

**ADMINISTRATIVE APPEAL DECISION  
CLEAN WATER ACT  
YOLO 16  
YOLO COUNTY, CALIFORNIA  
SACRAMENTO DISTRICT  
File Number SPK-2010-00101**

**DATE: February 22, 2018**

**Review Officer:** Thomas J. Cavanaugh, U.S. Army Corps of Engineers (Corps), South Pacific Division, San Francisco, California

**Appellant Representative:** Kenneth Russo, Caltrans (Appellant)

**District Representative:** Will Ness, U.S. Army Corps of Engineers, Sacramento District (District)

**Authority:** Clean Water Act (33 U.S.C. 1344)

**Receipt of Request for Appeal:** June 1, 2017

**Appeal Meeting and Site Visit Date:** August 16, 2017

**Summary of Decision:** The reason for appeal of this Clean Water Act (CWA) jurisdictional determination does not have merit. The District has supported its determination that AGDI-6 is a Relatively Permanent Water (RPW) that flows “seasonally”. The District’s jurisdictional determination is, therefore, consistent with the joint Corps/EPA guidance, dated December 2, 2008, “Clean Water Act Jurisdiction Following the Supreme Court Decision in Rapanos v. U.S. and Carabell v. U.S.” (Rapanos Guidance). The District’s decision is upheld and no further action is required.

**Background Information:** The (Property) is located near Madison, California, along State Route 16, between County Roads 89 and 90, Latitude 38.681009°, Longitude -121.961298°, Yolo County, California.

For purposes of evaluation during the CWA jurisdictional determination, the District evaluated the site using the August 3, 2016, “Waters Delineation Map (updated), Yolo 16 Safety Improvement Project, Location 3”; the 1987, Corps of Engineers Wetlands Delineation Manual (87 Manual); the Code of Federal Regulations (CFR) definitions of jurisdictional waters; and supporting guidance.

The District’s review included a field visit to the site on June 24, 2016. On April 28, 2017, the District issued its CWA jurisdictional determination for the Property at issue. The District concluded that the site contained approximately 0.64 acres of waters of the United States

(AGDI-6), including wetlands, within the survey area. The District determined that these waters are regulated under Section 404 of the Clean Water Act. The District's basis for its determination was detailed in its "Approved Jurisdictional Determination Form" dated April 27, 2017.

The Appellant submitted a Request for Appeal (RFA) on May 30, 2017. The Appellant disagreed with the District's conclusion that the 0.64 acres on the property are waters, subject to jurisdiction under Section 404 of the Clean Water Act. The Appellant asserted that AGDI-6 is a drainage ditch constructed in uplands that falls into a category of waters, generally not considered to be waters of the United States.

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

**INFORMATION RECEIVED AND ITS DISPOSAL DURING THE APPEAL REVIEW:**

The administrative appeal was evaluated based on the District's administrative record, the Appellant's Request for Appeal, and discussions at the appeal meeting with the Appellant and the District.

**REASON 1:** AGDI-6 is a highly maintained and manipulated, man-made roadside ditch that has never been a natural feature. It is a drainage ditch constructed in uplands that falls into a category of waters, generally not considered to be waters of the United States.

**FINDING:** This reason for appeal does not have merit.

**ACTION:** The District's decision is upheld and no further action is required.

**DISCUSSION:** In the RFA, the Appellant asserted that AGDI-6 is a drainage ditch constructed in uplands that falls into a category of waters, generally not considered to be waters of the United States.

The Appellant pointed out that, in Section 111.B.1.(ii)(b), the District checked the box for General Tributary Characteristics (Manipulated) and that the District stated that the source of water for AGDI-6 is stormwater runoff from SR 16 and irrigation water from adjacent agricultural fields.

The Appellant asserted that the statement, in Section 111.B.1.(ii)(c), other information on duration and volume, that during the June 24, 2016 site visit with Caltrans, the ditch was observed flowing into South Fork Willow Slough (SFWS), is incorrect. The Appellant asserted that water that was apparent in AGDI-6 was the result of directional flow coming from SFWS. The Appellant stated that the slough crossing under SR16 was extremely choked with cattail, reeds, and blackberry shrubs, enough to cause water in SFWS to back up into AGDI-6, not flow from AGDI-6 into SFWS as depicted in the AJD.

The Appellant disagreed with the District's assertion in, Section 111.B.1, (ii)(c): Surface flow is, that the OHWM was observed to be 10' throughout the length of AGDI-6, with a depth of 3-4'. The Appellant asserted that, during the site visit, when the OHWM conversation took place, the

10' OHWM observation discussion actually happened while the Caltrans staff and USACE were standing on the opposite side (south side) of SR 16 and west of AGDI-6 where SFWS crosses under SR 16. At this location, the OHWM was approximately 10' and had substantial water/flow, but has no connection to AGDI-6

Additionally, it is Caltrans' belief that any OHWM depicted in the AJD is a result of the backflow of water from SFWS into AGDI-6, and not the result of waters flowing from AGDI-6 into SFWS as described in the AJD.

The Appellant asserted that, while the District indicated, in Section 111.B.1.(ii)(c), that flow was observed during the June 24, 2016 site visit, the water in AGDI-6 was the result of water flowing up and into AGDI-6, due to heavy vegetation in SFWS. The Appellant stated that water was not flowing from AGDI-6 into SFWS.

The Appellant noted that, in Section 111.D.2 of the AJD form, "Determination of Jurisdictional Findings: The Subject Waters/Wetlands Are", Tributaries of TNW where tributaries have continuous flow "seasonally", was selected by the District. The Appellant disagreed with the District's rationale, which states that AGDI-6 receives irrigation overflow from agricultural fields to the north. The Appellant objects to this conclusion, as they believe this to be an indication that the District is asserting jurisdiction over groundwater sources.

In Section IV.A, the Appellant noted that the District checked the box that states the "Office does not concur with data sheets/delineation report". The Appellant indicated that this caused confusion, as in the next section (sec IV.B. Additional Comments) the District referenced the results from the data sheets submitted with the original delineation report in 2010 and used its interpretation of the results to justify the jurisdictional call. The delineation discussion of the ditch (then called AGDI-19) stated that the ditch met the three characteristics of a wetland, as restated in the AJD discussion. The Appellant had asserted, for each feature, its "Rationale for Non-jurisdictional Determination" being, that though the ditch exhibits all three wetland criteria, the ditch is an agricultural ditch that has been part of ongoing farming practices since the late 1800s.

The Appellant indicated that, in the first paragraph of Section IV.B, the District references evidence obtained through Google Earth analysis, historic photography, and soil profiles to make the statement that the surrounding agricultural lands "under normal circumstances" would support wetland vegetation. The District concluded that, since AGDI-6 receives its water source from these fields, AGDI-6 drains land that would meet wetland criteria under "normal circumstances". The Appellant asserted that, under the current and past land use for this area, normal circumstances have not been present since the late 1800's, over 150 years ago.

In the second paragraph of that section, the District describes analysis of flow patterns and regimes that were observed through viewing Google Earth. The paragraph indicates that flow was observed on several dates throughout various seasons and years. In the "New and Additional" information package submitted by Caltrans, several Google Street View images were included that showed water in the western portion of the ditch and dry conditions in the eastern portion. The Appellant intended these images to demonstrate the difference between water flow and stagnant water, or a lack of flow into SFWS. The Appellant indicated that it

provided topographic profiles of AGDI-6 to demonstrate that water flowing into the ditch (from agricultural runoff or roadside runoff) may not necessarily flow into SFWS due to topographic peaks. The Appellant asserted that this information was discounted for various reasons, though its surveys throughout the late summer, early fall and winter of 2016 indicated no water at all was present in the referenced ditch. Further, the Appellant asserted that, though the past year was also a record rain year for the Central Valley, it never observed flowing water in the ditch. In the second to last paragraph of this section, the Appellant asserted that the District dismissed the above mentioned Google Street View images due to clarity of the point of view, angle changes, and vegetative cover. The Appellant asserted that current date of the Google Imagery is the same as the referenced attachments and that a quick observation through a live Google Earth Street View exercise could validate the Appellant's assertion that water doesn't necessarily flow into SFWS as often as described in the District's documentation. The final paragraph in this section makes reference to the field visit of June 24, 2016 and the flow observed by the Appellant and District staff of AGDI-6 into SFWS. The Appellant stated that it did not observe flow from AGDI-6 into SFWS, and actually observed the above mentioned flow from SFWS backing up into AGDI-6.

The District completed one Approved Jurisdictional Determination form (AJD form) for the Property.

In Section I.C of the AJD form, the District identified the Sacramento River as the nearest downstream TNW and the South Fork of Willow Slough as the nearest waterbody to the property. Section II.B of the AJD form indicates that there are "waters of the U.S." within Clean Water Act (CWA) jurisdiction, as defined by 33 C.F.R. § 328, in the review area. Section II.B.1.a of the AJD form indicates that the review area contains RPWs to TNWs. Section II.B.1.b indicates that there are 0.64 acres of non-wetland waters in the review area.

Section III.B.1 of the AJD form indicates that both the watershed and drainage area of AGDI-6 is 83 acres and that the average annual rainfall in the area is 21.8 inches. Further, it is indicated that there are 6 tributaries between AGDI-6 and the Sacramento River. AGDI-6 flows to the South Fork Willow Slough (SFWS), to Willow Slough, to the Willow Slough By-Pass, which flows to the toe drain, to the Sacramento River Deepwater Ship Channel, to Cache Slough, into the Sacramento River, a TNW.

The District described the tributary as running in a relatively straight path, between agricultural fields and State Route 16. The tributary receives stormwater from SR16 and storm and irrigation water from the agricultural fields to the north, through at least three drainage pipes. The District stated that, while flow data was not available, they estimated that there were 20 or greater flow events in the review area per year. This was supported by observations in the fields on a number of occasions and a number of Google Earth images, which depict flow in the review area.

Further, it is indicated that the tributary has bed and bank, an OHWM, characterized by matted bent or absent vegetation, presence of litter or debris, and the destruction of terrestrial vegetation, as well as an abrupt change in the plant community. The District stated that the tributary carries pollutants from the highway and the agricultural fields and that the tributary provides habitat for birds, reptiles, amphibians, and mammals.

The District supported its conclusion that AGDI-6 flows seasonally in Section III.B of the AJD form. The District stated that Google Earth and Digital Globe aeriels show flow in the tributary from November through February, suggesting seasonal flow.

The Corps regulations, at 33 CFR Parts 328, defines “waters of the United States” and prescribes policy, practice and procedures to be used in determining the extent of such jurisdiction. The preamble to 33 CFR 328.3 indicates that the Corps generally does not consider non-tidal drainage ditches excavated on dry land to be "waters of the United States." The preamble further indicates, however, that the Corps reserves the right on a case-by-case basis to determine that a particular non-tidal drainage ditch excavated on dry land is a water of the United States.

The Rapanos Guidance, directs the agencies to assert jurisdiction over tributaries of TNWs, where tributaries have continuous flow, including those that flow “seasonally”.

The Rapanos Guidance further states that the agencies generally will not assert jurisdiction over ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water.

Therefore, while the appellant and the District have come to different conclusions, based on their interpretations of observations and available data, the District has, based upon its analysis of available information, concluded that AGDI-6 is an RPW that flows “seasonally”. The District’s jurisdictional determination is, therefore, consistent with the Rapanos Guidance.

#### **CONCLUSION:**

I conclude that the Appellant’s reason for appeal does not have merit. The District’s decision is upheld. No further action is required.

The District’s determination was not arbitrary, capricious or an abuse of discretion, and was not contrary to applicable law or policy. This concludes the Administrative Appeal Process.

#### **ORIGINAL SIGNED**

Thomas J. Cavanaugh  
Administrative Appeal Review Officer