and be practically indistinguishable to be 'adjacent.' Neither is there a policy for how to evaluate non-jurisdictional components as part of a CSC under the pre-2015 regulatory regime. There is no law, regulation, executive order, or officially promulgated Corps policy guidance that directs how to interpret court rulings or dictates the timeliness of AJD decisions. There is no practical experience to help understand how EPA would have the Corps implement in this instance. For example, as it pertains to this case, no guidance addresses the concept of whether a controlled-subsurface-pipeline can serve as part of a CSC for wetlands evaluated as paragraph (a)(7) adjacent wetlands.

Although the AR does contain evidence of irrigation and land management conducive to the expansion of wetland conditions, the effects of irrigation at the Property were never considered. The Appellant's argument is premature since no related analysis was requested or required. The Appellant can submit information supporting its contentions and request reconsideration of an AJD at any point and indicated during the appeal meeting that it will consider doing so.

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<sup>26</sup> See RGL 16-01; Questions and Answers for RGL 16-01, #8.

<sup>27</sup> [https://www.epa.gov/system/files/documents/2023-10/2023-joint-coordination-memo-pre-2015-regulatory-regime\\_508c.pdf](https://www.epa.gov/system/files/documents/2023-10/2023-joint-coordination-memo-pre-2015-regulatory-regime_508c.pdf)

<sup>28</sup> January 1, 2023, Sacramento District Regulatory Division Memorandum 2022-03.

<sup>29</sup> U.S. Army Corps of Engineers Regulatory Headquarters. Email dated October 5, 2023, "WOTUS Implementation: Jurisdiction SharePoint Updates, New Coordination Memo Templates/Inboxes, and Update to Web Posting Procedures."

Examination of the Appellant's version of events against the AR confirms that the District completed the AJD and notified the Appellant of its findings on January 30, 2024.<sup>30</sup> In its transmittal, the District noted its concurrence with the September 10, 2023, Wetland Delineation Results map prepared by the Agent that identified 18.95 acres of aquatic resources, consisting of an 18.9-acre wetland and a 0.05-acre irrigation ditch at the Property.<sup>31</sup> The District concluded that the Wetland 1 is jurisdictional under Section 404 of the CWA, and that the irrigation ditch is not.

The AR does not contain a draft AJD; only a copy of the final, which concluded that Wetland 1 is adjacent to an unnamed relatively permanent tributary to the GSL and is jurisdictional as a paragraph (a)(7) adjacent wetland under the 1986 regulations, consistent with the *Rapanos* plurality and *Sackett* decision under the pre-2015 regulatory regime.<sup>32</sup> The District provided supporting documentation with the AJD letter, consisting of four enclosures: a location map, a map depicting aquatic resources at the Property, a standardized memorandum for record (MFR) to document the basis for its jurisdictional findings, and a NAO/NAP form.<sup>33</sup> The MFR references but does not identify the relevance of the Appellant's submittal or explain any instance where the District only partially relied on the data source. The AR does not indicate that the local EPA region or Corps HQ was briefed of this action or the District's intention to assert.

The MFR identifies the aquatic resources reviewed and the District's assessment for CWA jurisdiction by the relevant category of WOTUS under the pre-2015 regulatory regime consistent with *Sackett* and provides basis for its findings.<sup>34</sup> The AR says that Wetland 1 is separated from the nearest navigable body of water, the GSL, by about two miles. The same wetland is also separated by about 0.75-mile from the next closest body of water, *i.e.*, the unnamed ditch identified in the AJD as an RPW tributary to the GSL. The AR establishes that the only water that ever falls on the Property is through rain or irrigation, there is no permanent presence of water anywhere on the Property, and that the only connection is through rainfall or irrigation flow that will enter the culverts. The District speculates that any flows entering the culverts will eventually flow into the GSL. The AR states, and the site visit confirmed, Wetland 1 does not physically touch an RPW and any flow of water between the Property and the GSL is less than permanent. The District does not claim that Wetland 1 abuts an RPW. The District claims that Wetland 1 is adjacent, indirectly, to an RPW since it abuts two non-jurisdictional culverts that connect to an underground pipeline.

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<sup>30</sup> AR 002-003

<sup>31</sup> AR 002; 007.

<sup>32</sup> AR 002-042. The AJD also concluded that 1,064 linear feet (0.05 acre) of irrigation ditch is not jurisdictional under the CWA, to which the Appellant has no dispute.

<sup>33</sup> AR 004-042.

<sup>34</sup> The "pre-2015 regulatory regime" refers to the pre-2015 definition of "waters of the United States," implemented consistent with the Supreme Court's decision in *Sackett v. Environmental Protection Agency*, 598 U.S. 651 (2023).



During the site visit, the Appellant cast doubt on the validity of the jurisdictional claim by providing testimony that the flow path identified by the AJD is mistaken.<sup>35</sup> The Appellant explained the blue outfall pipes depicted in the AR do not connect to the concrete culverts identified by the AJD.<sup>36</sup> Rather, the claim is that the concrete culverts connect to a below-ground pipe that is managed to deliver irrigation water to agricultural lands via turnouts that are controlled by above-ground screw-gates.<sup>37</sup> The Appellant said that water can be discharged from the underground pipeline to the subject tributary to the GSL through a maintenance valve used to flush sediment into the open-ditch.

The inclusion of these features along a less than permanent flow path to a TNW would have required a significant nexus pre-*Sackett*; however, during the appeal meeting, the District clarified that it did not rely on a significant nexus and stated its position that the Supreme Court did not stipulate in *Sackett* when or how non-jurisdictional features (non-RPWs) can or cannot be used as part of a CSC.<sup>38</sup>

The AR shows that the District requested more information and withdrew the request for AJD in the same letter.<sup>39</sup> Contrary to the claim of the District, it is not standard procedure to request information on an action and simultaneously withdraw the action.<sup>40</sup> To do so is unfair. Other than at the request of the requester, the District should only withdraw a request for AJD as result of non-responsiveness to requests for information.<sup>41</sup> The District is to include a time limit with requests for additional information and, in those cases where information is not provided, close out the action as would be done in the case of permit.<sup>42</sup>

The MFR concludes that Wetland 1 satisfies the jurisdictional definition for a water of the United States as an adjacent wetland having a CSC to a TNW.<sup>43</sup> The determination of adjacency and basis for asserting jurisdiction are due to the presence of an alleged approximately 2-mile CSC between Wetland 1 along an approximately 0.75-mile flow path to downstream waters consisting of two abutting concrete culverts and a buried irrigation pipe to an open channel that is tributary to the GSL.<sup>44</sup> The MFR does not explain how often water flows from Wetland 1 into the concrete culverts identified by the AJD. The AR does not include explanation for the respective jurisdictional conclusions of each discrete feature claimed as part of the CSC.

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<sup>35</sup> Appeal Meeting MFR p. 13. The City Engineer said that the blue outfall pipe depicted in the AR does not connect to the Property.

<sup>36</sup> AR 019.

<sup>37</sup> Appeal Meeting MFR p. 13. A control box shown to the right of the blue pipe controls the delivery of irrigation water through an underground pipeline that connects to the concrete culverts identified by the AJD.

<sup>38</sup> AR 010, 028; Appeal Meeting MFR p. 6, item 2b. and Appendix D.

<sup>39</sup> AR 078; 103-104, 116, 119.

<sup>40</sup> Appeal Meeting MFR pp. 9-10; See AR 064. Duplicates at 068, 071.

<sup>41</sup> 12513-South Pacific Division Regulatory Program Pending Regulatory Actions Withdrawal and Closure Procedures. Revised December 20, 2022.

<sup>42</sup> See 33 CFR 325.2(d)(5).

<sup>43</sup> AR 011, 028. See, 51 FR 41250, published November 13, 1986; 33 CFR 328.3(a)(7).

<sup>44</sup> AR 011.

The District said that its evaluation is grounded on information provided by the Appellant, including aerial records, the National Hydrography Dataset (NHD), and Layton Canal Company irrigation pipeline location and flow data.<sup>45</sup> The MFR lists “aerial photographs, LiDAR, and street view records” among the data sources referenced by the District.<sup>46</sup> None of the resource figures depict surface drains near the Property; however, the AR includes aerial photographs depicting a flow path drawn between Wetland 1 and the GSL.<sup>47</sup> In the AR and during the site visit, the District identified two blue pipes discharging to an open channel (*i.e.*, the “relatively permanent channel, first-order stream”) as proving a connection between Wetland 1 and the RPW.<sup>48</sup> The District explained that time-series aeriels together with other remote data were used to establish that the open-channel has relatively permanent flows.

In response to questions posed by the Review Officer, the District said that it was instructed through training that non-RPWs could indeed provide a CSC.<sup>49</sup> The training provided to the district reads, “Wetlands also have a [CSC] when they are connected to a jurisdictional water by a discrete feature like a non-jurisdictional ditch, swale, pipe, or culvert (per pre-2015 case law, see *United States v. Cundiff* (2009), and prior EPA practice).” In its responses to the Agenda items at Appendix C to the MFR, the District construed the legal case as inferential to this appeal and supportive of the District’s position.<sup>50</sup> The AR does not cite *Cundiff* despite the District’s claim that the decision governs in this instance.

In this appeal, there is considerable disagreement over whether the features in this area, the non-jurisdictional features that are said to provide connection of this property to the TNW, are sufficient to establish a CSC for jurisdiction. The Appellant’s view that CWA jurisdiction should be narrower post-Sackett is plausible in this situation because Wetland 1 does not directly touch another water. The hard question is what qualifies as a CSC connection and, when such a connection exists, where the connected wetland stops being “indistinguishable” from the jurisdictional water. In recognition of uncertainties related to implementing the pre-2015 regulatory regime consistent with *Sackett*, the District was required to coordinate its AJD with the EPA. Additionally, the District was required to copy its Headquarters to such coordination prior to rendering the AJD. The AR reveals that the District did neither. Since the District did not follow promulgated policy requiring it to coordinate its AJD, the jurisdictional status of Wetland 1 under the CWA remains a question.

The District erred by not considering or documenting the Appellant’s information. The District never shared any disagreement with the Appellant’s submittals but concluded the opposite of what the Agent opined and subsequently relayed in correspondence to

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<sup>45</sup> AR 014.

<sup>46</sup> AR 012-015

<sup>47</sup> AR 020-026.

<sup>48</sup> AR 019.

<sup>49</sup> [https://www.epa.gov/system/files/documents/2023-11/wotus-overview\\_tribes-and-states\\_11-15-23\\_508.pdf](https://www.epa.gov/system/files/documents/2023-11/wotus-overview_tribes-and-states_11-15-23_508.pdf). See slide 48.

<sup>50</sup> *Id.* The training instructs regulatory districts to coordinate jurisdiction with EPA. See slide 37-38.

the District.<sup>51</sup> While there may be situations where a CSC is maintained despite a minor subsurface interruption, the AR does not support how non-relatively permanent flows through a belowground communal irrigation delivery pipeline qualifies as a CSC. The District has not put forth specific facts to rebut the Appellant's showing and has created a factual dispute as to whether a CSC exists between Wetland 1 and the GSL. In this instance, a cursory explanation of the flow path is inadequate.

The AR includes a request from the District that appears superficial.<sup>52</sup> The District's request for information that seems easily accessible or unnecessary, coupled with its unilateral withdrawal of a pending action, appears arbitrary.<sup>53</sup> The unpredictability and inconsistency in decision-making processes appear burdensome to the Applicant.

The District should limit any request for information to the types of information that cannot be easily obtained through a standard desk review of reports submitted by the requestor and standard GIS data such as Google Earth, NHD, NWI, and soil survey information, or easily produced, such as the request for two entries on an ORM upload sheet.<sup>54</sup> The District could have easily gleaned this information from the Appellant's submittal but did not do so. The District has at its disposal a variety of remote tools and technology that reasonably compare to the functional equivalent of a site visit but did not use them.

Beyond the Appellant's contention that there is no connection, the tacit implication from a desktop review is that there is no flow path from the Property; however, the District asserts there is based on an inferred and indirect flow path traced on aerials.<sup>55</sup> The District's characterizations are not in accordance with applicable guidance, nor are its associated inferences reasonable or supported in the AR. The District's assertion that Wetland 1 is an "adjacent wetland" is the result of its non-compliance with policy and a misapplication of the current regulatory criteria. Applying the rules to the pertinent facts at hand, wetlands have a CSC when they physically touch (*i.e.*, abut) a jurisdictional water, or when they are connected to a jurisdictional water by a discrete feature like a swale, ditch, or culvert. Consequently, as a category of WOTUS, adjacent wetlands include only wetlands that directly abut an RPW that flows directly or indirectly into a TNW.<sup>56</sup> In effect, the District misrepresents that Wetland 1 meets the (a)(7) category "since it directly abuts two culverts that have a [CSC] to the GSL."<sup>57</sup>

The AR does not show that peer-review worked correctly in this instance and belies that the District was unaware that coordination is mandatory.<sup>58</sup> Notwithstanding Corps

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<sup>51</sup> See AR 065, 069-070, 072, 076, 119-120, 122, and 134.

<sup>52</sup> Appeal Meeting MFR, pp. 9-10.

<sup>53</sup> AR 119, the District said that the Appellant's submittal had been "missed by the folks that manage the general inbox." See also, *e.g.*, AR 120-124.

<sup>54</sup> See AR 074-075.

<sup>55</sup> AR 020-026, *c.f.*, narrative at AR 010.

<sup>56</sup> AR 011, 028. See 51 FR 41250, published November 13, 1986; 33 CFR 328.3(a)(7).

<sup>57</sup> AR 004.

<sup>58</sup> See, *e.g.*, AR 046-047, 054, 060.

policy, District policy, training, and internal direction to coordinate its draft with EPA, the AR does not demonstrate that coordination occurred. In fact, the District acknowledged it should have coordinated its draft AJD with the EPA but was unable to explain why it failed to do so.<sup>59</sup> To the question of coordination with EPA in accordance with the memo, the District appears to conclude that coordination in this instance was “discretionary” on the part of the District.<sup>60</sup> If this was the conclusion of the District, such was in error. The September 27, 2023 coordination memo between the EPA and USACE makes clear that at the time of this AJD, any Draft AJD based upon (a)(7) of the 1986 rules “shall be coordinated at the local level in accordance with the procedures in this memorandum.”<sup>61</sup> The District had several months’ time to engage with the local EPA region under the Coordination Memo; however, staff jettisoned the direction of internal reviews to coordinate and, in doing so, ignored an interagency agreement altogether. For the District to assert and issue a final AJD asserting CWA jurisdiction — while not submitting a draft AJD to EPA for coordination/consultation in accordance with standing policy — indicates that the District made a clear error of judgment when it issued the final AJD. The failure to coordinate its draft led to inconsistencies and inaccuracies in its determination, particularly concerning what constitutes an “adjacent wetland” and the requirements for a CSC under the CWA.

**CONCLUSION:** The AR fails to demonstrate that Wetland 1 has a CSC to an RPW, the District misinterpreted the definition of ‘adjacent’ consistent with *Sackett*, the District’s identification of a CSC is contrary to fact, and the process used by the District is inconsistent with officially promulgated policy. In making this assessment, the District made a clear error in judgment by not complying with policy despite incongruence noted by peer-review. The District’s failure to follow procedures is an error that must be addressed before the District can issue an AJD.

The District made a clear error in judgment by not considering and documenting its consideration of information provided by the Appellant. In the absence of sufficient information to document the District’s conclusions and because there is conflicting information provided by the Appellant in the AR, the District’s determination of CWA jurisdiction is unfounded. The District must reconsider all important parts of its decision to guarantee that the AR consists of accurate or sufficient information, or analysis. The District must document its disagreement with all pertinent information submitted by the Appellant, all necessary evaluation should be performed, and all findings should be reported in detail.

The jurisdictional status of Wetland 1 should be re-evaluated and coordinated with EPA. The District determined Wetland 1 is an adjacent wetland because it abuts two culverts that connect to an underground pipeline that discharges to an RPW tributary to the GSL. If upon remand, these waters and features are determined to be covered by the CWA, specific supporting information, including information regarding the respective

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<sup>59</sup> Appeal Meeting MFR, p. 11, item 6.

<sup>60</sup> AR 046.

<sup>61</sup> See “Joint Coordination Memorandum to the Field between the U.S. Department of the Army, U.S. Army Corps of Engineers (Corps) and the U.S. Environmental Protection Agency (EPA),” dated September 27, 2023.

jurisdictional status of features serving as part of a CSC and how this comports with applicable rules, regulation, and policy, should be provided in the draft AJD. If upon remand, the District identifies that the culvert and irrigation pipeline cannot serve as part of a CSC, the other aspects of the flowpath do not need to be evaluated to determine if they can serve as part of a CSC.

The District need not limit its reexamination of the AJD to the issues identified by this decision. The District is free to gather additional data or request additional information as it thinks this decision dictate. Likewise, the Appellant has the right to submit additional evidence or argument on the matter. If new and material evidence is presented, the District must review and document the disposition of the Property, document any disagreement using memoranda to the file, and coherently explain the rationale for its actions.

After completion of the above and any additional development of the evidence that the District may deem necessary, the District should develop the AR in conjunction with rendering the requested AJD; however, if the District again proposes to assert its regulatory jurisdiction, the District is specifically asked to consider whether Wetland 1 is irrigation-induced.<sup>62</sup> Entitlement to reconsideration of the wetland boundary confirmation is an inferred issue in the context of this appeal that must be considered when the record indicates that it should have done so. If the District is unable to provide an opinion regarding any aspect of its determination without resorting to speculation, the District must logically explain why in anticipation that its decision will be challenged and subjected again to administrative review.

In sum, I find that the District's decision on relevant matters was arbitrary, capricious, not compliant with officially promulgated policy, counter to regulatory definitions and guidance, and not supported by substantial evidence in the AR. This is the final decision of the Division Engineer on the merits of the appeal and concludes the administrative appeal process. Authority to make the final Corps decision on the jurisdictional determination resides with the Sacramento District Engineer pursuant to this remand. The District Engineer shall, upon reconsideration of this appeal as indicated, provide the final Corps decision to the Division Engineer and Appellant. This concludes the administrative appeal process.

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James J. Handura  
Colonel, U.S. Army  
Commanding

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<sup>62</sup> See, e.g., Chapter 5 of the Arid West Supplement; 88 FR 3116.