

ADMINISTRATIVE APPEAL DECISION
APPROVED GEOGRAPHIC JURISDICTION FOR
THE VALLEY VISTA PROPERTY

LOS ANGELES DISTRICT

File number 2002-01321-SDM

January 31, 2003

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

Appellant Representative: Stephen Powers, Stantec Consulting (Appellant)

Corps District Representative: Sallie McGuire, U.S. Army Corps of Engineers, Los Angeles District, Phoenix Field Office (District)

Jurisdiction: Section 404 of the Clean Water Act (33 U.S.C. 1344)

Receipt of Request For Appeal (RFA): November 6, 2002

Site Visit and Appeal Conference: December 5, 2002

Background Information: The District determined that a desert wash and impoundment on the Valley Vista property in the Phoenix, Arizona area were within Clean Water Act jurisdiction. The Appellant disagrees because he asserts the District's consideration of historic conditions in making its determination is inconsistent with Corps Clean Water Act policy and guidance. In addition, the Appellant asserts that even if the District's policy approach were appropriate, that the facts in this situation do not support a conclusion that the areas on the property should be within the jurisdiction of the Clean Water Act.

Summary of Decision: I found that portions of the District's decision in this action were inconsistent with the Corps guidance implementing the Clean Water Act and were insufficiently documented. I remand this approved jurisdictional determination to the District to reconsider and further document and/or modify its conclusions regarding whether T-Bone Tank and Wash 1 are within Clean Water Act jurisdiction as waters of the United States.

Appeal Decision and Instructions to the Los Angeles District Commander (DE):

Appeal Reason 1: The Appellant asserts that the District's consideration of, and dependence on, historic conditions that no longer exist to assert Clean Water Act (CWA) jurisdiction for T-Bone Tank and Wash 1 is inconsistent with the Corps regulations, policy and guidance implementing the CWA. The Appellant considers T-Bone Tank and Wash 1 to be isolated waters outside of CWA jurisdiction.

Finding: The appeal has merit.

Action: The District must reconsider its determination that T-Bone Tank and Wash 1 are within CWA jurisdiction using the criteria and instructions in this Administrative Appeal Decision.

Discussion: The Valley Vista property is an undeveloped, relatively flat, approximately 270-acre, irregularly shaped site that gently slopes from northeast to southwest. The property is located about 15 miles north of downtown Phoenix, Arizona, approximately 1 mile northeast of the intersection of Interstate 17 and Happy Valley Road in the northeast $\frac{1}{4}$, the southeast $\frac{1}{4}$, and the southwest $\frac{1}{4}$ of Section 36, Township 5 N, Range 2 E, Maricopa County, Arizona. Nearby areas include housing areas and undeveloped desert. The non-jurisdictional Central Arizona Project (CAP) canal forms the northeast boundary of the property.

The CWA jurisdictional status of approximately 1.6 acres of this property consisting of a man-made, earthen impoundment named T-Bone Tank and a desert wash (Wash 1) that flows into it from the northeast, are in dispute. T-Bone Tank receives water via runoff from direct rainfall on the site, and Wash 1 also receives some runoff water from desert washes originating in hills approximately 1 – 2 miles east of the site. Those hills are located east of the CAP canal, and a culvert conveys a portion of the flows from these washes into Wash 1, and subsequently down-gradient to T-Bone Tank. The District and the Appellant agree that an ordinary high water mark (OHWM) exists in Wash 1 between the property's northeastern boundary and T-Bone Tank. The District and the Appellant agree there is no OHWM down-gradient of T-Bone Tank. A second non-jurisdictional drainage with no OHWM also flows into T-Bone Tank from the north.

The District's September 9, 2002 approved jurisdictional determination supplied to the Appellant stated that:

“Each water of the United States herein delineated is an impoundment of a water that was tributary to an interstate water.”

The District's September 9, 2002 Memorandum for the Record (MFR) stated that:

“Because there is an ordinary high water mark upstream [in Wash 1] of the [T-Bone] tank, it is jurisdictional because it is an impoundment of waters of the

U.S. Also, the tank was determined to be jurisdictional in file #1999-15553-SDM (sheet 14 of 21) for a water and sewer line. Upstream of the [CAP] canal, washes were delineated as jurisdictional in Files #984-0290-SDM and #2002-00734-SDM.”

(Note: Words in brackets “[]” added for clarity).

These statements show that the District was basing its CWA geographic jurisdictional determination on 33 CFR 328.3 (a) (4) that states:

All impoundments of waters *otherwise defined as waters of the United States* are also waters of the United States and within CWA jurisdiction. (*italics added for emphasis*)

T-Bone Tank was constructed in 1952. T-Bone Tank could not have impounded a water of the United States or been within CWA jurisdiction at the time of its construction, since the CWA would not be enacted until 1972.

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

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

(Note: While the above statement was developed particularly to address wetland issues, the use of the term “aquatic system” rather than “wetlands” indicates that it has more general application.) The Corps regulations at 33 CFR 328.5 also state that man-made changes may affect the limits of waters of the United States.

The District stated as clarifying information at the appeal conference that they considered T-Bone Tank and Wash 1 as within CWA jurisdiction because of an historical tributary connection from Wash 1 to Scatter Wash, about 2 miles south of the site, that existed prior to 1952. The District stated that this connection would have had an OHWM prior to 1952. The District further stated that this tributary connection with an OHWM between T-Bone Tank and Scatter Wash disappeared some time after 1952.

The District’s basis of jurisdiction checklist dated September 5, 2002 identified the destruction of terrestrial vegetation, changes in soil characteristics (e.g. sandy channel bottoms), presence of litter/debris, and presence of man-made drainage features/scour protection as indicators observed on the site. These indicators provide evidence that T-Bone Tank and Wash 1 have an OHWM. The Corps regulations at 33 CFR 328.4 identify the limits of CWA jurisdiction of non-tidal waters of the United States – in the absence of adjacent wetlands - as the OHWM. However, an OHWM is used to establish

the geographic extent of CWA jurisdiction once a basis for CWA jurisdiction has been identified under 33 CFR 328.3. If an area does not meet the requirements of an area within CWA jurisdiction under 33 CFR 328.3, the presence or absence of an OHWM becomes irrelevant to a determination of the extent of CWA jurisdiction.

The District's basis of CWA jurisdiction in the administrative record is inconsistent with the CWA regulations and guidance regarding the use of historical information. In order for T-Bone Tank to be within CWA jurisdiction as an impoundment, it must be demonstrated that a tributary extended downstream from T-Bone tank to a water within CWA jurisdiction after the enactment of CWA and effective date of its implementing regulations regarding the jurisdiction of tributaries.

The Corps regulations at 33 CFR 328.3 (a) (5) define tributaries of waters of the United States as being within CWA jurisdiction. The District and the Appellant agree that Wash 1 has an OHWM. If T-Bone Tank were found to be within CWA jurisdiction, Wash 1 would clearly meet the requirements of a tributary to a water of the United States. The CWA jurisdictional status of Wash 1 as a tributary to a water of the United States is dependent on the CWA jurisdictional status of T-Bone Tank.

The District must reconsider the CWA jurisdictional status of T-Bone Tank and Wash 1. The following factors must be addressed and documented in the administrative record of the reconsideration of this action.

T-Bone Tank cannot be defined as a water of the United States within CWA jurisdiction based on a tributary connection that existed only prior to enactment of the CWA. In order to consider T-Bone Tank within CWA jurisdiction as an impoundment of a water of the United States, the District must document that a tributary connection meeting the requirements of the CWA including the presence of an OHWM, existed between T-Bone Tank and Scatter Wash after the CWA became law in 1972, and after the phase-in of subsequent Corps regulations regarding the extent of CWA jurisdiction. The District will review the phase-in schedule for implementation of permit requirements for the CWA identified in the July 25, 1975 Federal Register notice *Interim Final Regulation* for the Corps regulatory program to identify the correct phase-in date for this area.

If upon reconsideration the District concludes that T-Bone Tank is not within CWA jurisdiction under 33 CFR 328.3 (a) (4) as an impoundment of a water of the United States, the District will consider whether T-Bone Tank is within CWA jurisdiction as an isolated, intrastate water under 33 CFR 328.3 (a) (3). This reconsideration must include consideration of the Supreme Court Decision in *Solid Waste Agency of Northern Cook County v. United States*, 531 U.S. 159 (January 9, 2001) (*SWANCC* decision), associated court decisions, and the Environmental Protection Agency (EPA)/Department of the Army (DA), Joint General Counsel Memorandum of January 14, 2003 (*Appendix A to Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States*, Federal Register, Vol 68. No. 10, pgs 1991 – 1998 dated January 15, 2003). That guidance directs that:

“...in view of the uncertainties after *SWANCC* concerning jurisdiction over isolated waters that are both intrastate and non-navigable based on other grounds listed in 33 CFR 328.3 (a) (3) (i) – (iii), field staff should seek formal project-specific Headquarters approval prior to asserting jurisdiction over such waters...”

Although the Appellant provided clarifying materials asserting that the *SWANCC* decision had removed all isolated, intrastate waters from CWA jurisdiction. That position is inconsistent with the January 15, 2003 EPA/DA General Counsel memorandum regarding the *SWANCC* decision. The District must follow the EPA/DA joint memorandum rather than the Appellant’s alternative interpretation of the *SWANCC* decision.

The District and the Appellant agreed that the active channel of Wash 1 has moved since the construction of the CAP canal. The Appellant asserts that since T-Bone Tank is an isolated water, and that the active channel of Wash 1 has changed since T-Bone Tank was constructed, that the currently active Wash 1 channel has never been a tributary to a water of the United States. The Appellant considers this an additional reason that Wash 1 is outside CWA jurisdiction. As stated above, based on the existing administrative record, Wash 1 would meet the requirements of a tributary to a water of the United States if T-Bone Tank were found to be within CWA jurisdiction, even if its active channel location had changed over time.

Appeal Reason 2: The Appellant asserts that the administrative record does not support the District’s conclusion that a tributary connection with an OHWM meeting the requirements of the CWA ever existed between the area impounded by T-Bone Tank and Scatter Wash.

Finding: The appeal has merit.

Action: The District must reconsider its determination that T-Bone Tank and Wash 1 are within CWA jurisdiction using the criteria and instructions in this Administrative Appeal Decision.

Discussion: The District’s September 5, 2002 basis-of-jurisdiction checklist identified aerial photography interpretation, ground photography and United States Geological Survey maps as supporting documentation for its conclusion that a historical tributary connection existed between T-Bone Tank and Scatter Wash. My review officer examined all these items. No aerial or ground photography that provided sufficient detail to show a historical OHWM connection between T-Bone Tank and Scatter Wash was included in the administrative record. The United States Geological Survey maps did not provide documentation that a tributary with an OHWM once connected T-Bone Tank and Scatter Wash.

My review officer examined the three District disclaimers of CWA jurisdiction covering much of the area between the Valley Vista property and Scatter Wash. District file 2000-00561-SDM dated January 28, 2000, District file 2000-00120-SDM dated November 9,

2000, and District file 2002-00971-AP dated July 2, 2002 all covered portions of the area between T-Bone Tank and Scatter Wash. These CWA jurisdictional determinations covered most of the area through which the District had identified that a tributary with an OHWM previously flowed from T-Bone Tank to Scatter Wash. In each case the District had found no areas within CWA jurisdiction, including no tributaries to Scatter Wash. The District has not explained why a tributary connection between T-Bone Tank and Scatter Wash, which they concluded was present in 1952, would have disappeared sometime between 1952 and the present. The Appellant asserts that it is more reasonable to conclude that such a tributary connection never existed.

My review officer also examined District files #1999-15553-SDM, #984-0290-SDM, and #2002-00734-SDM cited in the District's MFR as previously accepted CWA jurisdictional determinations in the area. He found no basis of CWA jurisdiction information in those files that provided documentation or clarification as to why T-Bone Tank should be considered within CWA regulatory jurisdiction. My review officer discussed this at the appeal conference and in the subsequent appeal conference summary, and the District and the Appellant agreed that the documentation from these three files provided no conclusive information relevant to this action. These files were not considered further.

The Appellant provided as clarifying information a general analysis of local conditions regarding the likelihood that a channel from T-Bone Tank to Scatter Wash had ever existed or had an OHWM. The Appellant concluded that due to the high permeability of the soils in the area, as well as the higher evaporation rates that would exist as the channel became wider on the relatively flat areas between the T-Bone Tank and Scatter Wash, that no channel with an OHWM would have formed between these two locations.

The District's current administrative record does not provide documentation that a tributary with an OHWM ever existed between T-Bone Tank and Scatter Wash. The Appellant's position is that T-Bone Tank is a stock pond impoundment constructed in uplands and outside of CWA jurisdiction. The current administrative record is consistent with that conclusion.

The Preamble to the Corps 1986 regulations (Federal Register, Vol 51, No. 219, page 41217) discusses the CWA jurisdictional status of certain impoundments as follows:

“...we (the Corps) generally do not consider the following (to be) waters of the United States.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 must reconsider its conclusion that such a tributary existed, and was subsequently impounded and disappeared, and then apply the Corps CWA policy guidance as directed in Reason 1 above. Specifically the following documentation would be needed in the administrative record of the District to establish that T-Bone Tank is within CWA jurisdiction as an impoundment of a water of the United States.

The District must specifically document that a tributary connection with OHWM was present between T-Bone Tank and Scatter Wash after the enactment of the CWA in 1972, and after the subsequent phase-in of the implementation of the Corps regulations for CWA jurisdiction for tributaries. It appears likely that the correct phase-in date for CWA jurisdiction over a tributary that existed between T-Bone Tank and Scatter Wash would have been July 1, 1977. However, If the District asserts jurisdiction based on a historical tributary connection it must review the phase-in schedule for implementation of permit requirements for the CWA identified in the July 25, 1975 Federal Register notice *Interim Final Regulation* for the Corps regulatory program and document what it considers the correct phase-in date.

Information Received and its Disposition during the Appeal Review:

Information received from the Appellant: In addition to the request for administrative appeal, the appellant submitted the following document.

1. December 19, 2002 letter (8 pages), which provided a summary and restatement of the Appellant's positions, stated at the Administrative Appeal Conference and Site Visit and explained the Appellant's interpretation of the *SWANCC* Decision. These items were considered clarifying information. The letter also provided the Appellant's analysis and conclusion that if T-Bone Tank and Wash 1 were evaluated as isolated waters, that there would be an insufficient connection to regulate these areas pursuant to the CWA. That portion of the letter was considered new information, and not considered as part of this administrative appeal. That information was also provided to the District, which will consider it as part of the reconsideration of this action.

Information received from the District:

In addition to the administrative record, the following Los Angeles District, Phoenix Field Office, CWA approved jurisdictional determination files were reviewed:

1. File #984-0290-SDM
2. File #2002-00734-SDM
3. File #1999-15553-SDM
4. File #2000-00561-SDM
5. File #2000-00120-SDM
6. File #2002-00971-AP

Files 1 – 3 contained no relevant information beyond that covered in the file for this action. Files 3 – 6 were all determinations of no CWA jurisdiction. All six files were

considered clarifying information and all are discussed in this administrative appeal decision.

Conclusion: I remand this approved jurisdictional determination to the District to reconsider and further document and/or modify its conclusions regarding whether T-Bone Tank and Wash 1 are within CWA jurisdiction as waters of the United States. In completing this reconsideration, the District will follow the specific instructions identified in this Administrative Appeal Decision.

Original signed by

Robert L. Davis
Brigadier General, U.S. Army
Division Engineer