

**ADMINISTRATIVE APPEAL DECISION
CLEAN WATER ACT
STEGALL AND HERDBUILDERS PROPERTY
COLUSA COUNTY, CALIFORNIA
SACRAMENTO DISTRICT
File Number SPK-2012-00991**

DATE: October 19, 2016

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

Appellant Representative: Tom Boer, Hunton & Williams LLP (Appellant)

District Representative: James Robb, U.S. Army Corps of Engineers, Sacramento District (District)

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

Receipt of Request for Appeal: December 2, 2015

Appeal Meeting and Site Visit Date: April 7, 2016

Summary of Decision: Reasons for appeal 2 and 5 to this Clean Water Act (CWA) jurisdictional determination are found to have merit. The District's decision is remanded to the District for re-evaluation and documentation in accordance with this decision. The District must provide the Appellant with its determination as to whether wetlands on the Stegall and Herdbuilders Property (Property) are subject to jurisdiction under Section 10 of the Rivers and Harbors Act and include sufficient documentation of its evaluation of the NRCS delineation, which the District depended upon to support its conclusion as to the presence and extent of wetlands on the Property.

Background Information: The (Property) is located north of Colusa, California, in un-sectioned portions of the Colusa (Cachil Dehe) Rancheria Mexican Land Grant, Township 16 North, Range 2 West, Mount Diablo Meridian, Latitude 39.2624°, Longitude -122.0275°, Colusa County, California.

For purposes of evaluation during the CWA jurisdictional determination, the District evaluated the site using the January 13, 2014, "Final Certified Wetland Determination, Herdbuilders, Inc." drawing prepared by The U.S. Department of Agriculture, Natural Resources Conservation Service; the 1987, Corps of Engineers Wetlands Delineation Manual (87 Manual); the Code of Federal Regulations (CFR) definitions of jurisdictional waters; and supporting guidance.

On October 11, 2012, the District notified the Appellant that the District had determined that the Appellant had discharged fill material, without a permit, into a historic oxbow of the Sacramento River, which the District had determined was a waters of the United States. The District's review included a field visit to the site on September 20, 2012. On May 20, 2015, the District issued its CWA jurisdictional determination for the Property at issue. The District concluded that the site contained approximately 18.69 acres of waters of the United States, including wetlands, within the survey area. Further the District determined that these waters are regulated under Section 404 of the Clean Water Act. The District stated that the basis for its determination was detailed in its "Approved Jurisdictional Determination Form" dated May 29, 2015.

The Appellant's attorney submitted a Request for Appeal (RFA) on November 30, 2015. The Appellant disagreed with the District's conclusion that the 18.69 acres on the property are waters that were subject to jurisdiction under Section 404 of the Clean Water Act. The Appellant asserted that the basis of jurisdiction cited by the District - that the Property contains jurisdictional wetlands, adjacent to the Sacramento River, a Traditionally Navigable Water (TNW) - is not supported by the applicable law, regulations, and the factual circumstances.

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: The Sacramento District relied on an incorrect application of law, regulation and/or policy and incorrect factual conclusions by erroneously finding that the subject property was "adjacent" to the Sacramento River.

FINDING: This reason for appeal does not have merit.

ACTION: No action is required.

DISCUSSION: In the RFA, the Appellant asserted that the Property is not jurisdictional because it has been fully severed from the Sacramento River by multiple natural and man-made features; it is too far (not proximate) from the Sacramento River to be adjacent (as defined by the applicable regulations); and the Property does not have an identifiable surface or subsurface connection with the Sacramento River that would support a finding of jurisdiction under the Clean Water Act.

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 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 wetlands adjacent to TNWs. Section II.B.1.b indicates that there are 18.69 acres of wetlands in the review area.

Section III.A.1 of the AJD form indicates that the Sacramento River is navigable for 301 miles from its mouth up to Keswick Dam, according to the South Pacific Division, U.S. Army Corps of Engineers' 15 February 1978 "Sacramento River Determination of Navigability." River mile 151 and 152, adjacent to the subject area, are within the navigable portion of the Sacramento River.

Section III.A.2 of the AJD form indicates that the wetlands within the oxbow of the Sacramento River are neighboring and bordering the Sacramento River, separated only by man-made barriers, one of which, the abandoned railroad grade, appears to be relatively open to passage of water near the surface. The form indicates that the wetlands separated from other waters of the United States by man-made dikes or barriers are adjacent as per 33 CFR 328.3(c)(1). The AJD form states that two man-made barriers are present. The AJD form indicates that one barrier, closest to the river and furthest east of the oxbow, is a man-made levee first constructed circa 1870 and further that, in 1944, a federal levee was constructed behind and abutting the 1870 levee, expanding that man-made barrier. The AJD form states that the second barrier furthest from the river is a rail road grade constructed in or around 1912. The AJD form states that the distance between these barriers, measured from the top of the federal levee and the top of the rail road grade at their narrowest point, is 580 feet and that there is approximately 800 feet between the wetland and the Sacramento River at the narrowest point.

The Corps regulations, at 33 CFR Parts 328 and 329, define "waters of the United States" and "navigable waters of the United States", respectively, and each part prescribes policy, practice and procedures to be used in determining the extent of such jurisdiction. In addition, 33 CFR Part 331, "Administrative Appeal Process," provides terms and definitions for Jurisdictional Determinations. The Corps regulations, at 33 C.F.R. § 329.4, indicates that, "waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce" are to be considered "navigable waters of the United States." The term "adjacent" is defined, at 33 CFR 328.3(c)(1), as "bordering, contiguous, or neighboring a water identified in paragraphs (a)(1) through (a)(5) of this section" to include navigable waters of the United States. Wetlands separated from navigable waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are considered adjacent wetlands.

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), directs the agencies to assert jurisdiction over wetlands "adjacent" to traditional navigable waters as defined in the agencies' regulations. Under EPA and Corps regulations and as used in the Rapanos Guidance, "adjacent" means "bordering, contiguous, or neighboring". The Rapanos Guidance further states that finding a

continuous surface connection is not necessary to establish adjacency under this definition.

The Rapanos Guidance states that the regulations define adjacent as follows: “the term adjacent means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are ‘adjacent wetlands’. Under this definition, the agencies consider wetlands adjacent if one of the following three criteria is satisfied. First, there is an unbroken surface connection or shallow sub-surface connection to jurisdictional waters. This hydrologic connection may be intermittent. Second, they are physically separated from jurisdictional waters by man-made dikes or barriers, natural river berms, beach dunes and the like. Or, third, their proximity to a jurisdictional water is reasonably close, supporting the science based inference that such wetlands have an ecological interconnection with jurisdictional waters. Because of the scientific basis for this inference, determining whether a wetland is reasonably close to a jurisdictional water does not generally require a case specific demonstration of an ecologic interconnection. In the case of a jurisdictional water and a reasonably close wetland, such implied ecological interconnectivity is neither speculative nor insubstantial. For example, species, such as amphibians or anadromous and catadromous fish, move between such waters for spawning and their life stage requirements. Migratory species, however, shall not be used to support an ecologic interconnection. In assessing whether a wetland is reasonably close to a jurisdictional water, the proximity of the wetland (including all parts of a single wetland that has been divided by road crossings, ditches, berms, etc.) in question will be evaluated and shall not be evaluated together with other wetlands in the area.” (pages 5 and 6, Rapanos guidance).

In this case the District determined that wetlands on the Property meet all three criteria, although only one is necessary to satisfy adjacency. The District concluded that the wetlands on the Property are physically separated from jurisdictional waters by man-made dikes or barriers, natural river berms, beach dunes and the like. The District determined that it was unnecessary to demonstrate a hydrologic connection in this case, since the wetland on the Property had already been determined to meet one of the three criteria and is, therefore, adjacent by definition. However, the District concluded that the wetland on the Property has an unbroken subsurface connection to the Sacramento River; is below the elevation of the Ordinary High Water Mark (OHWM) of the Sacramento River; has permeable soils; and is mapped as within the 100-year floodplain. Further, historic aerial photography indicates that the water levels within the Subject Area rise and fall with the level of the Sacramento River. The District determined that the wetlands on the Property are proximate to the Sacramento River and that the wetlands on the Property were formed by the Sacramento River, as the oxbow was once a channel of the Sacramento River.

Therefore, in that the District has provided a rationale, consistent with regulation and guidance, for its determination that the wetlands on the Property are adjacent to the Sacramento River, no further action is necessary.

REASON 2: The subject property has been severed from the Sacramento River for more than a century by multiple man-made barriers and by natural topography. The subject property is clearly not susceptible to navigation and, as such, is not subject to Rivers and Harbors Act § 10 jurisdiction. The District erroneously declined to make a determination as to whether the subject property is covered by Rivers and Harbors Act jurisdiction.

FINDING: This reason for appeal has merit.

ACTION: The District must complete an evaluation of the potential for the aquatic features on the Property to be navigable waters of the U.S., within Rivers and Harbors Act (RHA) jurisdiction (as defined by 33 CFR part 329), document its conclusion, and provide that conclusion to the Appellant.

DISCUSSION: Section II.A of the AJD form comes to no conclusion as to the presence of “navigable waters of the U.S.” within Rivers and Harbors Act (RHA) jurisdiction, as defined by 33 C.F.R. Part 329, in the subject review area. The language inserted by the District in that section of the AJD form indicates that no determination was made, but briefly discusses the elevation of the oxbow and the possibility that the oxbow could have been susceptible to navigation at some point in the past, when it was a portion of the river.

33 CFR §331.2 states that, a “Jurisdictional determination (JD) means a written Corps determination that a wetland and/or waterbody is subject to regulatory jurisdiction under Section 404 of the Clean Water Act (33 U.S.C. 1344) or a written determination that a waterbody is subject to regulatory jurisdiction under Section 9 or 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 401 et seq.).”

The U.S Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook (Rapanos guidebook), on page 50, states that, for navigable waters of the U.S., subject to rivers and harbors act (RHA) jurisdiction (as defined by 33 CFR part 329) in the review area, that, by checking the appropriate box(es), field staff will indicate whether the water body is a navigable water of the U.S. because: a corps district has determined that the water body is a navigable water of the U.S. pursuant to 33 CFR part 329.14; the water body is subject to the ebb and flow of the tide; because it is presently used, or has been used in the past, or may be susceptible for use (with or without reasonable improvements) to transport interstate or foreign commerce; one or more decisions of the federal courts has determined that the water body is navigable-in-law; or the water body is navigable-in-fact (i.e. if the water body is either currently used or is susceptible to use in its existing condition for any commercial purpose involving navigation.

The AJD form, itself, indicates that Section II.A, of the AJD form, is required to be completed.

The AJD form is expected to document the entire extent of Corps jurisdiction. It’s neither fair nor reasonable for a District to provide a response to a request for a jurisdictional determination, with a determination under only one of its authorities. The

District must, therefore, provide the Appellant with a determination as to whether the Property is subject to jurisdiction under Section 10 of the Rivers and Harbors Act.

REASON 3: The District erroneously concluded that the "subject wetlands are within the mapped 100 year floodplain of the Sacramento River ..." This conclusion is factually incorrect. As discussed in our August 21, 2014 letter and the July 27, 2015 WRA Technical Memorandum, the subject area is not within the Sacramento River floodplain. The WRA technical memorandum concludes that: "The areas mapped as subject to the 100-year flood are local depressions in the landscape and not part of the Sacramento River floodplain. When the isolated depressions at the subject property do flood, the flood waters are neither received from the Sacramento River nor flow back into the River." The fact that the subject property is outside of the Sacramento River 100-year floodplain provides additional support for the conclusion that the subject property is not "adjacent" to the Sacramento River and that it does not have a "significant nexus" to the River (or any other traditional navigable water).

FINDING: This reason for appeal does not have merit.

ACTION: No action is required.

DISCUSSION: The Rapanos Guidance indicates that the *Rapanos* decision does not affect the scope of jurisdiction over wetlands that are adjacent to traditional navigable waters because at least five justices agreed that such wetlands are "waters of the United States". There is no requirement to establish, demonstrate, or document the existence of a significant nexus for wetlands adjacent to TNWs.

The District documented that the wetlands on the Property are within the FEMA mapped 100 year floodplain on FEMA FIRM map number 06011C0375F (AR, p. 445). Additionally, the California Department of Water Resources maps the area as within the Flood Recurrence Model for the Sacramento River (AR, p.25).

In its request to the District for reconsideration the Appellant asserted that wetlands on the Property do not flood from the Sacramento River. The Appellant asserted that areas mapped as subject to the 100-year flood are local depressions in the landscape and not part of the Sacramento River floodplain. In a report prepared by the Appellant's consultant, WRA (AR, p. 163), WRA concluded that historic maps show that the subject property is not flooded from the Sacramento River. The Appellant's consultant asserted, in that report, that several individual historic maps and aerial photos show the property as isolated by higher ground during individual flood events. The consultant's report concluded that the wetlands on the Property that are mapped as subject to the 100-year flood are local depressions in the landscape and not part of the Sacramento River floodplain. The consultant's conclusion and the Appellant's assertion was that, when the depression on the Property does flood, the flood waters are neither received from the Sacramento River nor flow back into the River.

The Appellant's consultant further asserted that the land separating the Property from the Sacramento River is dry land; that no surface water connections exist or subsurface flows

occur (nor have been observed by any party); and water reaching the subject Property is either rainfall, local runoff from the immediate surroundings, or from irrigation water of adjacent agricultural properties. The Appellant's consultant argued that the subject property is too far removed from the active river. Finally, although some of the property may not have been elevated substantially, the placement of features, such as the levee and the railroad bed, eventually eliminated the hydrology and the feature became more terrestrial. The Appellant's consultant asserted that the construction of multiple levees and the rail bed on dry land has further isolated the subject property from the River, and that studies show that grain sizes become smaller when a levee is built between an oxbow and a river and that groundwater connectivity is substantially reduced, as a result.

The District documented that the wetlands on the property are located within the mapped 100 year floodplain as described above. Additionally, the District has included documentation that the soils on the property are moderately well drained and therefore, permeable. Both of those conclusions support a conclusion that there is some hydrologic interaction between the River and the wetlands on the Property. The Appellant has asserted that flood waters from the river would flow around, rather than into the wetlands on the property and suggested that the construction of berms and levees between the wetlands on the Property and the Sacramento River would have reduced the permeability of soil in the vicinity of those activities. Therefore, while the Appellant questioned the District's conclusion and provided some support for a conflicting position, the District did support its conclusion with sufficient documentation. More importantly, the District was correct in its response to the Appellant's assertions when the District stated that neither the flood plain, nor the subsurface hydrology connections are required to support a conclusion that the wetlands on the Property are adjacent to the Sacramento River. The conclusion that the wetlands are reasonably close to the Sacramento River is sufficient to support that conclusion.

REASON 4: In concluding that wetland characteristics were present at the subject property, the District failed to investigate or evaluate the fact that the subject area formerly received significant irrigation run-off and spillage from a neighboring orchard owned by a third-party. That run-off has ceased. As summarized in our August 21, 2014 letter, long-standing Corps guidance states that wetlands created as a result of irrigation run-off are not waters of the United States subject to Clean Water Act § 404 jurisdiction.

FINDING: This reason for appeal does not have merit.

ACTION: No action is required.

DISCUSSION: The 1986 preamble to 33 CFR § 328.3 (51 FR 41217) indicates that the Corps generally does not consider artificially irrigated areas which would revert to uplands if the irrigation ceased to be waters of the United States under Section 404 of the Clean Water Act.

The USACE Quality Management System (QMS) process, 12510-SPD "South Pacific Division Regulatory Program Wetlands Determination And Delineation Procedures For

Irrigated Lands” (12510-SPD), states that, to determine whether irrigated land, or a portion of irrigation land, is a wetland under 33 CFR § 328.3(b), the Corps must first determine whether the irrigated land, under normal circumstances, exhibits the three factors for wetland identification and delineation provided in the 1987 Manual, or the applicable criteria in Chapter 5 of the appropriate regional supplement. Conducting a wetland determination or delineation in accordance with the 1987 manual and the indicators, guidance, and procedures provided in the appropriate regional supplement is critical for determining the extent and location of wetlands on the site.

12510-SPD further states that, where irrigation is ongoing, wetland indicators may be the result solely of the irrigation. Therefore, discontinuing the application of irrigation water is usually the best method for determining whether or not wetland hydrology would be present under normal circumstances. 12510-SPD states that wetland identification and delineation in these situations is also complicated by land modifications, such as leveling or diking, and/or ongoing grazing or vegetation management practices, including those described in the difficult wetland situations in the regional supplements.

Finally 12510-SPD clarifies that irrigated areas that, under normal circumstances, meet the definition of a wetland under the 1987 Manual and regional supplement are potentially subject to jurisdiction under Section 404 of the CWA. A wetland is considered jurisdictional if it meets the definition of waters of the U.S., in accordance with 33 CFR § 328.3(a) and guidance provided by the Corps and EPA.

12510-SPD suggests, among other things, the review of historic aerial photography to evaluate the potential for wetlands to exist on the site, absent irrigation, as well as observation of hydrology outside of the normal irrigation season as an approach to evaluating the extent to which irrigation

It is clear from the administrative record that the District did consider the possibility that wetlands on the property might be sustained by irrigation. The District considered the information provided in the Appellant’s August 21, 2014, letter. The District concluded that there was no evidence to support the conclusion that the wetlands would revert to uplands if irrigation ceased.

In this case, the District determined from the analysis of aerial photography from several years, taken outside of the normal period of irrigation, that the wetland on the property possessed indications of hydrology, which would not be expected if the wetland on the Property were sustained solely by irrigation or irrigation runoff.

The District concluded that what it observed in those photos matched what would be expected from a wetland in this geomorphic position and that any irrigation water inputs had not resulted in a substantial change in hydrologic regime. Further, the District concluded that, as the wetland is lower than the Sacramento River, its soils are permeable, allowing for a subsurface connection to the Sacramento River, and observed hydrology was what would be expected from a wetland in this geomorphic setting. The District has, thereby, sufficiently supported its conclusion.

REASON 5: The District failed to use adequate field data or analysis to support its claim that 18.69 acres of the subject property had wetlands characteristics. In reaching its determination, the District appears to have relied upon only two documents: (i) the USFWS National Wetland Inventory, Wetland Mapper; and (ii) the January 13, 2014 Final Certified Wetland Determination by USDA-NRCS. It was erroneous for the District to rely upon only these documents and fail to conduct its own independent, thorough assessment of wetland characteristics as required by the 1987 Wetland Manual and other Corps guidance. As discussed in the attached WRA Technical Memorandum, review of aerial photographs shows that the characteristics of the subject property were not homogeneous and indicate that 13.2 acres of the subject property consisted of upland woodlands and non-native grassland.

FINDING: This reason for appeal has merit.

ACTION: The District must reconsider its acceptance of the wetland delineation map and any supporting materials provided by NRCS and clearly document the consideration that led its acceptance or rejection of those materials. In doing so, the District should clearly describe the documentation provided by NRCS and whether or how it evaluated each piece of documentation for accuracy, in order to support its final determination as to the presence and extent of waters of the United States, including wetlands on the Property. If, as a result of this reconsideration, the extent of wetlands on the Property changes, the District must consider whether that would have any effect on its determination the wetlands on the Property are adjacent to the Sacramento River, a TNW.

DISCUSSION: The Corps regulations, at 33 CFR Parts 328 and 329, define “waters of the United States” and “navigable waters of the United States”, respectively, and prescribe policy, practice and procedures to be used in determining the extent of such jurisdiction. In addition, 33 CFR Part 331, Administrative Appeal Process, provides terms and definitions for jurisdictional determinations.

The 87 Manual states that the Corps of Engineers (*Federal Register* 1982) and the EPA (*Federal Register* 1980) jointly define wetlands as: 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. Wetlands must meet all three parameters of hydrology, hydrophytic vegetation, and hydric soils, as required by agency regulations, and described in the 87 Manual or appropriate Regional Supplement.

Procedures for making JDs for waters of the United States are described in the Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency Concerning the Determination of the Geographic Jurisdiction of the Section 404 Program and the Application of the Exemptions Under Section 404(f) of the Clean Water Act (MOA), dated 19 January 1989, later amended on 4 January 1993.

Regulatory Guidance Letter 88-05 indicates that the Corps is responsible for the analysis, coordination, verification, jurisdictional determinations, documentation, and other procedures required by applicable laws and regulations. It further provides that there is no restriction against applicants or potential applicants voluntarily providing the data needed for fulfilling those responsibilities. For example, an applicant or potential applicant may submit a map of the limits of jurisdictional wetlands based on delineation techniques prescribed by the district engineer. Additionally, as indicated by the District, the 25 February 2005 "Joint Guidance from the Natural Resources Conservation Service (NRCS) and the Army Corps of Engineers (COE) Concerning Wetland Determinations for the Clean Water Act and the Food Security Act of 1985" directs NRCS and the Corps to rely on each other's wetland determinations to the maximum extent permissible by current statute and regulations.

Section IV.A of the AJD Form contains blocks for the district to indicate that data sheets were provided by or on behalf of the applicant or consultant and whether it does or does not concur with data sheets/delineation report.

In Section IV.B, the District stated that it had "reviewed the 13 January 2014 USDA-NRCS Final Certified Wetland Determination determined that its findings were consistent with our own observations as summarized by its Atypical Situation Data form 3 . . ." and that the "25 February 2005 'Joint Guidance from the Natural Resources Conservation Service (NRCS) and the Army Corps of Engineers (COE) Concerning Wetland Determinations for the Clean Water Act and the Food Security Act of 1985" and states that "to the maximum extent permissible by current statute and regulations, NRCS and COE will rely on each other's wetland determinations . . . ", and that accordingly the District verified that 18.69 acres on the map, within Field 4B, described in the "Final Certified Wetland Determination Herdbuilders, Inc. January 13, 2014" are waters of the U.S.

Therefore, just as a District may accept a wetland delineation report, containing a map, data sheets, and other pertinent information from a consultant, prepared on behalf of a prospective applicant, a District may accept a wetland delineation report prepared by another agency. The fact that a wetland delineation report was prepared by another agency, such as NRCS, does not, despite direction to NRCS and Corps Districts to rely on each other's wetland determinations to the maximum extent permissible by current statute and regulations, reduce the District's responsibility and obligation to independently verify the accuracy of the report and insure that the mapping and data in that report is consistent with Corps requirements. In this case, it is clear that the District conducted some level of review of the NRCS report. It is, however, not clear what the extent of that review was and how much of the NRCS report was available or reviewed prior to its acceptance by the District.

REASON 6: There is no nexus between the subject property and the Sacramento River. The subject property is entirely hydraulically isolated from the Sacramento River. The subject area is a localized, isolated depression. The lack of a significant nexus further emphasizes the lack of adjacency between the subject property and the Sacramento River

and supports the conclusion that any portions of the subject property that met the applicable wetland characteristics would have been isolated.

FINDING: This reason for appeal does not have merit.

ACTION: No action is required.

DISCUSSION: As discussed above in Reason 3, there is no requirement to find a significant nexus between a TNW and its adjacent wetlands or to complete a significant nexus analysis to establish jurisdiction between a TNW and any adjacent wetlands. The District's determination that wetlands on the Property are adjacent is discussed under Reason 1, above.

CONCLUSION:

I, therefore, conclude that reasons for appeal 2 and 5 have merit. The decision is, therefore, remanded to the District. The District must complete an evaluation of the potential for aquatic features on the Property to be navigable waters of the U.S., within Rivers and Harbors Act (RHA) jurisdiction (as defined by 33 CFR part 329), document its conclusion, and provide that conclusion to the Appellant. The District must, also, reconsider its acceptance of the wetland delineation map and any supporting materials provided by NRCS and clearly document the consideration that led its acceptance or rejection of those materials and determination that the NRCS delineation was consistent with Corps requirements, as well as support its final determination as to the presence and extent of waters of the United States, including wetlands on the Property. Finally, if as a result of this reconsideration, the extent of wetlands on the Property changes, the District must consider whether that would have any effect on its determination the wetlands on the Property are adjacent to the Sacramento River, a TNW. The District's determination was not otherwise arbitrary, capricious or an abuse of discretion, and was not plainly contrary to applicable law or policy. This concludes the Administrative Appeal Process. The District shall, upon completion of these tasks, provide its final decision to the Division Engineer and Appellant.



Thomas J. Cavanaugh
Administrative Appeal Review Officer