

**ADMINISTRATIVE APPEAL DECISION FOR  
APPROVED JURISDICTIONAL DETERMINATION  
FOR THE KAWEAH DELTA WATER CONSERVATION DISTRICT  
DRAINAGES BELOW LAKE KAWEAH AND TERMINUS DAM INCLUDING  
THE ST. JOHNS RIVER, COTTONWOOD CREEK, MILL CREEK,  
PACKWOOD CREEK, CROSS CREEK, CAMERON CREEK, OUTSIDE  
CREEK, AND INSIDE CREEK**

**TULARE AND KINGS COUNTIES, CALIFORNIA**

**ARMY CORPS OF ENGINEERS SACRAMENTO DISTRICT FILE # 200300194**

**January 14, 2004**

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

**District Representatives:** Nancy Haley and Matt Hirkala; U.S. Army Corps of Engineers, Sacramento District Regulatory Office

**Appellant Representative:** Dan Dooley and Alex Peltzer; Dooley and Herr, Visalia, CA

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

**Receipt of Request For Appeal (RFA):** August 1, 2003

**Appeal Conference Date:** October 16, 2003      **Site Visit Date:** October 16, 2003

**Summary of Decision:** I conclude the Army Corps of Engineers Sacramento District's (District) administrative record did not provide sufficient documentation to establish CWA jurisdiction under the Corps regulations for drainages within the Kaweah Delta Water Conservation District (KDWCD). I also conclude that the District did not follow the Corps guidance that required the District to seek formal project-specific Corps Headquarters approval prior to any assertion of jurisdiction under 33 CFR 328.3 (a) (3). I remand this action to the District for detailed reconsideration of the factors as I have specified in this administrative appeal decision.

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

**Background Information:** This administrative appeal decision evaluates the District's administrative record and the Appellant's reasons for appeal separately for each subsection of the Corps CWA jurisdictional regulations at 33 Code of Federal Regulations (CFR) 328.3 that are relevant to this administrative appeal decision. Reason 1 discusses CWA traditional navigable waters (33 CFR 328.3 (a) (1)), Reason 2 discusses tributary connections (33 CFR 328.3 (a) (5)), and Reason 3 discusses intrastate, isolated waters that are not navigable (33 CFR 328.3 (a) (3)). The District summarized its conclusions in two documents in the administrative record: (1) the June 3, 2003 approved JD for this action, and (2) the District's internal June 4, 2003 "Memorandum for the File" expanding on the evidence supporting the District's conclusions. The District's administrative record included additional supporting materials.

The KDWCD, located within the San Joaquin Valley in Tulare and Kings County, near Visalia, California, is appealing the CWA jurisdictional status of drainages in for which it has maintenance responsibility. These include the St. John's River, Cottonwood Creek, Mill Creek, Packwood Creek, Cross Creek, Cameron Creek, Outside Creek, and Inside Creek. The KDWCD drainages receive water from Lake Kaweah, which is formed by the impoundment of the Kaweah River at Terminus Dam, which can currently store approximately 143,000 acre-ft of water. The District and the Appellant disagree as to whether these drainages are navigable in the sense that term is used under the Clean Water Act (CWA) and disagree on the CWA jurisdictional status of the drainages.

The District and the Appellant agree that Lake Kaweah, and the areas below Terminus Dam are part of an isolated, intrastate watershed. The KDWCD drainages are downstream of the Terminus Dam spillway and extend to the western boundary of the KDWCD, which roughly corresponds to the 200-foot Mean Sea Level elevation contour. This 200-foot contour is also considered the upper edge of the Tulare Lake Bed area. The primary land use of the Tulare Lake Bed area is intensive agricultural production. As the lowest point of an isolated, intrastate closed basin, the Tulare Lake Bed area occasionally floods. The Appellant asserts that the Tulare Lake Bed area has not flooded to a sufficient level to connect to the San Joaquin River, and then eventually to the Pacific Ocean, since 1878. A 1997 newspaper account of high water levels in that year stated that the Tulare Lake Bed area was being rapidly drained (presumably by pumping to the San Joaquin River system).

The District and the Appellant disagree regarding whether the jurisdictional status of Lake Kaweah, which is upstream of the drainages in question, has any relation to the CWA jurisdictional status of downstream areas that receive its waters. CWA jurisdictional determinations (JD) in the area are further complicated by the complex irrigation and drainage systems in the area that support local agricultural production. These modifications include the ability to route waters from the Kaweah River into multiple channels, and the ability to introduce water from other sources, such the King's River, into the system.

The District and the Appellant also disagree regarding the interpretation of certain regulations and guidance regarding the CWA.

**Reason 1:** The Appellant asserts the District incorrectly concluded that the isolated, intrastate drainages considered in this CWA approved JD were traditional navigable waters within CWA jurisdiction under 33 CFR 328.3 (a) (1).

**FINDING:** The appeal had merit

**ACTION:** The District must reconsider its conclusion that portions of the KDWCD are within CWA jurisdiction under 33 CFR 328.3 (a) (1) as discussed in greater detail in this appeal decision.

**DISCUSSION:** The District's June 3, 2003 approved CWA JD and the District's June 4, 2003 Memorandum for the File, described the District's conclusions regarding the CWA jurisdictional status of the drainages considered in this administrative appeal. The District and the Appellant agreed that the areas under consideration were isolated, intrastate waters.

The District concluded that the drainages were within CWA jurisdiction under subsections 33 CFR 328.3 (a) (1) which states that waters within CWA jurisdiction include:

“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.”

The Environmental Protection Agency (EPA)/Department of the Army Joint Memorandum of January 15, 2003 (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) stated that:

“Traditional navigable waters are waters that are subject to the ebb and flow of the tide, or waters that are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce.”

and then immediately after this statement listed the citation “ 33 CFR 328.3 (a) (1).”

However, the definition of CWA traditional navigable waters given in the Joint Memorandum that includes the words “...susceptible for use to transport interstate or foreign commerce” does not match the definition of waters within CWA jurisdiction in the Corps regulations at 33 CFR 328.3 (a) (1) which instead describes the areas it defines

as “...susceptible to use in interstate or foreign commerce” and omits the “to transport” wording.

The Joint Memorandum description of CWA traditional navigable waters is essentially the same wording as that of the Corps general definition of navigable waters within Corps jurisdiction under the Rivers and Harbors Act (RHA) at 33 CFR 329.4 that states:

“Navigable waters of the United States are those 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.”

This might lead some to believe that the Joint Memorandum directed the Corps to limit CWA traditional navigable waters to those waters that were also within RHA jurisdiction, and this was the Appellant’s position. However, Footnote 2 of the Joint Memorandum specifies the Corps is not to adopt that position. Footnote 2 states:

“These traditional navigable waters 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 (sic) to use, or historically used, to transport goods or people in commerce, do not form part of a continuous waterborne (sic) highway.”

Furthermore, Footnote 1 of the Joint Memorandum states that:

“The CWA provisions and regulations described in this document (the Joint Memorandum) contain legally binding requirements. This document (the Joint Memorandum) does not substitute for those provisions or regulations, nor is it a regulation itself. It does not impose legally binding requirements on ..... the Corps.” (Text in parentheses added for clarity).

The Joint Memorandum also 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* 181 F. Supp. 2d 1050 (C.D. Cal. 2001).”

So the Joint Memorandum considers the *Colvin v. United States* federal district court decision as a suitable *example* of tests of CWA navigability-in-fact tests, but not as a definitive or exclusive set of tests of CWA navigability-in-fact. The District’s documentation for the presence of waters within CWA jurisdiction under 33 CFR 328.3 (a) (1) is described below.

The District’s administrative record identified that Lake Kaweah provided boating, camping, fishing, and picnicking; supported interstate commerce; was navigable-in-fact;

and therefore was within CWA jurisdiction under 33 CFR 328.3 (a) (1). Lake Kaweah is clearly navigable-in-fact on an essentially permanent basis (it apparently rarely if ever has so little water as to preclude boating) and attracts a substantial number of recreational visitors. I find that the District reasonably concluded this represented sufficient evidence of interstate commerce uses to establish that Lake Kaweah was within CWA jurisdiction under 33 CFR 328.3 (a) (1). However, as discussed under Reason 2, the District's administrative record has not established that the CWA jurisdictional status of Lake Kaweah or any other area upstream of Terminus Dam is relevant to the CWA jurisdictional status of the isolated, intrastate areas within the KDWCD downstream of Terminus Dam.

The administrative record also included reprints of several local newspaper articles by a local boater recounting his canoe trips along the St. John's River and associated drainages in the high water year of 1995 (The St. John's River is a channel downstream of Terminus Dam). The District's approved JD did not list this information as part of its support for its conclusions, but it was discussed in the District's June 4, 2003 Memorandum for the File. The initial newspaper article in the series stated that:

“Nine years out of ten, the St. John's River that marks the northern border of Visalia has barely enough water in it to float an inner tube. Even then it's only for a few weeks at best. This year (1995) has been one of those rare exceptions and the river is full to the brim.” (Note: date added for clarity)

The Appellant did not dispute the accounts in these articles but believes they did not represent evidence that the St. John's River was a CWA traditional navigable area within CWA jurisdiction under 33 CFR 328.3 (a) (1). The administrative record is unclear as to whether the District considered that the 1995 canoe journey was sufficient to establish CWA jurisdiction under 33 CFR 328.3 (a) (1). Instead the administrative record indicates that the District considered such an analysis unnecessary because the St. John's River, other downstream channels, and the Corcoran Irrigation District (CID) ponds, all received water from Lake Kaweah, which the District had reasonably determined was within CWA jurisdiction under 33 CFR 328.3 (a) (1). The question of whether CWA jurisdiction over a downstream area can be established based on the CWA jurisdictional status of an upstream area is discussed under Reason 2.

The CWA jurisdictional status of the CID ponds, informally described in the District's documentation of this approved JD as the “Corcoran Reservoir” or “Nevada Avenue Ponds,” requires particular attention because these ponds are downstream from most of the drainages under consideration in this JD. So if the CID ponds are within CWA jurisdiction, portions of the KDWCD upstream from them might also be within CWA jurisdiction as tributaries. This is also further discussed under Reason 2.

The CID ponds receive water from various drainages that are maintained by the KDWCD, but the CID ponds are downstream from, and not part of, the KDWCD. The CID ponds are below the 200' Mean Sea Level elevation and are considered within the boundaries of the Tulare Lake Bed. The District's CWA JD stated that the CID ponds were “capable of being navigated” and the administrative record stated that the boater

who canoed portions of the St. John's River in 1995 completed his trip at the CID ponds. The administrative record did not clearly state whether the District considered that documentation sufficient to establish CWA jurisdiction under 33 CFR 328.3 (a) (1).

The Appellant asserted that the CID ponds could not be within CWA jurisdiction under 33 CFR 328.3 (a) (1) because these ponds could not qualify as traditional navigable waters, did not have a sufficient connection to interstate commerce to be within CWA jurisdiction, and were not open to the public. The CID ponds are surrounded by levees and are not visible from public roads and CID representatives at the appeal meeting stated that the ponds are not considered open to the public due to potential liability concerns associated with public use. The District did not refute that authorized access to the ponds was restricted, but the administrative record documented that recreational use of the ponds – authorized or not – does occur. The District stated at the appeal meeting that the jurisdictional status of the drainages in the KDWCD was not based on the jurisdictional status of the CID impoundment ponds, but that the conditions present in those ponds supported the District's CWA jurisdictional decision.

I conclude that the District has not sufficiently documented in the administrative record that the CID ponds and the drainages within the KDWCD downstream of Terminus Dam are within CWA jurisdiction. The District did not conduct and document an analysis of whether 33 CFR 328.3 (a) (1) applied to the areas below Terminus Dam. Instead, the District based its CWA JD for areas below Terminus Dam on the undocumented premise (discussed in detail under Reason 2), that because Lake Kaweah was within CWA jurisdiction under 33 CFR 328.3 (a) (1), areas downstream it below Terminus Dam must also be within CWA jurisdiction under 33 CFR 328.3 (a) (1).

The District must reconsider its conclusion that areas within CWA jurisdiction under 33 CFR 328.3 (a) (1) are present in the areas covered by this approved JD. This reconsideration must also include a consideration of the tests of navigability-in-fact including but not limited to those such as in *Colvin v. United States* for any areas within CWA jurisdiction under 33 CFR 328.3 (a) (1) as CWA traditional navigable waters. Other factors which must be included as part of this reconsideration are: (1) the frequency of use of these drainages for navigation purposes that meet the requirements of 33 CFR 328.3 (a) (1) – with specific consideration of the typical variation in flow levels in the KDWCD drainages; (2) whether the drainages and the CID ponds are legally accessible to the public (i.e. is access authorized or unauthorized (trespass) access) and how the extent of such access was considered in relation to the use of the area in interstate or foreign commerce in accordance with 33 CFR 328.3 (a) (1); and (3) what specific factors make the waters of these channels susceptible to use in interstate commerce.

As the Joint Memorandum and *Colvin v. United States* provide examples, but not exclusive, tests for identifying CWA traditional navigable waters, the District may seek the assistance of higher authorities within the Corps, and/or the views and information available from other relevant parties, such as the Appellant or other government agencies, prior to finalizing its decision. The District is not required to seek Corps Headquarters

project-specific approval prior asserting CWA jurisdiction over traditional navigable waters in accordance with 33 CFR 328.3 (a) (1).

After reconsideration, if the District determines that areas within CWA jurisdiction under 33 CFR 328.3 (a) (1) are present, the District must specifically and individually identify its basis of CWA jurisdiction for each of the KDWCD drainages covered by 33 CFR 328.3 (a) (1). The District must also explain and document whether any other subsections of 33 CFR 328.3 (a) would then apply as a result of the District's reconsideration (For example 33 CFR 328.3 (a) (5) regarding tributary connections.)

**Reason 2:** The Appellant asserts the District incorrectly concluded that the CWA jurisdictional status of Lake Kaweah and the Kaweah River upstream of Terminus Dam were relevant to the determination of CWA jurisdictional status of drainages within the KDWCD downstream Terminus Dam. The Appellant asserts this is an incorrect interpretation of the Corps regulations.

**FINDING:** The appeal had merit.

**ACTION:** The District must reconsider its conclusion that the CWA jurisdictional status of an upstream area can establish CWA jurisdiction over a downstream area. The District must also reconsider the CWA jurisdictional status of downstream areas beyond the boundaries of the KDWCD in order to properly assess which drainages within the KDWCD may be within CWA under 33 CFR 328.3 (a) (5) as tributaries to waters within CWA jurisdiction.

**DISCUSSION:** The District asserted that because Lake Kaweah was a traditional navigable water under 33 CFR 328.3 (a) (1), and navigable-in-fact, that water flowing downstream from Lake Kaweah would also be within CWA jurisdiction under 33 CFR 328.3 (a) (1). The Appellant asserts that regardless of whether Lake Kaweah and the Kaweah River are within CWA jurisdiction upstream of Terminus Dam, such a determination is irrelevant to establishing CWA jurisdiction downstream of Terminus Dam.

The Appellant asserts that the definition of areas within CWA jurisdiction under subsection 33 CFR 328.3 (a) (1), or any other subsection of 33 CFR 328.3 (a) of the Corps regulations, does not provide for establishing CWA jurisdiction over downstream areas based on the jurisdictional status of upstream areas. The District's administrative record did not document how the Corps regulations defining CWA jurisdiction (33 CFR 328.3 (a) (1) - (a) (7)), or other CWA guidance, supports the District's conclusion that it could use the CWA jurisdictional status of an area upstream of Terminus Dam to establish CWA jurisdiction over an area below Terminus Dam.

The Corps regulations identify that waters that are "tributaries of" waters that have been independently determined to be waters within CWA jurisdiction under 33 CFR 328.3 (a) (1) – (a) (4) are within CWA jurisdiction under 33 CFR 328.3 (a) (5). Tributaries are commonly understood to be upstream waterbodies that flow into downstream

waterbodies, and not the reverse. I have not found a basis in the Corps regulations and CWA guidance to support the District's conclusion that the CWA jurisdictional status of waters upstream of Terminus Dam, such as Lake Kaweah or the Kaweah River, may be used to establish CWA jurisdiction over downstream areas, such as the downstream drainages within the KDWCD that are at issue in this administrative appeal.

The District must reconsider its conclusion that the CWA jurisdictional status of an upstream area can be used to establish CWA jurisdiction over a downstream area. In order to assert CWA jurisdiction on this basis the District must specifically document why such a conclusion is consistent with the Corps regulations, CWA guidance, and legal requirements including a discussion of the appropriate subsection of 33 CFR 328.3 (a) (1) – (a) (7) under which such a determination can be made. If after reconsideration the District concludes that such a basis for CWA jurisdiction is appropriate, it must specifically document why such a basis for CWA jurisdiction is appropriate for each drainage within the KDWCD to which it applies.

In this CWA JD, the District did not establish the downstream limits of CWA jurisdiction for the entire watershed below Terminus Dam but generally limited its discussion to the drainages within the KDWCD. As a result, the District may not have evaluated some areas that are downstream of, and receive waters from, drainages within the KDWCD boundaries. If any of those downstream areas are within CWA jurisdiction, then the drainages that are within the KDWCD that are upstream of those areas might also be within CWA jurisdiction as tributaries under 33 CFR 328.3 (a) (5).

In order to insure that no tributaries to waters within CWA are inadvertently missed in this isolated system, the District must evaluate the following for each drainage within the KDWCD under consideration in this CWA JD; (1) the route of each drainage in the KDWCD; (2) whether or not that drainage ultimately reaches a waterbody that is within CWA jurisdiction under any provision of 33 CFR 328.3 (a) (1) – (a) (4); (3) if the drainage does not terminate in an area within CWA jurisdiction under 33 CFR 328.3 (a) (1) – (a) (4), identify what if any portions of the drainage itself meet the criteria to be within CWA under 33 CFR 328.3 (a) (1) – (a) (4); (5) evaluate whether any wetlands within CWA jurisdiction under 33 CFR 328.3 (a) (7) are present; and (6) reconsider whether any additional drainages within the KDWCD are tributaries to any of the areas just discussed above, and therefore now within CWA jurisdiction under 33 CFR 328.3 (a) (5). This will probably require evaluation of some areas beyond the downstream boundaries of the KDWCD. It may be appropriate to contact additional entities and/or landowners for information regarding such additional areas, and to advise them that the District is having to consider the CWA jurisdictional status of their property in order to complete a CWA jurisdictional determination for the KDWCD.

**Reason 3:** The District incorrectly determined that the channels within the KDWCD were within CWA jurisdiction under 33 CFR 328.3 (a) (3) and did not follow that guidance in the Joint Memorandum regarding such determinations.

**FINDING:** The appeal had merit.

**ACTION:** The District must reconsider its conclusion that a sufficient connection between the KDWCD channels and interstate commerce exists to establish CWA jurisdiction under 33 CFR 328.3 (a) (3). In accordance with the Joint Memorandum, if after reconsideration the District believes that subsection 33 CFR 328.3 (a) (3) of the Corps regulations applies, the District should provide its evaluation to Corps Headquarters via standard chain-of-command and seek formal, project-specific Headquarters approval prior to asserting CWA jurisdiction over any such area as required by the Joint Memorandum.

**DISCUSSION:** The Joint Memorandum discusses 33 CFR 328.3 (a) (3) under the heading “*Isolated Intrastate Waters that are Non-Navigable.*” and reiterates that the Corps CWA jurisdiction under subsection 33 CFR 328.3 (a) (3) of the Corps regulations is specific to isolated, intrastate, and non-navigable areas. The Corps regulations at 33 CFR 328.3 (a) (3) state that waters within CWA jurisdiction also 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;

The Joint Memorandum directs that in view of the *SWANCC* Decision, the Corps would not assert CWA jurisdiction under 33 CFR 328.3 (a) (3) on the basis of the connection to interstate commerce of the actual or potential use of a waterbody by migratory birds that cross state lines (precluded by the *SWANCC* decision) or assert jurisdiction under any other factor listed in the ‘Migratory Bird Rule’ 51 FR 41217 (November 13, 1986) (i.e. the Corps cannot currently consider (a) use of the water as habitat for birds protected by Migratory Bird Treaties; (b) use of the water as habitat for Federally protected endangered or threatened species; or (c) use of the water to irrigate crops sold in interstate commerce, as a sufficient basis to establish an interstate commerce connection and assert CWA jurisdiction).

The Joint Memorandum also stated that:

“...in light of *SWANCC*, it is uncertain whether there remains any basis for jurisdiction under the other rationales of § 328.3 (a) (3) (i)-(iii) over isolated, non-navigable, intrastate waters. (i.e. use of the water by interstate or foreign travelers for recreational or other purposes; the presence of fish or shellfish that could be

taken and sold in interstate commerce; use of the water for industrial purposes by industries in interstate commerce).”

and 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 actions.”

Although the District’s administrative record described several reasons that the District believed it could assert jurisdiction under 33 CFR 328.3 (a) (3), there is no evidence in the administrative record that the District consulted Corps Headquarters prior to asserting such jurisdiction. The Joint Memorandum requires that field staffs seek formal project-specific approvals prior to asserting jurisdiction based on 33 CFR 328.3 (a) (3). The Joint Memorandum provides no exemption to this requirement in cases when only a portion of a site is determined to be within CWA jurisdiction under 33 CFR 328.3 (a) (3). Therefore, I conclude that the District did not follow current Corps CWA guidance when asserted CWA jurisdiction under 33 CFR 328.3 (a) (3) prior to seeking Corps Headquarters project-specific approval of that action. As the District’s documentation that 33 CFR 328.3 (a) (3) applies must be submitted for Corps Headquarters approval, it is superfluous to conduct an evaluation of the sufficiency of that documentation as part of this administrative appeal decision.

The District must reconsider whether there is a sufficient connection to interstate commerce to consider portions of the KDWCD within CWA jurisdiction under 33 CFR 328.3 (a) (3) as isolated, intrastate, non-navigable waters. If after reconsideration the District still believes that a sufficient connection is present, it should provide its evaluation to Corps Headquarters via standard chain-of-command and seek formal, project-specific Headquarters approval prior to asserting CWA jurisdiction over any area using 33 CFR 328.3 (a) (3).

**Information Received and its Disposition During the Appeal Review:** In addition to the administrative record the Review Officer received the following information:

- 1) The Appellant submitted an October 29, 2003 letter reiterating the positions he expressed at the October 16, 2003 appeal meeting and site visit.

**Conclusion:** I conclude the District's administrative record did not provide sufficient documentation to establish that CWA jurisdiction existed within any KDWCD channel below Terminus Dam. I conclude the District's administrative record did not establish that there was a basis in the Corps regulations to assert CWA jurisdiction over a downstream area based solely on the CWA jurisdictional status of an area further upstream. I conclude that the District did not sufficiently evaluate whether tributary connections between drainages within the KDWCD and downstream areas within CWA jurisdiction were present. I conclude that the District did not follow the direction provided in the Joint Memorandum that the District must seek formal project-specific Corps Headquarters approval prior to any assertion of jurisdiction under 33 CFR 328.3(a)(3). I remand this action to the Sacramento District for detailed reconsideration of the factors I have identified in this administrative appeal decision.

Leonardo V. Flor  
COL, EN  
Commanding