

**ADMINISTRATIVE APPEAL DECISION
CLEAN WATER ACT APPROVED JURISDICTIONAL DETERMINATION
JOALLAN SUBDIVISION PROJECT SITE
CITY OF FIREBAUGH, FRESNO COUNTY, CALIFORNIA
SACRAMENTO DISTRICT
FILE NUMBER 200400937**

June 16, 2006

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

Appellant: Bob Bahrami

Appellant Representative: Karna Harrigfeld, attorney for appellants

District Representative: Anna Sutton, U.S. Army Corps of Engineers, Sacramento District (District)

Authority: Clean Water Act (CWA), Section 404 (33 U.S.C. 1344)

Receipt of Request For Appeal: December 16, 2005

Appeal Meeting Date: April 28, 2006. No site visit was required.

Summary of Decision: The Sacramento District (District) must reconsider its CWA jurisdictional determination for the Lake Joallan Project Site as the current administrative record does not sufficiently support the District's conclusions. In addition, in accordance with current Corps policy, the District must seek formal project-specific guidance from Corps Headquarters prior to asserting CWA jurisdiction over the Lake Joallan Project Site using 33 CFR 328.3 (a) (3).

Background Information: On September 15, 2005, the Army Corps of Engineers District issued an approved CWA jurisdictional determination for the 67.59-acre Joallan Subdivision Project Site, located in the City of Firebaugh, Fresno County, California, and identified 29.39 acres of the site as waters within CWA jurisdiction. The District identified five distinct areas within CWA jurisdiction on the project site including:

- (i) the approximately 26.22-acre Lake Joallan - an intrastate waterbody that formed as a result of groundwater entering a former sand excavation pit;
- (ii) a 1.91-acre emergent wetland bordering the southern boundary of Lake Joallan;

- (iii) a narrow fringe of wetlands – exact acreage unmapped - that borders the north edge of Lake Joallan below the ordinary high water mark (OWHM) of the lake;
- (iv) a seasonal wetland (SW1) located approximately 66 feet east of Lake Joallan; and
- (v) a seasonal wetland (SW2) located approximately 25 feet east of Lake Joallan, which when combined with wetland SW 1, comprises approximately 1.26 acres of wetlands.

The District concluded that Lake Joallan was within CWA jurisdiction in accordance with 33 CFR 328.3 (a) (3), and that the wetlands described above were within CWA jurisdiction as wetlands adjacent to Lake Joallan in accordance with 33 CFR 328.3 (a) (7). The District also concluded that the narrow fringe of wetlands bordering the north edge of Lake Joallan were within CWA jurisdiction because they were adjacent to the San Joaquin River, approximately 300 feet north of Lake Joallan, as well as Lake Joallan.

The Appellant disagreed that Lake Joallan should be considered navigable for purposes of the CWA. The Appellant concluded Lake Joallan was an intrastate, isolated, non-navigable body of water that had an insufficient connection with interstate commerce to be considered within CWA jurisdiction. The Appellant concluded that the wetlands on the north and south ends of Lake Joallan were adjacent to Lake Joallan, but were not within CWA jurisdiction because the lake was not within CWA jurisdiction. The Appellant concluded that the fringe wetlands at the north end of Lake Joallan were not adjacent to the San Joaquin River.

The Appellant concluded that wetlands SW1 and SW2 were isolated wetlands with an insufficient interstate commerce connection to be within CWA jurisdiction. The Appellant also concluded that areas SW1 and SW2 should not be classified as wetlands in accordance with the Corps 1987 Wetland Delineation Manual (WDM) because they were supported by man-induced artificial hydrology. The Appellant filed his appeal because of these differences between his evaluation of the extent of CWA jurisdiction on the Joallan Subdivision Project Site and the evaluation of the District.

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

Reason 1: The wetland areas on the Joallan Subdivision Project site are not adjacent to the San Joaquin River or any other waterbody within CWA jurisdiction.

FINDING: This reason for appeal has merit.

ACTION: The District must reconsider whether the “fringe wetlands” at the north end of Lake Joallan are adjacent to the San Joaquin River as described in more detail in this reason for appeal.

DISCUSSION: The District’s Jurisdictional Determination form (administrative record page 23) stated that Lake Joallan and the wetland areas within the Joallan Subdivision Project Site were within CWA jurisdiction as adjacent to the San Joaquin River. The District clarified at the appeal meeting that the open water of Lake Joallan was not considered within CWA jurisdiction as an adjacent wetland under 33 CFR 328.3 (a) (7). This determination is reasonable as Lake Joallan is primarily a waterbody of open water, and only limited areas along the edge of Lake Joallan are appropriately classified as wetland areas.

The District also clarified at the appeal meeting that it considered the “fringe wetlands” at the north end of Lake Joallan not only within CWA jurisdiction as adjacent to Lake Joallan in accordance with 33 CFR 328.3 (a) (7), but also within CWA jurisdiction as adjacent to the San Joaquin River. The District stated that the other wetlands on the Joallan Subdivision Project Site were only adjacent to Lake Joallan. Those areas included the emergent wetlands at the south end of Lake Joallan, seasonal wetland (SW1) located approximately 66 feet east of Lake Joallan, and seasonal wetland (SW2) located approximately 25 feet east of Lake Joallan.

The Corps regulations at 33 CFR 328.3 (a) (7) state that areas within CWA jurisdiction include:

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) (1) through (6) of this section.

The Corps regulations at 33 CFR 328.3 (a) (8) (c) further define the term adjacent as:

“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.” ”

The wetland adjacency concept was further discussed in the Preamble to the Corps 1977 regulations 42 Fed Reg page 37129 (1977), which stated:

“...we have defined the term “adjacent” to mean “bordering, contiguous, or neighboring.” The term would include wetlands that directly connect to other waters of the United States, or that are in reasonable proximity to these waters but physically separated from them by man-made dikes or barriers, natural river berms, beach dunes, and similar obstructions.”

The Corps has not established a national standard regarding a maximum distance limit for reasonable proximity between adjacent wetlands and the waters to which they are adjacent. This is discussed in the Preamble to the Final Rule to issue the Nationwide Permits in 1991, 56 Fed Reg Page 59113 (1991), which states that:

“Two commenters recommended that we establish a distance limit for adjacency. We believe that this would be an unreasonable approach due to the potential

variability of the factors utilized in establishing adjacency for each individual project such as man-made barriers and natural berms.”

and that:

“In systems where there is a broad continuum of wetlands, all are considered adjacent to the major waterbody to which it is contiguous.”

The administrative record reasonably establishes that the “fringe wetlands” at the north end of Lake Joallan, and the emergent wetlands at the south end of Lake Joallan are adjacent to Lake Joallan. Both these wetland areas are contiguous and bordering Lake Joallan, and the Appellant did not object to the District’s adjacency determination for those areas. The Appellant did object to the District’s determination that the “fringe wetlands” at the north end of Lake Joallan were adjacent to the San Joaquin River, because the Appellant concluded that there was not a hydrologic connection or other sufficient connection, between those wetlands and the San Joaquin River.

The District’s Jurisdictional Determination form (administrative record page 23) stated that:

“Due to the sandy substrate, the water soaks in and out of Lake Joallan via the pervasive underground aquifer. The lake and the San Joaquin River appear to overlie the same unconfined aquifer and the land separating the two is saturated below the water table, lending to a slow-moving, underground tributary to the river. As such the lake may be subject to the ebb and flow of the river and considered a navigable water.”

The Appellant’s Biological Resources Evaluation of the Lake Joallan Subdivision project site soils map (administrative record page 136) based on the Natural Resources Conservation Service (NRCS) soil survey of the area identifies the local soil as part of the Bisgan-Elnido soil association (0 to 1 percent slopes), which is characterized as poorly drained and having rapid permeability (administrative record page 135). The Appellant’s submittals do not state that there is an underground aquifer or underground tributary connecting Lake Joallan to the San Joaquin River.

The San Joaquin River is approximately 300 feet to the north of Lake Joallan, and separated by upland area. The upland area between the San Joaquin River and Lake Joallan is not a man-made barrier, but a natural feature that was present prior to the excavation of Lake Joallan. The Appellant’s Biological Resources Evaluation (administrative record page 138) states that some excavated sand has been placed between the San Joaquin River and Lake Joallan to increase the elevation in this area, but both the District and the Appellant consider Lake Joallan to be a man-made waterbody that was created when a sand-mine excavation pit filled with groundwater. Neither the District nor the Appellant characterized the upland area between Lake Joallan and the San Joaquin River as a barrier resulting either from natural processes, such as natural

river berms or beach dunes, or artificial fill, such as an artificial berm separating two areas that were once part of the same waterbody.

The Appellant cited two federal court decisions regarding CWA jurisdiction and groundwater as supporting his position that Lake Joallan was outside of CWA jurisdiction. These were *Village of Oconomowoc Lake v. Dayton Hudson Corporation et. al.*, 24 F. 3d 962 (7th Cir 1994), and *Washington Wilderness Coalition v. Hecla Mining Company* 870 F. Supp. 983 (E.D. Wash. 1994). The *Oconomowoc* decision is not binding outside of the 7th Circuit Court of Appeals. In addition, the *Oconomowoc* case is in curious opposition to the 7th Circuit case of *United States Steel Corp. v. Train*, 556 F. 2d 822 (7th Cir. 1977). In the *Train* case, the 7th Circuit determined that the EPA was authorized to regulate tributary groundwater. Similarly, the *Hecla* case is a federal district court decision that is not binding beyond that specific case. Moreover, the *Hecla* court determined that the broad surface water quality protection goals of the CWA required the inclusion of tributary groundwater under CWA jurisdiction. Therefore, the aforementioned case is not necessarily supportive of Appellant's position.

The District cited the federal district court decision *Northern California River Watch v. City of Healdsburg*, No. C01-0486WHA 2004 (not reported in F. Supp.2d.2004 WL 201502 (N.D. Cal.)) on its Jurisdictional Determination form (administrative record page 23) to support its conclusion that the wetlands adjacent to Lake Joallan could be adjacent to the San Joaquin River. Federal district court decisions typically are binding only to the specific case decided, however, the South Pacific Division evaluated the relevance of the *Northern California River Watch v. City of Healdsburg* decision to this action as it was cited on the Jurisdictional Determination form.

In *Northern California River Watch v. City of Healdsburg*, a wastewater treatment plant was known to discharge between 420 and 455 million gallons per year to a pond with a volume of 450 – 740 million gallons of water. As the pond never overflowed it was obvious the pond was draining to the surrounding aquifer, and both parties in *Northern California River Watch v. City of Healdsburg* agreed that some water entered the nearby river. The scenario under review in this appeal is, however, easily distinguished from *Healdsburg*. The administrative record on appeal lacks documentation that a similar subsurface hydrologic connection exists between Lake Joallan and the San Joaquin River. Further, in *Healdsburg*, the City of Healdsburg admitted that the groundwater basin in question exhibited a hydrologic connection to the Russian River. The administrative record for this action did not establish such a connection. The most substantive evidence in this regard is that the soil between Lake Joallan and the San Joaquin River is mapped as the Bisgan-Elnido soil association (0 to 1 percent slopes), which is characterized as poorly drained and having rapid permeability. I conclude the administrative record does not provide sufficient documentation to support the conclusion that the “fringe wetlands” at the north end of Lake Joallan should be considered within CWA jurisdiction because they are adjacent to the San Joaquin River.

The District considered wetlands SW1 and SW2, which combined constitute approximately 1.26 acres of wetland area (admin record page 41), to be adjacent to Lake

Joallan. The OHWM of Lake Joallan is 135-136 feet and the Appellant's topographic map identifies the elevation of areas SW1 and SW2 as between 136 and 137 feet (administrative record page 76). Areas SW1 and SW2 are located 66 feet and 25 feet, respectively, east of Lake Joallan. There are no barriers between areas SW1 and SW2 and Lake Joallan. The administrative record provides an explanation (annual plowing) as to why these areas were not identified as wetlands on the initial survey of the Joallan Subdivision Project Site. The administrative record provides a reasonable basis, including proximity and topography, for the District to conclude that wetlands SW1 and SW2 are adjacent to Lake Joallan. The administrative record does not provide a basis for concluding that wetlands SW1 and SW2 are adjacent to the San Joaquin River.

The District must reconsider its conclusions regarding whether the wetlands on the Joallan Subdivision Project Site are within CWA jurisdiction as follows:

1. The District must further document or revise its conclusion that the "fringe wetlands" at the north end of Lake Joallan are adjacent to the San Joaquin River. Prior to asserting CWA jurisdiction over any wetlands on the property based on adjacency the District must provide an evaluation that establishes why it is appropriate to consider these wetlands adjacent to the San Joaquin River as neighboring adjacent wetlands, when these wetlands are currently contiguous and bordering the open waters of Lake Joallan.
2. As described under Reason 3 below, the District must seek Corps Headquarters guidance before asserting CWA jurisdiction over Lake Joallan. Because the determination of whether the wetlands on the Joallan Subdivision Project Site are within CWA jurisdiction as adjacent wetlands is interrelated with the determination of CWA jurisdiction for Lake Joallan itself, I direct that the District must also seek formal project-specific Corps Headquarters guidance prior to asserting CWA jurisdiction over wetlands on the Joallan Subdivision Project Site based on adjacency to the San Joaquin River.

Reason 2: Areas SW1 and SW2 identified as wetlands on the District's CWA jurisdictional determination are receiving water from an artificial source and should not be considered to meet the Corps definition of wetlands.

FINDING: This reason for appeal did not have merit.

ACTION: None required.

DISCUSSION: The Appellant's Request for Appeal attributed the presence of wetland areas SW1 and SW2 to artificial hydrology, which the Appellant attributes to subsurface water seepage under a berm immediately east of these wetland areas. The Corps WDM page 83 states that:

"If hydrophytic vegetation is being maintained only because of man-induced wetland hydrology that would no longer exist if the activity (e.g. irrigation) were to be terminated, the area should not be considered a wetland."

The Appellant states that the periodic release of tomato processing wastewater into a municipal retention pond approximately 100 feet east of SW1 is providing a subsurface water source that is extending under an existing berm to provide water to wetlands SW1 and SW2.

Wetlands SW1 and SW2 are separated from this retention pond by a berm, which extends approximately to elevation 145 feet. The Appellant's additional information submittal of July 5, 2005 stated that seasonal wetlands SW1 and SW2 were not present during the original wetland delineation of the Joallan Subdivision Project Site. However this submittal also states that the Joallan Subdivision Project Site has been plowed annually and showed no evidence of wetland vegetation or hydrology during the field survey (administrative record pages 41 and 45).

Areas SW1 and SW2 are located in closer proximity to Lake Joallan than to the municipal retention pond east of the property. The elevation difference between SW1, SW2, and the OHWM of Lake Joallan is approximately one foot, while the elevation difference between SW1, SW2, and the retention pond is approximately 8 feet (administrative record page 76) There is also no berm between areas SW1, SW2, and Lake Joallan, while a berm extending to approximately elevation 145 separates the retention pond from SW1 and SW2. This combination of information reasonably supports the District's conclusion that areas SW1 and SW2 have some hydrologic connection with Lake Joallan, and are not solely maintained by artificial hydrology from the nearby municipal retention pond.

Reason 3: Lake Joallan is not “navigable-in-fact” and has an insufficient link to interstate commerce to be considered with CWA jurisdiction.

FINDING: This reason for appeal has merit.

ACTION: The District must reconsider the CWA jurisdictional status of Lake Joallan as described in detail in this reason for appeal, including seeking formal project-specific guidance from Corps HQ.

DISCUSSION: The administrative record describes Lake Joallan as a site that was known from the 1950's to the 1970's as the George Thompson sand pit. Eventually excavation of this sand pit reached the water table and groundwater inundated the pit. The pit was subsequently deepened in 1982 and ultimately named Lake Joallan. It is currently approximately 14 feet deep, consists of approximately 26.2 acres of open water, and has an OHWM elevation of approximately 135-136 feet. Lake Joallan is about 300 feet south of the San Joaquin River. The administrative record does not provide the exact OHWM on the San Joaquin River in this vicinity, but the Appellant's submittal of supplemental information regarding Lake Joallan (administrative record page 43) states that:

“The San Joaquin River is a defined channel with an OHWM about 10 ft. lower than the land south of the River (the area between the River and Lake).”

The topographic map of the project area (administrative record page 76) shows the elevation of the top of the south bank of the San Joaquin River to the north of Lake Joallan as approximately elevation 140 feet. The topographic map shows the approximately 300 foot upland area between the San Joaquin River and Lake Joallan as rising to approximately elevation 145 – 147 feet. So the corresponding OHWM for the San Joaquin River at this location is approximately 135 – 136 feet. The District and the Appellant agree that there is no surface water connection between Lake Joallan and the San Joaquin River. Dirt roads are present west, north, and east of the lake. The District and the Appellant agree that the San Joaquin River is within CWA jurisdiction.

The District’s CWA approved jurisdictional determination letter of September 15, 2005 (administrative record page 18) stated that:

“Approximately 29.39 acres of waters of the United States, including wetlands, are present within the survey area. These waters are regulated under Section 404 of the Clean Water Act since Lake Joallan is navigable in fact, and the wetlands and the lake are adjacent to the San Joaquin River.

The District further described its basis of jurisdiction on its Jurisdictional Determination form (administrative record page 23) stating that:

“Due to the sandy substrate, the water soaks in and out of Lake Joallan via the pervasive underground aquifer. The lake and the San Joaquin River appear to overlie the same unconfined aquifer and the land separating the two is saturated below the water table, lending a slow-moving underground tributary of the river. As such, the lake may be subject to the ebb and flow of the river and considered a navigable water of the U.S.

Additionally, due to its size, Lake Joallan has the ability to support small craft and is a navigable water, in fact. If the proposed project is constructed, the owners could use the lake for water craft recreation as an amenity to the sale of the lots. Also, the lake could again be used for industrial purposes, as it was during the 1950’s, 1960’s and 1970’s when it was an active sand mine.

Based on adjacency to the San Joaquin River by the lake and wetlands (*Northern California River Watch v. City of Healdsburg*, 2004) and navigability by small craft on the lake, the 29.39 acres of waters and wetlands on the 67.59 acre Lake Joallan project site are waters of the U.S.”

The District’s Jurisdictional Determination form (administrative record pages 22-24) identifies that Lake Joallan meets the definition of a water within CWA jurisdiction in accordance with sections 33 CFR 328.3 (a) (1) and 33 CFR 328.3 (a) (3) of the Corps

regulations, and that wetlands adjacent to Lake Joallan are within CWA jurisdiction in accordance with section 33 CFR 328.3 (a) (7) of the Corps regulations.

The Corps regulations at 33 CFR 328.3 (a) (1) identify waters within CWA jurisdiction as including:

“All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide

At the appeal meeting the District stated that it had made an error in identifying that Lake Joallan met the definition of a water within CWA jurisdiction in accordance with 33 CFR 328.3 (a) (1) (District e-mail of May 22, 2006) . The Appellant agreed that Lake Joallan is not within CWA jurisdiction in accordance with 33 CFR 328.3 (a) (1).

The South Pacific Division staff reviewed the administrative record regarding whether Lake Joallan was within CWA jurisdiction in accordance with 33 CFR 328.3 (a) (1) because the District had concluded that 33 CFR 328.3 (a) (1) applied (administrative record page 22) before the District changed its conclusion at the appeal meeting. The joint Environmental Protection Agency (EPA)/Department of the Army guidance issued subsequent to the U. S. Supreme Court’s decision in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* 531 US 159 (2001) (SWANCC) (EPA/Department of the Army Joint Memorandum of January 15, 2003 issued jointly by the General Counsel of the EPA and the General Counsel of Department of the Army, (Appendix A to the Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of “Waters of the United States” – Federal Register Vol. 68, pages 1995 – 1998)) (referred to as the Joint Memorandum in the remainder of this decision) provides guidance as to tests to consider to determine whether specific waters are traditional navigable waters. The Joint Memorandum states that:

“In accord with the analysis in SWANCC, waters that fall within the definition of traditional navigable waters remain jurisdictional under the CWA. Thus, isolated intrastate waters that are capable of supporting navigation by watercraft remain subject to CWA jurisdiction after SWANCC if they are traditional navigable waters, *i.e.*, if they meet any of the tests for being navigable-in-fact. *See. e.g. Colvin v. United States* F. Supp. 2d 1050 (C.D. Cal 2001).”

The Joint Memorandum cites the Federal District Court decision in *Colvin v. United States* F. Supp. 2d 1050 (C.D. Cal 2001), as including tests that can be used to consider whether a waterbody is navigable-in-fact. The Joint Memorandum also discusses the U.S. Supreme Court’s decision in *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 407-408 (1940) and several other federal court decisions which include tests that can be used as part of the consideration to establish whether a waterbody is navigable in fact. Footnote 2 of the Joint Memorandum also states that.

“These traditional navigable waters [that fall under 33 CFR 328.3 (a) (1)] are not limited to those regulated under Section 10 of the Rivers and Harbors Act of

1899; traditional navigable waters include waters which, although used, susceptible, susceptible to use, or historically used, to transport goods or people in commerce, do not form part of a continuous waterborne highway.”

The District did not provide any conclusions regarding the results of tests for navigability-in-fact identified in the references in the Joint Memorandum in the administrative record for this action. Unauthorized use of Lake Joallan by jet skiers is mentioned in the Appellant’s December 22, 2004, submittal (administrative record page 117), but the District stated at the appeal meeting that it did not consider such use to establish CWA jurisdiction. As the District concluded that Lake Joallan was not within CWA jurisdiction in accordance with 33 CFR 328.3 (a) (1), it follows that the District did not consider the possible use of Lake Joallan by small watercraft, discussed on administrative record page 23, to constitute evidence of CWA jurisdiction under 33 CFR 328.3 (a) (1). The District’s conclusion that Lake Joallan did not meet the definition of a water within CWA jurisdiction in accordance with 33 CFR 328.3 (a) (1) was reasonable.

The District’s Jurisdictional Determination sheet stated that Lake Joallan met the definition of a water within CWA jurisdiction in accordance with 33 CFR 328.3 (a) (3). This section of the Corps regulations states that areas within CWA jurisdiction include:

“(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

- (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
- (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
- (iii) Which are used or could be used for industrial purpose by industries in interstate commerce”

As discussed in the Joint Memorandum, *SWANCC* limited the use of 33 CFR 328.3 (a) (3) as a basis of jurisdiction over certain isolated waters. The Joint Memorandum also established a requirement that EPA and the Army Corps of Engineers field organizations must seek Headquarters approval prior to asserting CWA jurisdiction using 33 CFR 328.3 (a) (3). The Joint Memorandum states 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, including permitting and enforcement.”

In response to a request for clarification from the Review Officer of a District position described at the appeal meeting, the District stated in its May 22, 2006 e-mail that it considered Lake Joallan within CWA jurisdiction in accordance with 33 CFR 328.3 (a)

(3) (i) and 3 (iii). The District also clarified it considered Lake Joallan navigable-in-fact, and so concluded it did not need to seek formal project-specific Corps Headquarters approval prior to issuing that jurisdictional determination. By e-mail of May 30, 2006, the Appellant objected to the District's clarification, stating that she believed the District had only discussed CWA jurisdiction in accordance with 33 CFR 328.3 (a) (i) at the appeal meeting, and not CWA jurisdiction in accordance with 33 CFR 328.3 (a) (iii).

The District stated that Lake Joallan should be considered navigable-in-fact for purposes of the CWA based on the size and depth of the lake, which are sufficient to support the use of small boats. This approach is not clearly supported by the Joint Memorandum, which identifies "tests" of navigability, as described above. The tests referenced in the Joint Memorandum are more extensive than a simple determination that small watercraft can physically float on a waterbody. In the absence of a clear documentation in the administrative record that Lake Joallan is navigable as that term is used in the Joint Memorandum, I conclude that the District should have sought formal project-specific Headquarters approval prior to asserting CWA jurisdiction using any basis identified in 33 CFR 328.3 (a) (3).

Lake Joallan is an intrastate waterbody with roads on three side, surrounded by private land, with no surface water connection to waters within CWA jurisdiction and no clearly established hydrologic connection to waters within CWA jurisdiction. The administrative record did not sufficiently document that the potential future use, degradation, or destruction of Lake Joallan could affect interstate or foreign commerce sufficiently to establish CWA jurisdiction in accordance with 33 CFR 328.3 (a) (3). I conclude that the District must reconsider its CWA jurisdictional determination that Lake Joallan is within CWA jurisdiction in accordance with 33 CFR 328.3 (a) (3).

As part of the reconsideration of this CWA jurisdictional determination, the District must:

1. Request any additional relevant information the representative of the property owner may desire to submit for consideration during District reconsideration regarding the applicability of 33 CFR 328.3 (a) (3) or other sections of 33 CFR 328.3 (a) (1) – (7) as a basis of CWA jurisdiction for areas on the Joallan Subdivision Project Site.
2. The District must reevaluate whether it concludes there is sufficient information to establish that Lake Joallan is within CWA jurisdiction in accordance with 33 CFR 328.3 (a) (3), and if so provide a detailed evaluation as to why it concluded that 33 CFR 328.3 (a) (3) is applicable.
3. The District must reevaluate its contention that the past, present, or future use, degradation, or destruction of Lake Joallan by sand mining would represent a use that could affect interstate or foreign commerce in a manner sufficient to establish CWA jurisdiction in accordance with 33 CFR 328.3 (3) (a) (3). As part of that reconsideration the District must consider the Appellant's assertion that such activity could not affect interstate commerce because the

cost of hauling the sand long distances would have limited the use of the sand to intrastate commerce uses.

4. The District must reevaluate its contention that the possible use of Lake Joallan by small watercraft represents evidence of a sufficient effect on interstate or foreign commerce to establish CWA jurisdiction in accordance with 33 CFR 328.3 (a) (3).
5. The District must reevaluate its contention that the availability of Lake Joallan as a water amenity to the proposed future residential subdivision represents a sufficient effect on interstate or foreign commerce to establish Lake Joallan as within CWA jurisdiction in accordance with 33 CFR 328.3 (a) (3).
6. If after evaluation of these factors the District concludes that Lake Joallan is within CWA jurisdiction in accordance with 33 CFR 328.3 (a) (3), then the District must then submit its analysis to Corps Headquarters, including a copy of this appeal decision and how the deficiencies in the District's prior jurisdictional determination were addressed. In accordance with the existing policy in the Joint Memorandum, the District must seek formal project-specific Corps Headquarters approval prior to issuing a CWA jurisdictional determination based on 33 CFR 328.3 (a) (3). The District is encouraged to seek informal project specific guidance from Corps Headquarters prior to finalizing a formal project-specific evaluation of the whether any areas within the Joallan Subdivision Project Site are within CWA jurisdiction in accordance with 33 CFR 328.3 (a) (3) or other sections of 33 CFR 328.3 (a) (1) – (a) (7).

Information Received and its Disposition During the Appeal Review: In addition to the District's administrative record for this action the following materials were also evaluated:

1. Appellant's May 10, 2006 addendum to the summary of the administrative appeal meeting.
2. District's May 22, 2006 response Review Officer's request for clarification of portion of administrative record.
3. Appellant's May 30, 2006 response to District's May 22, 2006 response to request for clarification of portion of the administrative record.

Conclusion: The District must reconsider its CWA jurisdictional determination for the Lake Joallan Project Site as described in detail in this appeal decision. In accordance with current Corps policy, the District must seek formal project-specific guidance from Corps Headquarters prior to asserting CWA jurisdiction over the Lake Joallan Project Site using 33 CFR 328.3 (a) (3). Since the CWA jurisdictional status of Lake Joallan and the wetlands on the property is interrelated to their relationship to the San Joaquin River, I have also directed that the District seek Corps Headquarters guidance prior to asserting CWA jurisdiction over any wetlands on the property based on their being adjacent to the San Joaquin River.

for Paul G. Thayer Col, USA
Joseph Schroedel Acting Commander
Brigadier General, U. S Army