

ADMINISTRATIVE APPEAL DECISION

MURRAY DAM COMMITTEE, FILE NO. 23493N

SAN FRANCISCO DISTRICT

DATE May 1, 2000

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

Appellant Representative: Mark Murray, Murray Dam Committee (appellant), Berkeley, California

Receipt of Request For Appeal (RFA): February 3, 2000

Appeal Conference Date: March 24, 2000

Site Visit Date: March 21, 2000

Background Information: The Murray Dam Committee (appellant) requested a permit for annual construction and removal of a 2-foot high seasonal summer dam on Austin Creek, near Cazadero, Sonoma County, California. The Murray Dam Committee represents a group of property owners including an extended family who have traditionally built summer dams at this location since the early 1900's to improve summer aquatic recreation, especially swimming. The USACE began regulating summer dams in this area under the Clean Water Act (CWA) in 1979, and issued permits that covered construction of up to approximately 38 summer dams on local streams in the Cazadero area.

The most recent USACE permit for this activity authorized the Cazadero Dam Committee (CDC) to construct summer dams annually from 1991 - 1995. The permit required that the CDC decrease the number of dams each year and phase out all the summer dams by October 31, 1995 due to adverse impacts on aquatic resources. The Murray Dam Committee (no connection to the Cazadero Dam Committee) applied for a permit for annual construction and removal of one summer dam on Austin Creek in January 1998, which was denied by the San Francisco District (district), USACE, in December 1999. The denial is being appealed.

Summary of Decision: I find the appeal has merit. I find that (a) that the district did not provide sufficient documentation of what present and reasonably foreseeable cumulative environmental impacts would occur as a result of the project, (b) that the definition of overall project purpose used for the consideration of viable and practicable alternatives was incorrect, (c) that some impacts on endangered and threatened species were undocumented, and (d) that some impacts on water quality were undocumented. This matter is remanded to the District Engineer for reconsideration of the permit decision consistent with the instructions in this administrative appeal decision.

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

Reasons for the appeal are as presented by the appellant.

Reason 1: The district used an incorrect definition of cumulative impact.

FINDING: The appeal does not have merit.

ACTION: No action required.

DISCUSSION: The appellant's position as stated in the RFA is that the district should only consider the cumulative impacts of other existing projects, approved projects or those proposed projects for which applications are currently pending. The appellant position is that considering other cumulative impacts is unreasonably speculative.

The USACE decision document must meet the requirements of the National Environmental Policy Act (NEPA). The Council on Environmental Quality established the NEPA definition of cumulative impacts which states (40 CFR 1508.7):

“ “Cumulative impact” is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.”

The decision document for this action used the correct definition of cumulative impacts required by the NEPA regulations and included subsections that discussed past, present and reasonably foreseeable environmental impacts. The sufficiency of those discussions is addressed in detail in this appeal decision document.

The appellant states that legal precedents have been set in the State of California and under the Federal Endangered Species Act (ESA) that limit the consideration of cumulative impacts. Legal precedents established under state law would not be relevant to the USACE cumulative impact analysis requirements for permit applications under federal law.

The federal ESA, Section 7, Interagency Consultation cumulative impact analysis definition (50 CFR 402.02) used for consultations between the U. S. Fish and Wildlife Service (USFWS) and/or the National Marine Fisheries Service (NMFS) and other federal agencies to evaluate impacts of actions on listed species is a narrower definition than is used under NEPA. That cumulative impact definition is used only for ESA, Section 7, Interagency Consultations between federal agencies.

Reason 2: The district's assessment of cumulative detrimental impacts is based only on the impact of the previous summer dams and had no relationship to the proposed project.

FINDING: The appeal has merit.

ACTION: The DE should further document the present and reasonably foreseeable future cumulative environmental impact analysis, evaluate the relationship of prior environmental impacts to present and potential future cumulative impacts, and then reconsider the associated conclusions.

DISCUSSION: The decision document discussed past, present, and reasonably foreseeable cumulative impacts associated with this project. At the appeal conference, the district stated that a substantial consideration in its cumulative impacts analysis was that the Austin Creek aquatic environment was still degraded by the past environmental impacts associated with multiple, annual summer dams.

A cumulative impact occurs when a project's environmental impacts incrementally increase other environmental impacts that are not caused by the project. The decision document provided information on past environmental impacts of summer dams. The decision document provided minimal details regarding specific anticipated present and reasonably foreseeable cumulative impacts.

The decision document stated that constructing additional summer dams would multiply the environmental impacts. The "Present and Foreseeable Future Impacts" cumulative impacts section did not explain what specific types of aquatic organisms or functions would be impacted.

The decision document "Present and Reasonably Foreseeable Future Impacts" section did not discuss whether there were other ongoing or potential cumulative impacts to the aquatic environment outside of the control of the USACE regulatory program which had or continue to contribute to adverse impacts on Austin Creek. Potential sources of such environmental impacts might include activities such as ongoing high erosion, new timber harvests, gravel mining, road construction, or other potentially environmentally adverse activities.

The decision document's conclusion regarding cumulative impacts states (page 12):

"Based on the information in the Corps project files used in the evaluation of the Cazadero Dam Committee's permit applications, the summer dams have had a major cumulative detrimental impact to aquatic organisms within Austin Creek in the past."

This conclusion is undisputed, but these past environmental impacts must be shown to be relevant to the analysis of present and reasonably foreseeable future impacts, especially considering that the appellant's project proposes different construction methods than past dam projects.

page 12 continues:

“If authorized, the proposed project may have the impacts described above for the next five years. If additional dams were built on Austin Creek during the next five years the magnitude of the impact of the proposed projects would be multiplied.”

It is reasonable to assume approving a series of projects with similar environmental impacts could result in a cumulative increase in those impacts. However, the decision document did not describe the nature of the present and anticipated future cumulative environmental impacts in detail.

The second paragraph of decision document’s Conclusion regarding cumulative impacts states (page 12):

“Therefore, Corps authorization of this project would have a cumulatively major detrimental impact on the aquatic environment.”

I find that the current administrative record does not support reaching this conclusion because the present and future cumulative adverse environmental impacts of the project have not been adequately defined or explained.

Based on the past history of summer dams in the area, if this permit is approved, the district is likely to receive additional summer dam permit requests in the future. Authorization of this project could contribute to the cumulative impacts in the future if additional summer dams were authorized. Approving this project would not automatically produce cumulative impacts associated with additional summer dams that the district has not authorized. For such cumulative impacts associated with additional authorized summer dams to occur, applicants would have to request, and the district would have to approve, additional summer dams on Austin Creek. Although such cumulative impacts could be evaluated as reasonably foreseeable as part of a cumulative environmental impact analysis, they should be characterized as potential impacts that could occur, not impacts that would definitely occur.

The district could determine this project would produce a cumulatively major detrimental environmental impact in combination with other environmental impacts outside control of the USACE regulatory program. The decision document’s “Present and Reasonably Foreseeable” cumulative impact analysis did not identify such impacts. Additional supporting information regarding the specific type of cumulative impacts that could occur would be needed to support such a conclusion. The nature of the continuing environmental degradation of Austin Creek, and the resulting high sensitivity of Austin Creek to any further adverse environmental impacts, could also be considered as part of the cumulative impact analysis.

Reason 3: The district project manager failed to understand the project.

FINDING: The appeal does not have merit

ACTION: No action required.

DISCUSSION: The decision document described that the project would pond water to a depth of two feet, while the appellants state that the project would increase water depth by two feet. The district stated at the appeal conference that this project purpose could have been stated more clearly in the decision document. The appellant also emphasized at the appeal conference that their proposed construction methods are different than those used in the past.

The administrative record indicates that the project manager understood this project was a small, seasonal, summer dam with the potential to impede movements of aquatic organisms, increase water temperature, inundate one creek riffle, and affect listed species. I consider the unclear statement of project purpose a harmless error, as the decision document clearly analyzed the environmental impacts of an annual, summer dam on Austin Creek constructed as described by the appellant.

Reason 4: The district improperly asserted negative impacts on the endangered California freshwater shrimp, and threatened salmonids, the Coho salmon and steelhead.

FINDING: The appeal has merit

ACTION: The DE should provide further document or modify the conclusion that Coho salmon or steelhead might delay their migration at the summer dam site due to searching for fish ladders or becoming disoriented when exiting fish ladders.

DISCUSSION: The appellant's position is that the project would not affect the California freshwater shrimp because no shrimp occur in the project vicinity. The nearest known shrimp population on Austin Creek was found about one mile downstream of the project. The appellant considered it unreasonable to assume that the slow-swimming shrimp could disperse upstream one mile against the current to reach the project area.

At the appeal conference, the district and the appellant agreed that the seasonal movements of California freshwater shrimp and the potential for shrimp to disperse upstream against the stream current were unknown

The USFWS, NMFS, and other agencies commented on the project and identified a variety of potential environmental impacts that could occur as a result of the project. The district reviewed these comments and identified the following potential environmental impacts on shrimp in the decision document (page 6):

“when the water level downstream of the proposed dam drops during construction the shrimp may be stranded above the water line and dessicate.”

The district and the appellant agreed that placing and removing one board of the dam at a time could minimize this potential impact. The district conclusion that this impact had some potential to occur is reasonable. Also on page 6:

“the proposed dam would serve as a barrier to movement by the shrimp and could prevent dispersal upstream (the velocity through the fish ladder would probably be too much for the shrimp to move through).”

The district considered this a potential impact because shrimp habitat was present on Austin Creek above and below the dam. The appellant disagreed because of the one mile distance between the nearest known shrimp population and the project. The district’s position is reasonable. The decision document continues on page 6 regarding impact to shrimp:

“the proposed dam could increase the risk of predation.”

The decision document’s conclusion that the project could increase predation is minimally documented. Although briefly discussed at the appeal conference that raccoons and birds might prey on shrimp at the fish ladder, only “land and water predators” were mentioned in the decision document. Although the decision document discusses potential predation by bass and other warm-water sunfish, the district and the appellant agreed at the appeal conference that based on information from the California Department of Fish and Game and other sources, warm-water fish species were not present in Austin Creek. The district’s documentation is limited but its conclusion is reasonable.

The appellant’s position is that since the Coho salmon and steelhead would not be present when the summer dam is in place, the dam would not adversely affect these species.

The district reviewed the comments by USFWS, NMFS, and others and identified no impacts on adult salmonids. The district identified the following potential environmental impacts on juvenile salmonids (Coho salmon and steelhead) in the decision document (page 6):

“increase the populations of predatory fish by providing favorable habitat for fish which prey on juvenile salmonids”

As discussed above under the California Freshwater Shrimp, the decision document provided minimal information regarding the potential for increased predation. The district and the appellant agreed that bass and warm-water fish were not present. However, the district position is reasonable. Other impacts to juvenile Coho salmon and steelhead identified in the decision document page 6:

“delay juvenile fish migration and cause these fish to expend energy searching for the fish ladder.”

“since the velocity of the water in the fish ladder would be greater (then) that (in) the creek the juvenile salmonids may be disoriented when they reach the downstream end of the fish ladder”

At the appeal conference, the district stated that fish were known to delay their migration at large dams due to searching for fish ladders or becoming disoriented when exiting fish ladders. However, the district did not document that similar impacts were known to occur in very small dams located within existing channels. More documentation or explanation is needed to support these conclusions. The decision document further states on page 6:

“the fish ladder would concentrate migrating salmonids which could increase hunting success by land and water predators.”

The decision document’s conclusion that the project could increase predation is minimally documented. Although briefly discussed at the appeal conference that raccoon and birds might prey on shrimp at the fish ladder, only “land and water predators” were mentioned in the decision document. Although the decision document discusses potential predation by bass and other warm-water sunfish, the district and the appellant agreed at the appeal conference that based on information from the California Department of Fish and Game and other sources, warm-water fish species were not present in Austin Creek. Although the documentation is limited, the district’s position is reasonable.

Reason 5: A compilation of subordinate issues.

Reason 5 (a): The district has failed to present facts sufficient to substantiate the argument for denial.

FINDING: The appeal has merit.

ACTION: The permit is remanded to the district for reconsideration based on the actions identified in this appeal decision document.

DISCUSSION: As discussed in other sections of this appeal decision document, the district did not provide sufficient documentation to support portions of its environmental impact analysis in the decision document. The USACE regulatory program permit regulations 33 CFR 320 – 331 require a wide variety of factors be considered in reaching a permit decision. The USACE must also follow the Environmental Protection Agency, Clean Water Act, Section 404 (b) (1) Guidelines for Specification of Disposal Sites for Dredged or Fill Material (EPA 404 (b) (1) guidelines) when making permit decisions.

For activities involving the discharge of dredged or fill material subject to the CWA Section 404, the USACE regulations 33 CFR 320.4 (a) (1) require that a permit will be

denied if the discharge that would be authorized by such permit would not comply with the EPA's 404 (b) (1) guidelines. Subject to the preceding sentence and any other applicable guidelines and criteria (see 33 CFR 320.2 and 320.3), a permit will be granted unless the district engineer determines that it would be contrary to the public interest.

As discussed under Reason 5 (d), 5 (e) and 5 (f), the DE is instructed to reevaluate whether the project complies with the EPA 404 (b) (1) guidelines. The DE is also directed to reconsider his permit decision based on a revised decision document prepared in accordance with the instructions in this appeal decision document.

The DE considers and weighs a broad range of factors prior to his decision to issue or deny a permit. The USACE regulatory program regulations 33 CFR 320.4 discuss factors typically considered in the public interest review. Among the public interest factors that could be considered for this project are the protection and recovery of listed species, the aquatic environment of Austin Creek, the historical recreational use of Austin Creek, and equitable treatment for all local landowners if only a limited number of summer dam permits could be issued without adversely impacting the aquatic environment.

Reason 5 (b): The USACE could not reach a valid permit decision without completion of ESA, Section 7, Interagency Consultations.

FINDING: The appeal does not have merit.

ACTION: Although the appeal does not have merit, the DE may need to undertake ESA Section 7 consultations if reconsideration of the permit indicates that the only factors precluding issuance of the permit are the direct and indirect impact of the project on listed species. In that case, the DE should consider whether completing ESA, Section 7 consultations could result in reasonable and prudent measures and/or alternatives to allow the project to proceed without being contrary to the public interest. If consultations proceed, the appellant should be involved during the development of mitigation measures, such as a modified fish ladder design, which could allow the project to proceed.

No action would be required if the DE determines he has sufficient reasons to deny the permit as contrary to the public interest or as inconsistent with the EPA 404 (b)(1) guidelines without completing consultations. The DE could determine the permit is contrary to the public interest even if the direct and indirect impacts to listed species would not preclude issuing the permit and would not jeopardize the continued existence of listed species. The DE may consider whether adverse cumulative impacts on listed species, including recovery of such species may be contrary to the public interest

DISCUSSION: The ESA, Section 7(a)(2) requires every Federal agency, in consultation with the Secretary of Interior or Commerce, as appropriate, insure that any action it authorizes, funds, or carries out, in the United States or upon the high seas, is not likely to

jeopardize the continued existence of any listed species or results in the destruction or adverse modification of critical habitat. The ESA, Section 7(a)(4) requires Federal agencies to confer with the appropriate Secretary on any action that is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat. Under the ESA, Interagency Consultation implementing regulations, 50 CFR 402.12, a biological assessment may be prepared when an action could adversely affect listed species or habitat. The appellant prepared a biological assessment for the project.

The district initiated formal consultation under the ESA with the USFWS and the NMFS on the appellant's permit request on December 7, 1998. At the appeal conference the district clarified that during the permit review process it obtained sufficient information to conclude that appellant's permit request should be denied as contrary to the public interest.

Once the district concluded that it was going to deny the permit and not undertake an action that could adversely affect any listed species, jeopardize the continued existence of any listed species, or result in the destruction or adverse modification of critical habitat of listed species, there was no requirement for the district to complete the consultation process. At the appeal conference the appellant agreed that they did not object procedurally to termination of the ESA, Section 7, consultation process, but indicated that they did not believe the district had sufficient information to support the conclusions reached in the decision document.

The district received comment letters from, and conducted meetings with, the USFWS, the NMFS, and the California Department of Fish and Game, regarding the impact of the project on listed species. The district stated in the appeal conference that it would have received more information from the USFWS and the NMFS had the consultation process been completed, but that the district had sufficient information to reach a decision regarding the appellant's project. The sufficiency of that documentation is discussed in other portions of this appeal decision document.

The district is required to document potential adverse impacts to listed species in its decision document. However, once the district determined it had appropriate reasons for denying the permit, it was reasonable for the district to terminate ESA, Section 7, consultations. This would provide the appellant a permit decision as rapidly as possible, and minimize the workload of the district and other federal agencies.

If however, completing ESA, Section 7, consultations, might have resulted in a non-jeopardy biological opinion which identified reasonable and prudent measures, and/or mitigation measures allowing the project to proceed, and there were no other reasons to deny the permit, then it would be premature to make a permit decision prior to completion of the consultations.

This determination cannot be made based on an examination of the administrative record because the district insufficiently documented the types of cumulative impacts that

contributed to the decision to deny the appellant's permit. Therefore, it is not clear whether such cumulative impacts might have been reduced sufficiently by identifying reasonable and prudent measures during ESA, Section 7, consultations.

The district is not obligated to issue a permit for an action which would adversely impact listed species, even if mitigation measures could be developed to allow such a permit to be issued without jeopardizing the continued existence of listed species. As part of its public interest review of the permit, the district can weigh the public interest in protection and recovery of listed species against other factors including the desire of the local landowners to continue a traditional recreation activity.

Reason 5 (c): The district stated that the dam would cause water to become slightly warmer, but has no evidence to support this conclusion.

FINDING: The appeal does not have merit.

ACTION: None required.

DISCUSSION: The district decision document stated on page 5:

“This temperature increase is expected to be very slight and would probably not effect the aquatic organisms downstream.”

The district conclusion that the project might slightly increase water temperatures was based on comments by the USFWS and the NMFS. These agencies reported they observed this phenomenon at summer dam locations in other watersheds. The California Department of Fish and Game stated at the March 30, 1999, interagency meeting, that they observed that water temperature did not increase from upstream to downstream on Austin Creek in the presence of summer dams. The district's characterization of this potential very slight temperature increase is reasonable.

Reason 5 (d): Evaluation of compliance with the EPA 404 (b) (1) guidelines regarding alternatives. The district lists the “no action alternative” as the least damaging alternative that fulfills the basic project purpose. The appellant states that this is saying that not building a dam is the same as building a dam, and disregards the social enjoyment of the project and the tradition of summer swimming at this location since before 1920.

FINDING: The appeal has merit.

ACTION: The DE should review the alternatives in relation to a revised overall project purpose and reconsider whether the no action alternative is least damaging viable and practicable alternative.

DISCUSSION: The EPA 404 (b) (1) guidelines 40 CFR 230.10 (a) (1) – (3) address the project purpose and presumptions under the guidelines regarding alternatives. The

USACE “Standard Operating Procedures for the Regulatory Program” issued April 8, 1999, addresses project purpose and alternatives.

The appellant’s permit application, block 19, stated his purpose as:

“The purpose of the dam is to continue recreational use of the Murray Camp swimming facility at a location that has had such a facility since the early 1900’s as well as to provide a source of water for use in fire fighting in a heavily forested area.”

The district determined that providing a water source for firefighting was not a primary purpose of the project and it was not considered in the description of basic or overall project purpose, or the alternatives analysis.

The district identified the appellant’s basic project purpose as providing aquatic recreation. The district identified the appellant’s overall project purpose as constructing an aquatic recreation facility. The district’s definitions of basic and overall project purpose were consistent with what was described in the appellant’s permit application but not so specific as to limit all consideration of alternatives to the use of the appellant’s traditional site in Austin Creek.

However, the district’s definition of the overall project purpose was too broad. The appellant’s specific purpose for building an aquatic recreation facility was to provide a facility for swimming. In order to build a swimming facility the appellant considered it necessary to build a dam to provide greater water depth than would otherwise be present on the site. The overall project purpose should be modified to consider that the applicant’s purpose was to provide a swimming facility. The overall project purpose should also be modified to indicate a reasonable geographic area for the location of that facility.

The decision document (page 20) states:

“...the no action alternative is a practicable alternative that would have less adverse effect on the aquatic environment.”

The viability and practicality of the alternatives should be reviewed against the revised overall project purpose.

The appellant’s social enjoyment and traditional use of the project was discussed under “Community Cohesion” on page 8 of the decision document and considered during the DE’s permit decision process. The DE will consider traditional use of the site as part of his reconsideration of the appellant’s project.

Reason 5 (e) The district stated that the proposed discharge may violate state water quality standards but has no evidence for this conclusion.

FINDING: The appeal has merit.

ACTION: The DE should provide the current status of the state water quality certification in the revised decision document. If a state water quality certification determination has not been made or waived, the DE should review whether he has sufficient documentation to determine and identify which state water quality standards may be violated as a result of the project. The DE should then consider this information in his reconsideration of compliance of this project with the EPA 404 (b) (1) guidelines.

DISCUSSION: The decision document does not clearly explain how the project might violate state water quality standards and which standards might be violated. On page 13 the decision document states:

“The North Coast Regional Water Quality Board to date has not received a complete application for the proposed project. Therefore, it has not decided if the proposed project could be waived, nor has the project been certified.”

The decision document page 19 states:

“The proposed discharge (a) might violate state water quality standards.”

As part of the reconsideration of the permit decision required by this appeal decision, the district should provide the current status of the state water quality certification in the decision document. If a state water quality certification determination has not been made or waived, the district should review whether it has sufficient information to determine whether state water quality standards may be violated as a result of the project, document that conclusion in the decision document, or indicate that there is insufficient information available to make a determination.

Reason 5 (f): The district states that this discharge may violate toxic effluent standards but has no evidence for this conclusion.

FINDING: The appeal has merit.

ACTION: The DE should provide further documentation and analysis to substantiate the conclusion, or modify the conclusion. The DE should then consider this information in his reconsideration of compliance of this project with the EPA 404 (b) (1) guidelines.

DISCUSSION: The district states on page 19 of the decision document:

“The proposed discharge: (b) might violate toxic effluent standards (under Section 307 of the (Clean Water) Act.”

The district states on page 20 of the decision document:

“(e) evaluation of the information in II C and D above indicates that the materials used to construct the dam are not carriers of contaminants.”

The project description attached to the permit application identifies the materials used to construct the dams as:

“...sandbags, wood planks, plastic sheeting, and native rocks.”

The EPA has identified 65 toxic pollutants pursuant to Section 307 of the CWA (40 CFR 401.15). The district has identified no source for any of these toxic pollutants associated with the project, and has stated that the materials used to construct the dam are not carriers of contaminants. The district needs to reevaluate this conclusion and provide further documentation to substantiate this conclusion, revise the conclusion, or indicate that there is insufficient information available to make a conclusion.

Reason 5 (g): The District incorrectly stated that there is no public need for this project.

FINDING: The appeal does not have merit.

ACTION: No action required.

DISCUSSION: The appellant states that since 27 families representing over 150 people are pursuing approval of this permit, and additional summer and year-round residents would use the project if approved, this should be considered evidence of the public need for the project. The USACE regulation 33 CFR 320.4 (a) require that a district undertake a public interest review of the proposed project and consider all public interest factors before making a permit decision. The district must consider the public and private need for the project.

As shown in the permit application and confirmed during the site visit, the project location in Austin Creek is surrounded by private property. The appellant does not claim that the site would be accessible from a public road or readily available to the general public. The project is being built to benefit private landowners and their guests. While the use and enjoyment of these private landowners and their guests is a consideration in the public interest review, this use and enjoyment is not evidence that the project meets a need of the general public. The district’s characterization that this project would not meet a public need was reasonable.

Reason 5 (h): The district did not provide copies of information to the appellant from the 1991 Cazadero Dam Committee project file which was used to determine that the dams had a major cumulative effect on the aquatic environment.

FINDING: The appeal does not have merit

ACTION: None required.

DISCUSSION: The district provided a copy of the administrative record used by the district to make a decision on the appellant's permit request as part of the administrative appeal process. The administrative record included USACE permit applications, district decision documents, and USACE permits for Austin Creek summer dams going back to 1979 as well as technical reports on Austin Creek going back to 1972.

However, the district has not been able to locate the decision document for 1991 – 1995 permit issued to the Cazadero Dam Committee, which describes the district's decision to phase out summer dams on Austin Creek. The district and the review officer both attempted to locate this decision document in internal files and in the files of other agencies but were unsuccessful. Therefore, as part of the reconsideration of cumulative impacts identified under Reason 2 above, the district was instructed to consider the relevance of past degradation of the Austin Creek aquatic environment in relation to reasonably foreseeable present and future cumulative impacts.

Reason 5 (i): The district incorrectly stated that the North Coast Water Control Agency had not received a complete application.

FINDING: The appeal does not have merit

ACTION: No action required.

DISCUSSION: The district provided the status of the water quality as it understood it at the time the decision document was prepared, and this status was not changed by whether or not the appellant's application for water quality certification was complete at that time. Under Reason 5 (e) above the district is directed to review its documentation regarding compliance of the project with state water quality standards.

Information Received and its Disposition During the Appeal Review:

- 1) The appellant provided a September 30, 1999, Murray Dam Committee letter to the district that was not included in the project's administrative record. The appellant's letter responded to a district Cease and Desist letter of September 17, 1999, which was included in the administrative record. **Disposition: The district's letter documented for the administrative record that unauthorized dams were observed on Austin Creek in 1999, and the appellant's response letter identified that they were in no way responsible for such actions. Considered irrelevant.**
- 2) The appellant provided a federal court decision citation to cumulative environmental impact analysis, National Resources Defense Council v.

Calloway 524 F 2d 79 (2d Cir. 1975) regarding NEPA and CWA compliance for a specific federal government action in 1975. **Disposition: Considered as clarifying information and part of the available guidance on cumulative environmental impact analysis. The CEQ issued regulations in 1978 specifying NEPA implementation procedures (40 CFR 1500 – 1508) and defining cumulative environmental impacts.**

Conclusion

For the reasons stated above, I conclude this administrative appeal has merit and remand it to San Francisco District Engineer to reconsider the permit denial decision for the appellant's project based on my instructions in this appeal decision document.

original signed by Thomas J. Hodgini, Col, for

Peter T. Madsen
Brigadier General, Corps of Army
Division Engineer