

**ADMINISTRATIVE APPEAL DECISION
CLEAN WATER ACT
SILVA RANCH PROPERTY
AKT DEVELOPMENT CORPORATION
SACRAMENTO COUNTY, CALIFORNIA
SACRAMENTO DISTRICT
FILE NUMBER 200500649**

DATE: May 18, 2007

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

Appellant: Robert Uram, attorney representing AKT Development Corporation

District Representative: Will Ness, Army Corps of Engineers, Sacramento District (District)

Authority: Clean Water Act (33 USC 1344)

Receipt of Request For Appeal: January 8, 2007

Appeal Meeting and Site Visit Date: 19 April 2007

Summary of Decision: This CWA jurisdictional determination is remanded to the District for further evaluation and consideration of the source(s) of water responsible for maintaining the wetland hydrology indicators found in Zones 3, 4, 5, and 6 of the Silva Ranch property. Based on that evaluation the District must reconsider whether 213.37 acres of Zones 3, 4, 5, and 6 are within CWA jurisdiction. The District must also reconsider the CWA jurisdictional status of 15.5 acres of constructed ponds and 0.2 acres of ditch/channel.

Background Information: The Silva Ranch property is an approximately 600 acre site located in southeastern Sacramento County, approximately 10 miles southeast of the City of Elk Grove. The property is bounded by Clay Station Road on the east and undeveloped land on the north, south, and west. Laguna Creek traverses the property from north to south. Aerial photographs and other documentation establish that the Silva Ranch property has been in agricultural use for over 70 years. Agricultural uses have included year-round livestock grazing, with natural forage production of the property supplemented by irrigation, primarily during the May – October dry season. Rice cultivation has also occurred on portions of the property, but ceased a number of years

ago. The most recent agricultural use has been livestock grazing, with irrigation, occurring primarily from May to October, to supplement forage growth.

The administrative record and the Appellant's Request for Appeal (RFA) state that soils and topography on the site have been substantially altered from undisturbed historic conditions by cut and fill activities to level portions of the property to provide more even coverage of irrigation water. Soils investigations of the property have established that substantial changes have occurred in the soils as a result of agricultural activities.

For purposes of evaluation during the CWA jurisdictional determination, the Appellant divided the Silva Ranch property into 7 zones, an area of constructed ponds, and several other jurisdictional features. The rolling topography of Zone 7 (Northwest Upland Pasture) is similar to its original topography, and its soils are generally similar to historic conditions. Most of the remainder of the Silva Ranch property has been modified by cutting and filling of the soils associated with extensive land leveling to modify conditions for the benefit of agricultural production.

The District and the Appellant agreed on the CWA jurisdictional status of all features in Zones 1 (East Lowland Pasture), Zone 2 (East Lowland Pasture), and Zone 7 (Northwest Upland Pasture), as well as the CWA jurisdictional status of several miscellaneous features such as Laguna Creek and several unnamed perennial wetland areas. These areas include jurisdictional wetlands and vernal pools that are located up to 2,450 linear feet from Laguna Creek as measured by the Review Officer on District's 8 November 2006 CWA jurisdictional determination map (administrative record page 560). The District also concluded Zone 3 (Central Lowland Pasture), Zone 4 (West Lowland Pasture), Zone 5 (Southwest Upland Pasture), and Zone 6 (West Lowland Pasture) were wetlands within CWA jurisdiction. The District also determined that 15.5 acres of constructed ponds south of Zone 5 were within CWA jurisdiction as tributaries to other waters within CWA, as well as 0.2 acres of ditch/channel located on the west and east boundaries of Zone 5.

The Appellant disagreed with the District's CWA jurisdictional determination for Zones 3, 4, 5, and 6, the constructed ponds and the 0.2 acre of ditch/channel on the west and east boundaries of Zone 5. The Appellant concluded that Zone 3, Zone 4 and the northern portion of Zone 6 were man-induced (irrigation induced) wetlands outside of CWA jurisdiction. The Appellant concluded that Zone 5 and the southern portion of Zone 6 were upland areas outside of CWA jurisdiction rather than wetland areas. The Appellant also concluded the 15.5 acres of constructed ponds south of Zone 5 were outside of CWA jurisdiction, as well as the 0.2 acre of ditch/channel on the western and eastern boundaries of Zone 5.

The District reviewed the Appellant's 15 May 2006 proposed CWA jurisdictional determination map. On 8 November 2006 the District issued its CWA jurisdictional determination for the Silva Ranch property. The District concluded that Zones 3, 4, 5, and 6 were wetlands within CWA jurisdiction, and concluded that the constructed ponds south of Zone 5 and the 0.2 acre of ditch/channel were waters within CWA jurisdiction.

The Appellant disagreed and appealed citing the reasons for appeal addressed in this appeal decision.

Until recently the Corps used the *1987 Wetland Delineation Manual, On-line Edition* (1987 WDM) as guidance for all wetland delineations throughout the United States. As of 12 February 2007, the Corps Sacramento District and other Corps Districts in the western United States started a 1 year trial period using the Corps December 2006 *Interim Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Arid West Region* (WDM Arid West Supplement) as a supplement to the 1987 WDM. The WDM Arid West Supplement provides indicators for hydrophytic vegetation, hydric soils, and wetland hydrology specific to conditions in arid areas of the western United States. However, as this CWA jurisdictional determination was completed before the start of the trial period for the WDM Arid West Supplement, it was completed using the 1987 WDM.

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

Reason 1: The District's *Regulatory Branch Memorandum 2003-04 "Irrigated" Wetlands*, is not valid as it is inconsistent with the Corps' 1987 Wetland Delineation Manual. To the extent the District relied upon the Regulatory Branch Memorandum in making the Silva Ranch Jurisdictional Determination, the District's Determination should be vacated and remanded for further consideration consistent with the 1987 Manual.

FINDING: This reason for appeal is moot because the District replaced *Regulatory Branch Memorandum 2003-04, "Irrigated" Wetlands*, with *Regulatory Branch Memorandum 2007-01, Irrigated Wetlands*, on March 13, 2007.

ACTION: Since this administrative appeal is being remanded to the District for reconsideration, the District must evaluate its CWA jurisdictional determination in accordance with *Regulatory Branch Memorandum 2007-01, Irrigated Wetlands*.

DISCUSSION: The Sacramento District does not have the independent authority to establish CWA jurisdictional determination policies that are inconsistent with the 1987 WDM. The District issued its CWA jurisdictional determination for the Silva Ranch property on 8 November 2006 and the Appellant submitted his request for appeal of that jurisdictional determination on 8 January 2007. On 13 March 2007, the Sacramento District issued *Regulatory Branch Memorandum 2007-01, Irrigated Wetlands*, which rescinded and replaced Sacramento District *Regulatory Branch Memorandum 2003-04, Irrigated Wetlands*, with modified guidance for irrigated areas.

By e-mail of 1 May 2007 to the Review Officer, Ms. Katherine Trott of the Corps headquarters regulatory staff confirmed that the revised Sacramento District *Regulatory Branch Memorandum 2007-01* had been coordinated with Corps headquarters. As Sacramento District *Regulatory Branch Memorandum 2003-04, Irrigated Wetlands*, is no

longer in effect, evaluation of that memorandum in this appeal decision is a moot question. However, as described under other reasons for appeal this CWA jurisdictional determination is remanded to the Sacramento District for reconsideration. The District is directed to consider the guidance issued in District *Regulatory Branch Memorandum 2007-01 Irrigated Wetlands*, as part of its reconsideration of its 8 November 2006 CWA jurisdictional determination.

Reason 2: Assuming the Regulatory Branch Memorandum is valid, the District has not met its burden of showing that 279.62 acres of the Silva Ranch area subject to the District's regulatory jurisdiction

FINDING: Portions of this reason for appeal had merit

ACTION: The District must reconsider its determination of the extent of wetlands within Zones 3, 4, 5, and 6 in accordance with the directions provided in this appeal decision.

DISCUSSION: The District concluded that approximately 279.62 acres of the Silva Ranch property were within CWA jurisdiction as shown on the CWA jurisdictional determination map on administrative record page 560. The Appellant agreed that 50.55 acres of the property were within CWA jurisdiction including agreeing with the extent of CWA jurisdiction in all of Zones 1, 2, and 7, Depressional Wetland Area # 189, Laguna Creek, and several other areas outside of zone boundaries. The Appellant disagreed with the District's CWA jurisdictional determination regarding 229.07 of the 279.62 acres of jurisdictional area the District found on the approximately 600 acre property. The Appellant disagreed with the District's conclusion that the 213.37 acres of historically irrigated areas in Zones 3, 4, 5, and 6 should be considered wetlands within CWA jurisdiction in accordance with the 1987 WDM, the Corps regulations, and associated guidance. The Appellant also disagreed with the District's conclusion that 0.2 acre of ditches on the east and west boundaries of Zone 5, and 15.5 acres of constructed ponds located south of Zone 5, were within CWA jurisdiction. Those areas are discussed under Reason 3 below.

Evidence of wetlands in Zones 3, 4, and the northern portion of Zone 6

The District and the Appellant both classified all of Zones 3 and 4, and the northern portion of Zone 6, a total of 164.7 acres, as wetlands. Both the District and the Appellant observed indicators of all 3 parameters required by the 1987 WDM as necessary to establish the presence of wetlands – prevalence of hydrophytic vegetation, presence of hydric soils, and presence of wetland hydrology – in those areas. The District concluded that those conditions would persist with only natural water sources and no irrigation, and therefore concluded those areas were wetlands in accordance with the 1987 WDM. However, the Appellant concluded those areas would revert to uplands if irrigation ceased. Therefore, the Appellant considered all wetlands in Zones 3 and 4, and the northern portion of Zone 6, to be wetlands outside of CWA because they would cease to support all three parameters necessary to sustain a wetland – hydrophytic vegetation,

hydric soils, and wetland hydrology - without artificial irrigation. The District and Appellant agree that if the areas did qualify as wetlands under the 1987 WDM, they would be within CWA jurisdiction as adjacent wetlands in accordance with the Corps regulations at 33 CFR 328.3 (a) (7).

Evidence of the presence of wetlands in Zone 5 and the southern portion of Zone 6

The District also concluded that all of Zone 5, (42.7 acres) and the southern portion of Zone 6 (5.97 acres), were wetlands and would remain so without irrigation. The Appellant asserted that Zone 5 and the southern portion of Zone 6 were not currently wetlands as they did not exhibit indicators of all 3 parameters required by the 1987 WDM to establish the presence of wetlands. These assertions were evaluated in detail.

Zone 5

The District and the Appellant disagreed regarding whether the approximately 42.7 acre Zone 5 was a wetland area. Several wetland evaluation data points were completed for the disputed area in Zone 5. The Appellant collected data at data points 118, 120, and 121 on February 25, 2006. Two other data points the Appellant collected in Zone 5, data points 3b and 119, do not appear to be representative of Zone 5. Data point 3b is on the immediate edge of Depressional Perennial Wetland Area #189, and data point 119 is identified as being behind a berm at the western edge of Zone 5. The District revisited Appellant data points 118, and 121 on March 29, 2006. On the March 29, 2006 site visit the District also collected information from Corps data point 5 in Zone 5, located between Appellant data points 118 and 120.

The District and the Appellant agreed that hydrophytic vegetation was the dominant vegetation at data points 118, 120, and 121 in Zone 5, although the Appellant believed that the prevalence of hydrophytic vegetation had been induced by irrigation. The District also found a prevalence of hydrophytic vegetation at data point 5 in Zone 5. The District reasonably concluded that hydrophytic vegetation was the dominant prevalent vegetation present in Zone 5. The Appellant agreed that hydrophytic vegetation was the prevalent vegetation present, but considered the prevalence of hydrophytic vegetation to be a remnant from past irrigation practices.

The District concluded that hydric soils were present at data points 118, 121 and 5 based on the presence of soil matrix chroma of 2 in mottled soils (a hydric soil indicator according to the 1987 WDM paragraph 44 (f) (2) (a) page 26). The Appellant's evaluation of soil colors at data points 118, 120, and 121 was that the soil matrix was chroma 3, rather than chroma 2, and that therefore these soils did not have the necessary indicator of hydric soils. The District also found concretions at data points 121 and 5, and soft masses at data point 118. The District concluded that these concretions represented a second hydric soil indicator in accordance with 1987 WDM paragraph 44 (h), page 27.

The District found 2 indicators of hydric soils at 3 different data points in Zone 5. In a soil that had not been subject to long term irrigation practices this would be sufficient

documentation that hydric soils were present in Zone 5. I determined the District's administrative record includes reasonable documentation that hydric soil indicators are present throughout Zone 5. The Appellant's soil observations were not consistent with the District's soil observations for Zone 5, leading the Appellant to conclude that hydric soils were not present. The Appellant also concluded for other Zones in dispute that the hydric soils indicators found on the property were remnants from past irrigation practices, and were inconsistent with the soil surveys of the property.

The exact reasons for the differences in the District's and the Appellant's evaluation of the soil color in Zone 5 cannot be determined from the administrative record. Both the District and the Appellant used experienced wetland delineators to collect data in Zone 5. The differences could be due to differences in professional judgment as to exact chroma of the soils evaluated, what constitutes evidence of concretions, random differences in the specific locations and clumps of soil evaluated at each data point, or to some combination of these factors. Since the District used experienced observers and identified multiple indicators of hydric soils, the District's determination that hydric soils were present in Zone 5 is considered reasonable.

The District found indicators of wetland hydrology at data points 118, 121, and Corps data point 5 in Zone 5. The District found soil saturation in the top 2 – 3 inches of soils at data point 118, and 121, and saturation within the top 12 inches of soil (depth of saturation unspecified) at Corps data point 5. The District also found algal matting - a form of sediment deposit - at data points 118, 120, and 5. Soil saturation in the root zone is considered an indicator of wetland hydrology in accordance with 1987 WDM page 32, paragraph 49 (b) (2), and sediment deposits are considered an indicator of wetland hydrology in accordance with 1987 WDM page 33, paragraph 49 (b) (5). The District also found vegetation at data point 5 provided a secondary indicator of wetland hydrology based on the FAC-neutral test (WDM page 34).

The District concluded that the presence of the indicators of wetland hydrology described above were sufficient to establish that wetland hydrology was present, as they are consistent with a determination that wetland hydrology is present in accordance with the 1987 WDM. The administrative record provides a reasonable basis to conclude that wetland hydrology was present, but not to establish whether the water present was the result of ongoing irrigation, unusually heavy precipitation, or normal precipitation.

Zone 6

Both the District and the Appellant concluded that the northern portion of Zone 6 was a wetland area. The District concluded that the northern portion of Zone 6 would remain wetlands in the absence of irrigation. The District and the Appellant disagreed regarding whether an approximately 5.97 acre area in the southern half of Zone 6 was a wetland area. The District concluded the southern portion of Zone 6 was a wetland. The Appellant concluded that the northern portion of Zone 6 would revert to an upland area in the absence of irrigation, and that the southern portion of Zone 6 was currently upland and would remain an upland area whether or not irrigation continued.

Several wetland evaluation data points were completed for Zone 6. The Appellant collected data at data points 115 and 117 in the southern portion of Zone 6, and from data point 116, in the northern portion of Zone 6 on 25 February 2006. The District revisited Appellant data points 116 and 117 on 29 March 2006 and established Corps data point 4, between data points 116 and 117 at that time.

Both the District and the Appellant agreed that hydrophytic vegetation was prevalent at Appellant data point 116, in the northern part of Zone 6, located approximately 200 feet north of Corps data point 4 and approximately 400 feet north of Appellant data point 117. The District and the Appellant also agreed that hydrophytic vegetation was the dominant vegetation at data points 115 and 117 in the southern portion of Zone 6. The District also found a prevalence of hydrophytic vegetation at data point 4. However, except for Area 171, a 0.098 acre vernal pool, the Appellant considered the prevalence of hydrophytic vegetation in all portions of Zone 6 to be a remnant of past irrigation practices. The District reasonably concluded that hydrophytic vegetation was the dominant prevalent vegetation present in the southern portion of Zone 6 because indicators of the prevalence of hydrophytic vegetation in accordance with the 1987 WDM were established at data points 115, 117, and 4.

The District concluded that hydric soils were present at data point 116 in the northern portion of Zone 6, and at data points 117 and 4 in the southern portion of Zone 6 based on the presence of soil matrix chroma of 2 in mottled soils (a hydric soil indicator according to the WDM paragraph 44 (f) (2) (a) page 26). The District also found concretions at data points 4, an additional indicator of hydric soils in accordance with 1987 WDM paragraph 44 (h), page 27.

The District found 1 indicator of hydric soils at 2 different data points in the southern portion of Zone 6, as well as a second indicator at 1 location in the southern portion of Zone 6. In addition, the District and the Appellant agreed that 1 indicator of hydric soils was present at data point 116, in the northern portion of Zone 6. In a soil that had not been subject to long term irrigation practices this would be sufficient documentation that hydric soils were present in the southern portion of Zone 6.

The Appellant agreed with the District's conclusion that the northern portion of Zone 6 contained hydric soil as the Appellant concluded that the soil at data point 116 had a chroma of 1, but was unmottled – a hydric soil indicator in accordance with the WDM paragraph 44 (f) (2) (b) page 26. The Appellant's evaluation of soil colors in the southern portion of Zone 6 differed from the District's evaluation. At data point 117, the Appellant concluded the chroma of the soil matrix at data point 117 was chroma 3, rather than chroma 2 as observed by the District, and that mottles were not present. The Appellant therefore concluded that data point 117, and the southern portion of Zone 6, did not have an indicator of hydric soils as required by the 1987 WDM.

The Appellant's soil observations were not consistent with the District's soil observations for the southern portion of Zone 6, leading the Appellant to conclude that hydric soils were not present there. The Appellant also concluded for the other Zones in dispute that

the hydric soils indicators found on the property were remnants from past irrigation practices, and were inconsistent with the soil surveys of the property.

The exact reasons for the difference in the District's and the Appellant's evaluation of the soil colors in Zone 6 cannot be determined from the administrative record but could be due to differences in professional judgment as to exact chroma of the soils evaluated, what constitutes evidence of concretions, random differences in the specific locations and clumps of soil evaluated at each data point, or to some combination of these factors. Since the District used experienced observers and identified multiple indicators of hydric soils, the District's determination that hydric soils were present in the southern portion of Zone 6 was considered reasonable.

In Zone 6, The District concluded that wetland hydrology was present at Appellant data points 116, 117, and District data point 4. The District found soil saturation in the upper 12 inches of soil at data points 116, 117, and 4. The District also found soil inundation at data points 116, 117, and 4. Soil saturation in the root zone and inundation during the growing season are both considered indicators of wetland hydrology in accordance with 1987 WDM page 32, paragraph 49 (b) (1) and (2). The District found sediment deposits at data points 117 and 4 and also found algal matting, a form of sediment deposit, at data point 117. Sediment deposits are considered an indicator of wetland hydrology in accordance with 1987 WDM page 33, paragraph 49 (b) (5). At data point 4 the FAC-neutral test was positive for wetland hydrology which is a secondary indicator of wetland hydrology (1987 WDM page 34). The administrative record provides a reasonable basis to conclude that wetland hydrology was present, but as discussed further below, did not to establish whether those conditions were the result of ongoing irrigation, unusually heavy precipitation, or normal precipitation.

The Corps regulations at 33 CFR 328.3 (b) and the Corps 1987 WDM page 9 define wetlands as:

“The term wetlands means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.”

The 1987 WDM identifies conditions associated with vegetation, soils, and hydrology in both wetlands and uplands. The 1987 WDM pages 9 and 10 describes the general diagnostic characteristics of wetland vegetation, soils, and hydrology as follows:

“*Vegetation:* The prevalent vegetation consists of macrophytes that are typically adapted to areas having hydrologic and soil conditions described in *a* [i.e. 1987 WDM page 9] above. Hydrophytic species, due to morphological, physiological, and/or reproductive adaptations, have the ability to grow, effectively compete, reproduce, and/or persist in anaerobic soil conditions.”

“Soil: Soils are present and have been classified as hydric, or they possess characteristics that are associated with reducing soil conditions.”

“Hydrology: The area is inundated either permanently or periodically at mean water depths less than or equal to 6.6 ft, or the soil is saturated to the surface at some time during the growing season of the prevalent vegetation.”

The 1987 WDM page 11 defines nonwetlands as follows:

“Nonwetlands include uplands and lowland areas that are neither deepwater habitats, wetlands, nor other special aquatic sites. They are seldom to never inundated, or if frequently inundated, they have saturated soils for only brief periods during the growing season, and, if vegetated, they normally support a prevalence of vegetation typically adapted for life only in aerobic soil conditions.”

The 1987 WDM page 11 also gives the specific diagnostic characteristics of vegetation, soils, and hydrology for nonwetlands as follows:

“Vegetation: The prevalent vegetation consists of plant species that are typically adapted for life only in aerobic soils. These mesophytic and/or xerophytic macrophytes cannot persist in predominantly anaerobic soil conditions.”

“Soils: Soils, when present, are not classified as hydric, and possess characteristics associated with aerobic conditions.”

“Hydrology: Although the soil may be inundated or saturated by surface water or ground water periodically during the growing season of the prevalent vegetation, the average annual duration of inundation or soil saturation does not preclude the occurrence of plant species typically adapted for life in aerobic soil conditions.”

The District’s and the Appellant’s evaluations of the property differed primarily as a result of their different interpretations of what constituted normal circumstances for different areas of the property and how irrigation affected the property.

The Corps Regulatory Guidance Letter 86-09 defines normal circumstances as follows:

“ “Normal circumstances” are determined on the basis of an area’s characteristics and use, at present and in the recent past. Thus if a former wetland has been converted to another use (other than by recent unpermitted action not subject to 404(f) or 404(r) exemptions) and that use alters its wetland characteristics to such an extent that it is no longer a “water of the United States”, that area will no longer come under the Corps regulatory jurisdiction for purposes of Section 404. However, if the area is abandoned and over time regains wetland characteristics such that it meets the definition of “wetlands” then the Corps 404 jurisdiction has been restored.”

In this instance, the disagreement regards whether areas that are currently wetlands will remain so in the absence of irrigation, or will revert to uplands. The District considers the conditions observed during site visits representative of normal circumstances as defined by the Corps 1987 WDM and associated guidance. The Appellant believes that Zones 3, 4, 5, and 6 were still influenced by irrigation, that the conditions observed during site visits therefore do not represent normal circumstances, and that without irrigation Zones 3, 4, 5, and 6 would revert to uplands outside of CWA jurisdiction.

The most conclusive method to establish whether Zones 3, 4, 5, and 6 would remain wetlands within CWA jurisdiction in the absence of irrigation, would be to terminate irrigation for a sufficient period of time to permit the effects of irrigation to dissipate, and then reevaluate the property. The District cannot require the Appellant to stop irrigating the site. However, if irrigation continues, the Appellant leaves the District no choice except to make its best professional judgment of what the extent of wetlands would be with normal precipitation after irrigation ceased.

Alternatively, the Corps has established a *Technical Standard for Water-Table Monitoring of Potential Wetland Sites* (ERDC-TN-WRAP-05-2 June 2005) which describes the use of shallow monitoring wells to determine whether wetland hydrology is present on sites with human disturbance. The Corps cannot require the Appellant to install monitoring wells to collect data for a CWA jurisdictional determination. Collecting wetland hydrology data from shallow monitoring wells while irrigation continued would not necessarily establish whether wetland hydrology would persist if irrigation ceased. To date, irrigation has been periodically interrupted but has not totally ceased on the property, and no monitoring wells have been installed.

The Appellant stated that irrigation did cease in Fall 2005, but that Zones 3, 4, 5, and 6 were still affected by irrigation when data was collected in those areas in February and March 2006. The Appellant stated that irrigation resumed after the wetland delineation data was collected in February and March 2006. As a result, the District had to consider whether or not the site was still being influenced by irrigation and if so, whether that additional water had produced wetland areas that were outside of CWA jurisdiction. The wetland delineation data for Zones 3, 4, 5, and 6 was collected during the February and March 2006 site visits. The District claims that Zones 3, 4, 5, and 6 will continue to be dominated by hydrophytic vegetation without irrigation, while the Appellant claims that evidence of wetlands, including hydrophytic vegetation, will disappear when irrigation stops for a sufficient period of time.

If hydrophytic vegetation persisted over time with normal precipitation but without irrigation, that finding would support the District's position that wetlands would persist without irrigation. If hydrophytic vegetation were replaced by upland vegetation over time in the absence of irrigation, but with normal precipitation, it would support the Appellant's position. The data regarding the extent of hydrophytic vegetation observed in February and March 2006 does not exclude either of these possibilities. The presence of hydrophytic vegetation in Zones 3, 4, 5, and 6 during the site visits indicates that

hydrophytic vegetation was still present at that time, but does not conclusively establish whether or not such vegetation will persist into the future without irrigation.

The District considered the normal circumstances for soils in the areas in dispute to be the current conditions observed during the site visits. In particular, the District considered the leveled landscape to be a relatively permanent change. The District also considered the hydrologic conditions observed during the site visits to be representative of the current conditions of the property after irrigation had ceased.

The current condition of the soils in Zones 3, 4, 5, and 6 is substantially different from historic, unmodified conditions. The Appellant's soils report *Silva Ranch, Historic Land Use and Altered Soil Properties* by Cook, based on observations from August 30 to September 2, 2004 (administrative record pages 410 – 441), states that Zones 3, 4, 5, and 6 have been leveled. The Appellant's submittals state several times that different areas of the property have been modified to retain water and that these modifications are more extensive in Zones 3 and 4. The Appellant soils report administrative record page 412 describes these changes as follows:

“The effect of years of animal compaction created a very dense, less permeable, less porous zone within the upper part of the soil. The result of the compaction has created areas within the pasture that impounds or ponds surface water for various lengths of time. This impoundment is also a likely factor in providing the saturation necessary to artificially produce redoximorphic features indicative of hydric soils.”

The Appellant's evaluation that the current conditions of the soils would impound or pond surface water for various lengths of time is consistent with the District's conclusion.

The District's and the Appellant's interpretation of these conditions is quite different. The District's conclusion is that these soil modifications created large, level areas in Zones 3, 4, 5, and 6, and that this resulted in the development of hydric soils throughout Zones 3, 4, 5, and 6. While the District and the Appellant agree that the leveled topography is a relatively permanent feature, and therefore now part of the normal circumstances for this site, the Appellant claims that due to biological and physical processes, the soils in Zones 3, 4, 5, and 6 will return to the conditions described in the Natural Resources Conservation Service (NRCS) soil survey of the area. The Appellant's Request for Appeal discussed this soil conditions as follows:

“According to the NRCS Soils survey data, the dominant soils at the Silva Ranch site are non-hydric with hydric inclusions of no more than 4%. ...Taking into account the relative impermanence of artificial irrigation on the Silva Ranch site, in that it can be stopped or turned off, it is clear that non-hydric characteristics identified in the soils survey data are the normal circumstances for virtually the entire Silva Ranch site, and that hydric features have been induced by artificial irrigation of leveled lands.Soils Survey groundwater data from the soils present at Silva Ranch indicate that soils present at the site would be naturally dry from

May to October with a water table at 60” or lower. ... Despite these indications, soils at the Silva Ranch site exhibit perched water at higher levels during the dry season. This is contrary to what would be expected based on the Soils Survey, which indicates that, absent outside factors, groundwater tables at 60” to 72” could not support soil saturation for the duration necessary to maintain hydric conditions in the upper soil horizons.”

The NRCS soil survey estimated that generally the soils found on the site in an undisturbed state would have no more than 4% hydric soils inclusions. That estimate of 4% hydric soil inclusions was developed for unmodified soils that would have included numerous depressions in a gently rolling landscape. However, the percentage of hydric soil inclusions specified for an unmodified soil is not directly relevant to establishing the percentage of hydric soils on the same site after agricultural modifications. The District reasonably used on-site determinations of the presence or absence of hydric soil indicators to establish the boundaries of hydric soils and wetlands on the site.

Similarly, the general NRCS soil survey groundwater data for unmodified soils in Zones 3, 4, 5, and 6 is not representative of, nor directly relevant to, the determination of whether these modified soils would remain hydric soils and retain wetland hydrology when irrigation ceased. The NRCS letter of May 2, 2006 from Mr. Karl Hipple, Chair, National Technical Committee for Hydric Soils to Ms. Katherine Trott, Regulatory Branch, Army Corps of Engineers headquarters also specifically addresses the use of general groundwater information from soil surveys during Corps CWA jurisdictional determinations and states that:

“.. the application of hydric soils lists, and water table information found in soil survey reports or other soil survey data are inappropriate for specific on-site wetland delineation and identification.”

The District’s use of the hydric soils indicators identified by data collection during the site visits, and the corresponding boundaries established for the extent of hydric soils on the site was reasonable.

The administrative record indicates that irrigation ceased in Fall 2005, but the administrative record does not provide specific timing as to the date irrigation ceased. Based on discussions at the appeal meeting it seems likely the exact dates irrigation ceased is unrecorded and unknown. The District concluded sufficient time elapsed between the cessation of irrigation in Fall 2005 and the wetland delineations conducted on the site in February and March 2006, to attribute evidence of wetland hydrology observed on the site visits to natural precipitation and runoff. The Appellant disagreed. The Appellant asserted that irrigation during Summer and Fall 2005 influenced the wetland hydrology indicators observed in February and March 2006. The Appellant also asserted (administrative record page 495) that the evidence of wetland hydrology observed during the District’s data collection in March 2006 were due in part to unusually heavy precipitation during that month.

The District's best professional judgment determination was that the wetland hydrology indicators observed in Zones 3, 4, 5, and 6 such as soil saturation and inundation were the result of a normal level of natural precipitation. This conclusion was not sufficiently documented in the administrative record because the District did not complete a systematic evaluation of whether precipitation had been unusually high, normal, or unusually low prior to the wetland delineations in Zones 3, 4, 5, and 6 in February and March 2006. The District must reconsider its determination regarding the presence, absence, and extent of wetland hydrology in Zones 3, 4, 5, and 6.

Recently, the Corps Sacramento District, along with other Corps Districts throughout the western United States, issued public notices advising the regulated public that the District would use the December 2006 *Interim Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Arid West Region* (Arid West WDM supplement) for wetland delineations in designated arid areas within the District boundaries. This public notice stated that field data collected for wetland delineations prior to the February 12, 2007 effective date of the notice could be submitted for review in accordance with the 1987 WDM. The public notice also provided that if a wetland delineator was concerned that the wetland boundary established by the Arid West WDM supplement was substantially different than the wetland boundary established using the 1987 WDM, the delineator could submit wetland delineations using both the 1987 WDM and the Arid West WDM supplement for evaluation by the District.

Since this wetland delineation was initiated under the 1987 WDM, in order to avoid unnecessary delays, I direct that the delineation be finished under the 1987 WDM with the following exceptions. First, the District will evaluate whether precipitation during the 2005 – 2006 November to April wet season was normal, unusually high, or unusually low, using the procedures on pages 94 to 96 of the Arid West WDM supplement. These procedures are the same as those identified in supplemental guidance to the 1987 WDM to classify precipitation levels. The District must evaluate whether precipitation was normal, unusually low, or unusually high in the November 2005 to March 2006 time period, and take that determination into account during reconsideration of presence, absence, and extent of wetland hydrology observed in Zones 3, 4, 5, and 6 during February and March 2006.

The District should also consider a water budget evaluation of the site in relation to normal precipitation to more systematically evaluate whether the sources of water available to Zones 3, 4, 5, and 6 without irrigation would be sufficient to sustain wetland hydrology throughout those zones. The Web-Based Water-Budget Interactive Modeling Program identified on Arid West WDM supplement page 94 or similar model which considers water losses due to evapotranspiration, infiltration, and runoff should be considered to as part of the reevaluation of the extent of wetland hydrology in Zones 3, 4, 5, and 6.

The District and the Appellant conducted an additional site visit to the property in April 2007, prior to the administrative appeal site visit. As this appeal evaluates the District's November 8, 2006 CWA jurisdictional determination decision and its supporting

administrative record, any data from the District and Appellant's April 2007 site visit was new information that could not be considered during this appeal. However, any data collected during the District's April 2007 site visit should be considered in reconsidering the District's 8 November 2006 CWA jurisdictional determination.

Also, if the Appellant desires to conduct and submit an analysis under the Arid West WDM supplement for consideration as part of the remand of this action, collect data from shallow water monitoring wells in accordance with the Corps standard methodology, or submit other new information, the District could consider that new information as part of its reconsideration of this administrative appeal. However, the Appellant will not receive additional appeal rights by submitting a delineation using the Arid West WDM supplement wetland indicators or other new information.

Once the District has reconsidered and documented the extent of wetlands in Zones 3, 4, 5, and 6, the District should make a determination as to the extent of those wetlands within CWA jurisdiction. The Appellant and the District agreed that wetlands up to 2,450 feet from Laguna Creek in Zones 1, 2, and 7 were within CWA jurisdiction as adjacent to Laguna Creek in accordance with 33 CFR 328.3 (a) (7) (administrative record pages 494 and 560). The Appellant did not dispute that if he had identified wetlands in Zones 3, 4, 5, and 6 they could appropriately be considered wetlands within CWA jurisdiction because they were adjacent to waters within CWA jurisdiction i.e. Laguna Creek and Depressional Perennial Marsh area #189 shown on administrative record pages 494 and 560. If the District modifies the extent of wetlands in Zones 3, 4, 5, or 6, that determination should be reconsidered.

Reason 3: The inclusion of 15.5 acres of irrigation pond in the Jurisdictional Determination is contrary to the Corps' existing regulations, which state that Corps generally does not consider to be jurisdictional artificial lakes and ponds created for irrigation or stock watering purposes.

FINDING: This reason for appeal has merit

ACTION: The District must reconsider the CWA jurisdictional status of the 15.5 acres of constructed ponds and 0.2 acres of ditch/canals that border Zone 5 in accordance with the direction in this appeal decision.

DISCUSSION: At the appeal meeting the District clarified that its CWA jurisdictional evaluation regarding the 15.5 acres of constructed ponds (hereafter ponds) south of Zone 5 was based on these ponds being tributary to Laguna Creek and therefore within CWA jurisdiction in accordance with 33 CFR 328.3 (a) (5) (Tributaries to waters within CWA jurisdiction are also within CWA jurisdiction). The District stated that it did not consider the ponds to be within CWA jurisdiction on the basis of their being adjacent wetlands.

The District's CWA jurisdictional determination map, administrative record page 560, also identifies areas labeled ditch/canal on the western and eastern boundaries of Zone 5. These ditch/canal areas flow from south to north, and are near the northern boundary of

the 15.5 acres of constructed ponds south of Zone 5, and receive waters from a fish farm and holding ponds south of the Silva Ranch property (administrative record page 443). The fish farm supplies the primary water source for the 15.5 acres of ponds and was the only water source identified for the ponds other than precipitation directly falling on the ponds. A groundwater well pumps water for use by the fish farm and that water is subsequently conveyed via a pipe system to the ponds.

The District cited the Appellant's 31 January 2005 *Silva Ranch Restoration Draft Master Plan*, (Administrative Record page 47), as supporting the District's conclusion that the ponds were tributary to Laguna Creek. The draft master plan states:

“The entire site drains to Laguna Creek through a series of created, altered, and naturally existing drainage ways. Discharge points to the creek include six culverted outfalls and four head cuts that have been formed as a result of improper field drainage.”

With regard to the constructed ponds (the 3 northern “stock ponds” referred to in the master plan below) the master plan states (administrative record page 50):

“These ponds are formed by levees holding the water above the natural grade of the adjacent land. The three northern ponds [i.e. the 15.5 acres of constructed ponds] lie within the project boundary. Water is pumped into these stock ponds needed by the farm and is eventually drained through a gravity fed pipe and drainage ditch system into the irrigation pond [i.e. Depressional Perennial Marsh, CWA jurisdictional Area #189, administrative record page 560] located in the northwest section.”

and

“The current source of water for the stock ponds is the sturgeon farm. ...this source is not guaranteed to supply water indefinitely into the future... If this water source is eliminated, it is likely that the stock ponds would dry up since they are above grade and there is no natural drainage input into the ponds.”

The Review Officer reviewed the topographic map of the ponds (administrative record page 102) which shows the ponds are surrounded by berms approximately 3 – 9 feet higher than the surrounding gently rolling topography. The only other water source to the 15.5 acres of ponds is direct precipitation, as the berms around the pond block drainage to the ponds from the surrounding area. Aerial photography of the project site establishes that the ponds were constructed between 1987 and 1993 (Administrative record pages 449 and 465).

The Appellant cited the Preamble to the Corps Nov 13, 1986 Final Rule, as supporting his conclusion that the ponds are not within CWA jurisdiction. The Preamble to the Corps Nov 13, 1986 Final Rule, Federal Register, pg 41217, discussing 33 CFR 328.3: *Definitions*, states 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....”

- b. Artificially irrigated areas which would revert to upland if the irrigation ceased.
- c. Artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing.

The District needed to determine whether the Preamble language cited by the Appellant might be applicable in this instance. Therefore the District evaluated whether areas within CWA jurisdiction had previously existed where the 15.5 acres of ponds have been constructed. The District did this by comparing aerial photographs of features in Zone 7 that the District and the Appellant had previously agreed were within CWA jurisdiction (administrative record page 494 and 560) with similar features in located where the ponds were subsequently constructed.

The District found the 15.5 acres where the ponds were constructed had included similar features to those identified as within CWA jurisdiction in Zone 7. These features were visible on the aerial photographs taken prior to construction of the ponds which covered both areas. The District and the Appellant agreed that Zone 7 consisted of greater than 50 percent upland areas interspersed with vernal pools and seasonal wetlands within CWA jurisdiction as shown on the maps on administrative record pages 494 and 560. Based on the similarities between portions of Zone 7 found to be within CWA jurisdiction, and features present in the area where 15.5 acres of ponds were subsequently constructed, the District concluded that a portion of the ponds were constructed where wetlands within CWA jurisdiction had previously occurred. The District clarified at the appeal meeting that it did not estimate the acreage of jurisdictional features that it believed existed in the area where the 15.5 acres of ponds were subsequently constructed.

The Appellant reviewed the same aerial photography and concluded that the areas the District had concluded were wetlands had been converted to non-wetlands through agricultural use prior to constructing the 15.5 acres of ponds. The Review Officer reviewed the same aerial photographs and concluded the District’s interpretation of the aerial photographs was reasonable. However, the presence of some areas within CWA jurisdiction on the 15.5 acre area prior to construction of the ponds does not establish that the ponds are currently within CWA jurisdiction.

The Preamble to the Corps March 9, 2000 Final Rule, further discusses the wording of the Preamble to the Corps November 13, 1986 Final Rule. Although primarily addressed to drainage ditches, the discussion in the Preamble to March 9, 2000 the Final Rule, Federal Register, page 12823 provides guidance as to how to address whether the 15.5 acres of ponds are within CWA jurisdiction. Page 12823 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 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.* (italics added). District engineers will determine, on a case-by-case basis, whether a particular area is a water of the United States. 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

Drainage ditches constructed in uplands that connect two waters of the United States may be considered waters of the United States if those ditches constitute a surface water connection between those two waters of the United States. As previously noted, drainage ditches constructed entirely in uplands generally are not considered waters to be waters of the United States. District Engineers will use the criteria at 33 CFR 328.3 (e) to determine the presence and extent of an OHWM that may have developed in a drainage ditch.”

I have considered the guidance from the two Preambles in relation to the administrative record for this property. I conclude the District did not sufficiently document several factors necessary to support its conclusions that the 15.5 acres of constructed ponds are within CWA jurisdiction as tributaries to waters within CWA jurisdiction in accordance with 33 CFR 328.3 (a) (5). It appears probable that the construction of these ponds may have eliminated the source of hydrology necessary to make the ponds either a tributary or a wetland area. In order to sufficiently document that the ponds are within CWA jurisdiction in accordance with 33 CFR 328.3 (a) (5), the District must review the Corps regulations and associated guidance and establish that a tributary connection within CWA jurisdiction exists between the ponds and a water within CWA jurisdiction, or that another basis of CWA jurisdiction for the ponds exists.

The Corps regulations at 33 CFR 328.4 *Limits of jurisdiction*, identifies the limits of jurisdiction in non-tidal waters as:

(c) Non-Tidal Waters of the United States.

The limits of jurisdiction in non-tidal waters:

- (1) In the absence of adjacent wetlands, the jurisdiction extends to the ordinary high water mark, or
- (2) When adjacent wetlands are present, the jurisdiction extends beyond the ordinary high water mark to the limit of the adjacent wetlands.
- (3) When the water of the United States consists only of wetlands the jurisdiction extends to the limit of the wetland.

The Preamble to the Corps November 13, 1986 Final Rule, Federal Register page 41217, and Preamble to the March 9, 2000 Final Rule, Federal Register, page 12823, provides additional guidance regarding the limits of CWA jurisdiction described at 33 CFR 328.4. Federal Register page 41217 states that:

“...it should be concluded that in the absence of wetlands the upstream limit of Corps jurisdiction also stops when the ordinary high water mark is no longer perceptible.”

Federal Register Page 12823 states that:

“The upstream limit of waters of the United States is the point where the OHWM is no longer perceptible.”

In this instance, the administrative record documents that water is conveyed from the fish farm south of the ponds both to the ponds and around the ponds using a combination of open ditch channels and closed pipes, as shown on administrative record page 443. Some of this water is subsequently discharged into Area #189, or used as irrigation water on other portions of the property. Water was discharging through a culvert from the northernmost constructed pond into Zone 5 during the appeal meeting site visit.

The District and the Appellant agree that Area #189 is within CWA jurisdiction as the impoundment of a natural stream. However, the administrative record does not clearly document that the ditch/canals on the west and east boundaries of Zone 5, should be within CWA jurisdiction as tributaries to Area # 189 or Laguna Creek. The administrative record does not discuss whether an OHWM is present between the ditch/channels and either Area # 189 or Laguna Creek, or whether these 2 areas may appropriately be classified as non-jurisdictional ditch/canals that are related to the irrigation system for the property.

The District must reevaluate its conclusion whether the 0.2 acre of ditch/canals on the western and eastern boundaries of Zone 5 represent tributary connections with an OHWM that connect to Area # 189 or Laguna Creek, or are constructed features of the irrigation and drainage system that under the Corps regulations and guidance should be considered outside of CWA jurisdiction. The District must also reconsider whether the 15.5 acres of ponds should be considered as a further connection to the tributary system, or whether construct of these ponds resulted in an area that no longer meets the definition of an area within CWA jurisdiction.

The Preamble to the Corps March 9, 2000 Final Rule, Federal Register page 12823, makes it clear that an area that has been legally converted to an area that no longer meets the definition of an area within CWA jurisdiction in accordance with 33 CFR 328.3 (a) (1) – (7), is no longer within CWA jurisdiction. Therefore, the District must also consider the following factors in reconsidering the CWA jurisdictional status of the 15.5 acres of ponds.

a). Did the construction of perimeter berms around the 15.5 acres of ponds change hydrology of the 15.5 acres in such a manner that the features within CWA jurisdiction that District previously believed to be present – i.e. vernal pools and seasonal wetlands interspersed with substantial areas of upland habitat – no longer exist? If so, the District must document what, if any, features within the 15 acres of constructed ponds currently meet the definition of a water within CWA jurisdiction in accordance with the definitions at 33 CFR 328.3 (a) (1) – (7) of the Corps regulations.

b). The primary source of water to the 15.5 acres of ponds documented in the administrative record originates at a ground water well. This well provides water to the fish farm. This water is then conveyed through closed pipes and open ditches to the 15.5 acres of ponds. This source of water can be stopped by the operators of the piping and irrigation system. As this source of water can be eliminated with no CWA permit required, the District should consider whether the ponds represent a part of a tributary system within CWA jurisdiction or a constructed feature outside of CWA jurisdiction.

The District must also consider whether the ponds were “legally” converted, as discussed in the Preamble to the March 9, 2000 the Final Rule, Federal Register, page 12823. The Corps regulations at 33 CFR 323.2 (d) (4) state that:

“For purposes of this section, an activity associated with a discharge of dredged material destroys an area of waters if it alters the area in such a way that it would no longer be a water of the United States. Note: Unauthorized discharges into waters of the United States do not eliminate Clean Water Act jurisdiction, even where such unauthorized discharges have the effect of destroying waters of the United States.”

The District stated that it did not have a record of an authorization for the construction of the 15.5 acres of ponds. As stated above, the administrative record reasonably supports the District’s conclusion that areas within CWA jurisdiction were present prior to construction of the 15.5 acres of ponds. Therefore, the District must evaluate whether the construction of 15.5 acres of ponds might have been an exempt activity, an activity that was covered by a Corps Nationwide permit in place at the time of construction of the ponds, or a fill of an area within CWA jurisdiction that occurred without a Corps permit authorization. With regard to exemptions, the District must also consider the Corps regulations at 33 CFR 323.4 (c) which states:

“Any discharge of dredged or fill material into waters of the United States incidental to any of the activities identified in paragraphs (a) (1) through (6) of this section (33 CFR 323.4 *Discharges not requiring permits*) must have a permit if it is part of an activity whose purpose is to convert an area of waters of the United States to a purpose to which it was not previously subject. ... A conversion of a Section 404 wetland to a non-wetland is a change of use of an area of waters of the United States.”

If the District determines that the ponds no longer meet the definition of waters within CWA jurisdiction, but that areas within CWA jurisdiction were filled without authorization to construct the ponds, then in accordance with 33 CFR 323.2 (d) (4), those areas filled without authorization should be considered as still within CWA jurisdiction. The District would then need to document the extent of such areas previously filled, include that estimate as part the CWA jurisdictional determination issued as a result of this appeal decision, and subsequently determine any appropriate action needed to resolve the placement of unauthorized fill.

The District must document its findings and issue a CWA jurisdictional determination with a basis of jurisdiction discussion to the Appellant that addresses these issues.

Reason 4: The District’s determination is inconsistent with the objectives of the CWA.

FINDING: This reason for appeal did not have merit

ACTION: No action required

DISCUSSION: The Appellant stated in his RFA:

“Lastly, it should be noted that the District’s Jurisdictional Determination is inconsistent with the clear Congressional intent of the Clean Water Act. According to the Act, “[t]he objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 USC § 1251 (a). ...The District’s actions with regard to the Jurisdictional Determination have simply delayed, and will further delay, the restoration of hundreds of acres of severely degraded, unmaintained pastures into a protected, actively maintained vernal pool and wetland landscape with potential habitat for threatened and endangered species. This delay is clearly contrary to the objectives of the Clean Water Act and should not be upheld.”

The District is required to determine the presence and geographical extent of CWA jurisdiction in accordance with the definitions in the Corps regulations at 33 CFR 328.3 (a) (1) – (a) (7). The District must use the same definitions and procedures to determine the extent of CWA jurisdiction regardless of the type of activity proposed for a particular site. In this instance, the administrative record showed that the Appellant’s proposed restoration project had been developed as compensatory mitigation for the adverse effects of prior fills of waters within CWA jurisdiction that had been authorized in accordance with previous permits issued by the District.

It was reasonable for the District to evaluate the extent of CWA jurisdictional areas on this property in accordance with established procedures. There is no basis in the Corps regulations for the District to modify the definitions of areas within CWA jurisdiction because the Appellant’s current proposed activity on the property includes restoration and enhancement of the existing aquatic environment. Such benefits are considered as part of

the balancing of public interest factors during the Corps permitting process, not as a basis for determining the extent of CWA jurisdiction on a project site.

Reason 5: The action (the District's jurisdictional determination) is arbitrary because it fails to provide a reasoned explanation why the Corps reached its conclusions.

FINDING: This reason for appeal was addressed in more specific reasons for appeal above.

ACTION: See actions required under Reasons 1, 2 and 3

DISCUSSION: This reason for appeal stated by the Appellant was addressed under reasons for appeal 1, 2, 3, and 4.

Information Received and its Disposition During the Appeal Review: The administrative appeal was evaluated based on the District's 569 page administrative record, the Appellant's Request for Appeal, Appellant's written responses to the draft appeal meeting agenda, and discussions at the appeal meeting. The District and the Appellant also submitted addendums to the Review Officer's summary of the appeal meeting further stating the Appellant's positions regarding several issues. These addendums were also considered during the review of the administrative appeal.

Conclusion: I conclude the District must further evaluate the source(s) of water responsible for maintaining the wetland hydrology indicators found in Zones 3, 4, 5, and 6 of the Silva Ranch property. Based on that evaluation the District must reconsider whether the wetland areas in Zones 3, 4, 5, and 6 are within CWA jurisdiction. The District must also reconsider the CWA jurisdictional status of 15.5 acres of constructed ponds and 0.2 acres of ditch/channel. The District's evaluation of these areas must consider the District's revised guidance document on irrigated areas - *Regulatory Branch Memorandum 2007-01, Irrigated Wetlands*. Substantial information regarding this site was collected prior to initiation of the trial period for the WDM Arid West Supplement in February 2007. In order to avoid delays in reconsideration, the District will complete the evaluation of this site using the 1987 WDM procedures unless the Appellant chooses to supplement his prior submittals using additional evaluations in accordance with the WDM Arid West Supplement procedures.

Original Signed

John R. McMahon
Brigadier General, U. S Army
Commanding